Appeal No. 08-16788-DD

United States Court of Appeals
for the Eleventh Circuit

CITY OF ORLANDO,

Defendant-Appellant,

v.

FIRST VAGABONDS CHURCH OF GOD, an unincorporated association; BRIAN NICHOLS; ORLANDO FOOD NOT BOMBS, an unincorporated association; RYAN SCOTT HUTCHINSON; BENJAMIN B. MARKESON; ERIC MONTANEZ; and ADAM ULRICH,

Plaintiffs-Appellees.

Appeal from the United States District Court
Middle District of Florida, Case No. 6:06-cv-1583-Orl-31KRS

INITIAL BRIEF OF APPELLANT, CITY OF ORLANDO

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APPEAL NO. 08-16788-DD
City of Orlando v. First Vagabonds Church of God, et al.

APPELLANT'S CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, CITY OF ORLANDO, certifies that the following persons and entities are known to have an interest in the outcome of this case:

1. American Civil Liberties Union Foundation of Florida, Inc., Central Florida Chapter
2. American Civil Liberties Union Foundation of Florida, Inc.
3. Bailey, Zachary
4. City Of Orlando
5. Demings, Val, Orlando Police Chief
6. Dowd, Jacqueline H., Esq.
7. Downs, Mayanne, Esq.
8. Dyer, Buddy, Mayor
9. Early, Lisa, Director of Families, Parks and Recreation, City of Orlando
10. First Vagabonds Church Of God
11. Hebert, Kenneth, Esq.
12. Hutchison, Ryan Scott
13. Katon, Glenn, Esq.

14. King, Blackwell, Downs & Zehnder, P.A.

15. Litchford, Jody M., Esq.

16. Lombardy, Martha Lee, Esq.

17. Markeson, Benjamin B.

18. Marshall, Randall C., Esq.

19. Mason, Brett

20. Montanez, Eric

21. Murphy, Megan

22. National Law Center On Homelessness
    And Poverty

23. Nichols, Brian

24. Orlando Food Not Bombs and its individual members

25. Presnell, Gregory A., Honorable

26. Salam, Zeina N.

27. Sheehan, Patty, Orlando City Commissioner, District 4

28. Skambis & Skambis, P.A.

29. Skambis, Christopher C., Esq.

30. Skambis, Kathleen Maloney, Esq.

31. Smith, James Fash

32. Soffin, Rachel, Esq.

33. Spaulding, Karla R., Honorable

34. Strickland, Brittany

35. The Skambis Law Firm

36. Ulrich, Adam

STATEMENT REGARDING ORAL ARGUMENT

Appellant, City of Orlando, requests that the court permit oral argument in this case. This case involves important matters regarding a local government's right to regulate matters that affect the public health, safety and welfare. Specifically, this case involves a city's right to regulate in those traditional areas of public concern when the regulation may have an incidental impact on individual citizens' rights under the First Amendment to the United States Constitution. The Appellant believes that the court's understanding and consideration of the case would be aided by oral argument.

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STATEMENT OF JURISDICTION

This is an appeal from a final order of the United States District Court for the Middle District of Florida, Orlando Division. This court has jurisdiction under 29 U.S.C. § 1291. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331, because plaintiffs there, Appellees here, alleged they were entitled to relief under the United States Constitution.

STATEMENT OF THE ISSUES

Issue Number One: Whether, as applied to the OFNB Plaintiffs, the City of Orlando's Large Group Feeding Ordinance violates the Free Speech clause of the First Amendment to the Constitution of the United States.

Issue Number Two: Whether, as applied to the FVCG Plaintiffs, the City Orlando's Large Group Feeding Ordinance violates the Free Exercise clause of the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an appeal from a final order, following a bench trial, of the United States District Court for the Middle District of Florida, Orlando Division.

A. Course of the Proceedings and Disposition Below

Appellant, City of Orlando (hereinafter "City" or "Orlando"), is a municipal entity organized under the laws of the State of Florida. On July 24, 2006, the City enacted an ordinance that, generally, requires a permit for the feeding of groups of twenty-five (25) or more persons in the Greater Downtown Park District ("GDPD"), a circular area extending out on a two-mile radius in all directions from Orlando City Hall. Code of the City of Orlando, FL §§ 18A.09-2, 18A.01(23), (24) (2008) (hereinafter "the Ordinance" or "Large Group Feeding Ordinance"). The Ordinance limits the number of large group feeding permits a person can

obtain in a one year period to two per park within the GDPD. *Id.* § 18A.09-2(3). It imposes no regulation at all on large group feedings outside the GDPD. *Id.*

On October 12, 2006, a group of plaintiffs, Appellees here, whose activities were affected by the Large Group Feeding Ordinance, filed this action against the City. R: 1.[1] On December 29, 2006, the plaintiffs filed an Amended Complaint, which is their operative pleading in the case. R: 20. The City filed its Answer and Affirmative Defenses to the Amended Complaint on January 16, 2007. R: 24.

The Amended Complaint set forth six causes of action. The first and second causes of action were asserted only by Brian Nichols (hereinafter "Nichols") and First Vagabonds Church of God (hereinafter "FVCG"). R: 24 at 19-23. In Count I, Nichols and FVCG alleged that as applied to their activities, the Large Group Feeding Ordinance violates the Florida Religious Freedom Restoration Act of 1998, §§ 761.01-.05, Florida Statutes. R: 24 at 19-21. In Count II, Nichols and FVCG (hereinafter, collectively, the "FVCG Plaintiffs") alleged that both facially and as applied to their activities, the Ordinance violates their right to free exercise of religion under the First Amendment to the Constitution of the United States. *Id.* at 22-23. In Count III, all of the plaintiffs alleged that both facially and as applied

[1] References to the record are designated as "R: __." "R" refers to the docket number of the cited item in the district court's docket. When appropriate, more specific information, such as page numbers, is provided. Thus, for example, the citation "R: 20 at 7" refers to page 7 of the item docketed as number 20 in the district court.

to their activities, the Ordinance violates their right to free assembly under the First Amendment to the Constitution of the United States. *Id.* at 22-25. In Count IV, all of the plaintiffs alleged that the Ordinance violates their right to free speech under the First Amendment to the Constitution of the United States. *Id.* at 25-27. In Count V, all of the plaintiffs alleged that the Ordinance violates their right to equal protection under the Fourteenth Amendment to the Constitution of the United States. *Id.* at 27-28, 32. And, finally, in Count VI, all of the plaintiffs alleged that the Ordinance violates their right to due process under the Fourteenth Amendment to the Constitution of the United States. *Id.* at 29-32. Apparently, Counts IV through VI were intended to be both facial and as-applied challenges to the Ordinance. *See id.* at 31-32.

The City filed a motion seeking final summary judgment on all counts of the Amended Complaint, R: 33, which the plaintiffs opposed. R: 42, 43. On March 31, 2008, the district court entered an order granting summary judgment to the City on plaintiffs' equal protection and due process claims. R: 55 at 10-12. In its order, the court also ruled that the plaintiffs' claim that the Ordinance on its face violates their right to free speech was without merit. *Id.* at 8.

Prior to trial, the parties filed a joint pretrial statement on April 18, 2008. R: 59. In that document, the plaintiffs clarified that only plaintiffs Orlando Food Not Bombs and individual plaintiffs Hutchinson, Markeson, Montanez and Ulrich

(hereinafter, collectively, "OFNB" or the "OFNB Plaintiffs") were asserting that the Ordinance violated their right to Free Speech under the First Amendment. *Id.* at 2. Plaintiffs reiterated that position at trial. T. 290.[2]

The case proceeded to trial without a jury on June 23 and 24, 2008. At the close of the trial, the court requested that, in lieu of closing arguments, the parties simultaneously submit post-trial briefs. T. 423. Each party filed a brief on August 8, 2008. R: 82, 83.

At trial, at the close of the plaintiffs' case, counsel for the City made an *ore tenus* motion for partial findings pursuant to Federal Rule of Civil Procedure 52. T. 276-85. The court reserved ruling on the motion. T. 294. On June 26, 2008, the court entered an order granting the City's motion on Count I, the claim of the FVCG Plaintiffs that the Ordinance violated Florida's Religious Freedom Restoration Act. R: 79. On July 25, 2008, the court denied the Motion for Reconsideration of that order filed by the FVCG Plaintiffs. R: 80.

After considering the parties' post-trial briefs, the district court entered a fourteen-page memorandum opinion and order on September 26, 2008. R: 88. In that order, the court did not specifically find facts or state separately its conclusions of law. *See id.* The court labeled one section of its order

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[2] The citation "T. __" refers to the specific page or pages of the transcript of the trial on which the referenced testimony may be found. The transcript is consecutively numbered and was filed as items 85 and 86 in the district court's docket.

"Background," *id.* at 3-6, and another section "Legal Analysis." *Id.* at 6-14. However, both sections appear to combine findings of fact and conclusions of law.

In its order, the court reiterated its prior summary judgment and judgment as a matter of law in favor of the City on the plaintiffs' Fourteenth Amendment equal protection and due process claims (Counts V and VII of the Amended Complaint) and on the claim of the FVCG Plaintiffs under Florida's Religious Freedom Restoration Act claim (Count I). *Id.* at 1, n.1. The court went on to rule in favor of the FVCG Plaintiffs on their claim that the City's Ordinance violates their right to free exercise of their religion, Count II of the Amended Complaint. *Id.* at 12-13. The court ruled in favor of the City against all of the plaintiffs on their claim that the Ordinance violates their right to free assembly, Count III of the Amended Complaint. *Id.* at 13-14. The court ruled against the City and in favor of the OFNB Plaintiffs on their claim that the Ordinance violated their right to Free Speech under the First Amendment, Count IV of the Amended Complaint.[3] *Id.* at

[3] In its order, the district court incorrectly referred to both the Free Speech claims of the OFNB Plaintiffs and the Freedom of Assembly claims brought by all the plaintiffs as "Count IV." R: 88 at 6, 13. In the last paragraph of its order, the court exacerbated that error by stating, contrary to the substantive text of its opinion, that it was ruling in favor of the City on Counts I, IV, V, and VI, and in favor of the plaintiffs on counts II and III. *Id.* at 14. As set forth above, the text of the district court's order makes it clear that the court ruled in favor of the City on Counts I, III, V, and VI of the Amended Complaint, and in favor of the plaintiffs on Counts II and IV of the Amended Complaint. *Id.* The scrivener's error was repeated in the district court's judgment, which was entered on September 29, 2008. R: 89. None of the parties sought to correct that mistake.

6-11. The court permanently enjoined the City from enforcing the Ordinance against the plaintiffs, but did not award money damages. *Id.* at 14.

On October 14, 2008, the FVCG Plaintiffs filed a motion to amend the district court's judgment pursuant to Federal Rule of Civil Procedure 59(3). R: 96. They argued that the district court should have awarded them damages in the amount of $22,800, when it granted judgment in their favor on the Free Exercise claim alleged in Count II of the Amended Complaint. *Id.* The City opposed the motion, R: 103, and on October 30, 2008, the district court denied it. R: 104. The court found that the evidence at trial was insufficient to support an award of monetary damages. *Id.*

The City timely filed its notice of appeal on November 28, 2008. R: 113. All of the plaintiffs joined in a notice of cross-appeal that was timely filed on December 12, 2008. R: 115.

B. <u>Statement of the Facts</u>

1. The City and the Feedings

The City of Orlando is a municipality located in Orange County, Florida. R: 59 at 6. In the heart of downtown Orlando lies Lake Eola Park, which is the signature park of Orlando and is featured on the City's seal. *Id.* at 7. Despite its stature, Lake Eola Park is small because most of its acreage is a lake. T. 349.

Next to Lake Eola Park are several neighborhoods, including Lake Eola Heights, Eola South and Thornton Park. R:59 at 7; T. 242.

The revitalization of downtown Orlando is a priority for the City. T. 239. The benefits of downtown redevelopment for a city are substantial and include improvement of the city's tax base and reduction of urban sprawl. T. 297-99. Orlando has made progress in its downtown revitalization efforts. T. 239. Thousands of downtown residential units have been recently constructed, and downtown Orlando remains the largest center of employment in the region. T. 297.

The City of Orlando recognizes that a historic impediment to downtown development is an over-concentration in downtown of social services aimed at low income and homeless citizens. T. 238-39, 297. It has experienced the deterioration caused by that over-concentration in its downtown Parramore neighborhood. *Id.* The City appreciates the complex nature of homelessness and expends a great deal of resources on the issue. T. 232-40, 380-82.

In 2003, a working group on homelessness established by the City recommended that group feedings in the downtown area be regulated. T. 230, 233-34. At about that same time, the City began to receive a large number of complaints about the dispersal into nearby neighborhoods of large groups of people

who were being fed in downtown parks by various groups.[4] T. 240-42, 248, 257. Residents were being confronted on the streets and were reporting that they were afraid of going out in their neighborhoods to walk. T. 242. Problems with litter and trash were also reported. T. 242.

In addition to more general testimony about complaints, several witnesses testified at trial about their specific experiences. A volunteer at OFNB feedings, Ms. Chris Field, who is a director of finance at the local Salvation Army, testified that she had observed a feeding participant brandishing a knife on one occasion, although she considered the man harmless. T. 168. Mr. William Sheaffer, whose law office is one building away from the location at Lake Eola Park commonly used for group feedings, testified that when the feedings first began at the park, he noticed an increase in trespassing, litter, and confrontational vagrancy in the neighborhood. T. 323-24. He also testified about several specific instances in which persons he carefully connected to the feedings caused significant problems for his business and damage to his property. T. 324-34.

2. The Ordinance

As a result of the complaints and the working group's recommendation, the City proposed an ordinance to regulate large group feedings in its parks located in

[4] In addition to the plaintiffs here, other people also fed groups in downtown Orlando, including a group called "Tailgating for Jesus," T. 139-43, and one called "The Ripple Effect." T. 381.

the downtown area. T. 242, 257; Plaintiffs' Trial Exhibit 3. The City held two lengthy hearings at which many residents of the City spoke in favor of the ordinance. T. 242-43. On July 24, 2006, the City enacted an ordinance to regulate large group feedings in City parks in the downtown area. Essentially, the Ordinance requires anyone conducting a "large group feeding" in a City park within a two-mile radius of City Hall to first obtain a permit. It restricts the number of permits that a person can obtain to two per year per park within the defined downtown area. It does not restrict smaller feedings and it does not apply at all to feedings conducted at parks outside of the defined downtown area. The Ordinance reads as follows:

> Sec. 18A.09-2. Large Group Feeding in Parks and Park Facilities Owned or controlled by the City in the Greater Downtown Park District (GDPD).
> Except for activities of a governmental agency within the scope of its governmental authority, or unless specifically permitted to do so by a permit or approval issued pursuant to this Chapter or by City Counsel:
> (a) It is unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or park facility owned or controlled by the City of Orlando within the boundary of the Greater Downtown Park District without a Large Group Feeding Permit issued by the City Director of Families, Parks and Recreation or his/her designee.
> (b) It is unlawful to fail to produce and display the Large Group Feeding Permit during or after a large group feeding, while still on site, to a law enforcement officer upon demand. It is an affirmative defense to this violation if the offender can later produce, to the City Prosecutor or the Court, a Large Group Feeding Permit

issued to him/her, or the group, which was valid at the time of the event.

(c) The Director of Families, Parks and Recreation or his/her designee shall issue a Large Group Feeding Permit upon application and payment of the application fee as established by the City. Not more than two (2) Large Group Feeding Permits shall be issued to the same person, group, or organization for large group feedings for the same park in the GDPD in a twelve (12) consecutive month period.

(d) Any applicant shall have the right to appeal the denial of a Large Group Feeding Permit pursuant to appeal procedure in Section 18A.15 with written notice to the Director of Families, Parks and Recreation and with a copy to the City Clerk.

Ordinance of 7-24-2006 § 2, Doc. #0607241012, Code of City of Orlando, FL § 18A.09-2 (2008). The Ordinance also provides definitions:

> *Large Group Feeding* is defined as an event intended to attract, attracting, or likely to attract twenty-five (25) or more people, including distributors and servers, in a park or park facility owned or controlled by the City, including adjacent sidewalks and rights-of-way in the GDPD, for the delivery or service of food. Excluded from this definition are activities of City licensed or contracted concessionaires, lessees, or licensees.
>
> *Greater Orlando Park District (GDPD)* is defined as an area within the limits of the City of Orlando, Florida, extending out a two (2) mile radius in all directions from City Hall and including all of the parks and park facilities owned or controlled by the City touched by that radius, in their entirety.

Ordinance of 7-24-2006 § 1, Doc. #0607241012, Code of City of Orlando, FL § 18A.01 (23), (24) (2008).

At trial, the Mayor, the City's Director of Families, Parks and Recreation, and the aide to the city commissioner in whose district the Lake Eola neighborhoods are located, all testified about the purposes served by the Ordinance. Mr. Charles Smith, who is an aide to Orlando City Commissioner Patty Sheehan, testified that the Ordinance "was primarily intended to help broaden the burden across downtown and not primarily—and specifically in the Lake Eola and Thornton Park neighborhoods in which Commissioner Sheehan represents." T. 253, 257.

Both the Mayor and the City's Director of Families, Parks and Recreation testified about the City's role in mediating between competing interests in the use of limited park space and impacts on the neighborhoods surrounding parks. T. 246, 351, 377. Mayor Dyer testified about the use of permits as a tool in managing the City's parks. T. 248-49. He spoke of the unfairness of subjecting a single neighborhood to the impacts caused by large group feedings. T. 245-46. He specifically testified that the purpose of the Ordinance was to fairly distribute among the various City parks and neighborhoods the impact of the feedings. T. 241, 244.

Lisa Early is the City's Director of Families, Parks and Recreation. T. 337. She explained to the court that her background is in social services work in developing countries. *Id.* She began working for the City in 2003, and has held

her current position, which includes managing all of the City's approximately 108 parks, since January 2005. T. 337-38. She participated in the drafting of the Ordinance. T. 373-74. Ms. Early testified about the increasing pressures on all of the City's downtown parks, especially Lake Eola Park. T. 343-44, 348-49. She testified that the City has tried to mitigate the impacts of Lake Eola Park's popularity in a number of ways, including by increasing funding for the park, directing people seeking to use it to other parks, and passing the Ordinance. T. 348-51.

Ms. Early testified about the burdens imposed on City parks by large group feedings. T. 372-74, 377-78. She explained, in response to questions from the court, that the Ordinance was designed to have the least negative impact on people seeking to use the City's parks while alleviating the overburdening of parks and the people who use them in a particular area. T. 369-79, especially 373-78. She emphasized that moving the burdensome use from park to park both alleviated the burden and fairly distributed it among the City's parks and neighborhoods. T. 375-78. Ms. Early also testified about the procedures in place for enforcement of the Ordinance. T. 353-60. The court admitted into evidence, as Defendant's Trial Exhibit 6, the explanation of the Ordinance and the list of parks it impacted, which are found on the City's website, along with the City's implementation guidelines for the Ordinance. T. 354. The evidence at trial established that 42 of the City's

approximately 108 parks are within the GDPD. Defendant's Trial Exhibit 6; T. 338.

The City's exhibit number four, which was admitted into evidence without objection, is a composite of the 65 permits applied for and issued under the ordinance. T. 336, Defendant's Trial Exhibit 4. Those permits were issued to a wide array of individuals and groups. Defendant's Exhibit 4. Neither the permit applications nor the Ordinance implementation guidelines make inquiries about or distinctions of any kind based upon the applicant's potential message. Defendant's Trial Exhibits 4 and 6.

On October 12, 2006, two distinct groups of plaintiffs whose activities were affected by the Ordinance filed suit against the City. Those two groups, Appellees here, are comprised, first, of the "OFNB Plaintiffs, (Orlando Food Not Bombs, a unincorporated association, Hutchinson, Markeson, Montanez and Ulrich)[5] and, second, the "FVCG Plaintiffs" (First Vagabonds Church of God, an unincorporated association, and Nichols).

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[5] Of the named OFNB Plaintiffs, only Hutchison and Montanez testified at trial. T. 2-3. In addition, the plaintiffs elicited testimony from others who had participated in OFNB feedings: Mr. Bruce Shawen, a homeless man who regularly ate with the group, T. 81-97; Mr. Joshua LeClair, a member of the Young Communist League, who regularly comes to the feedings in support of OFNB, T. 130-38; and Ms. Chris Field, the finance director for the local Salvation Army and a member of Code Pink, who regularly volunteers at the OFNB large group feedings. T. 164-75.

3. *The OFNB Plaintiffs*

OFNB is an unincorporated association affiliated with the international Food Not Bombs movement. R: 59 at 6. It is a loose collection of groups based on the idea that world governments spend too much money on war and not enough on taking care of their own people. T. 99-100, 176-77. Since January 2005, OFNB has been conducting feedings for the hungry at various locations in downtown Orlando. T. 177-78. Those locations have included Heritage Square Park, City Commons Park at City Hall, Lake Eola Park, at political rallies, and outside the downtown courthouses, including the federal courthouse on the morning of trial in this case. T. 102-04, 109-10, 122, 177-78, 184-85. Since early summer 2005, OFNB has conducted large group feedings every Wednesday at 5:00 p.m. at Lake Eola Park. T. 102, 177, 180. Beginning in early 2008, OFNB added a second weekly large group feeding at Lake Eola Park on Mondays at 8:00 a.m. T. 188-89, 102.

OFNB testified that the number of people being fed at its regularly scheduled feedings ranges between 50 and 120, usually over 100 on Monday mornings. T. 109, 189. Approximately 15 to 20 additional people volunteer at each of these feedings. T. 179, 106. Including set-up, feeding, clean-up, and socializing, each large group feeding lasts between three and four hours. T. 81-82, 101, 216.

The feedings involve relocating the park picnic tables to the sidewalks of the park. T. 83. They generate garbage, and after the food is eaten, the non-disposable serving items are washed in large buckets of water. T. 84, 86, 106, 120. After each feeding, at least two five-gallon buckets and one "significantly larger" bucket of dirty dishwater, including biodegradable soap and vinegar, are dumped directly onto the ground in the park. T. 120-21. When OFNB conducts feedings at sites without running water, it makes alternate arrangements, such as provision of hand sanitizer and off-site dishwashing. T. 122-23, 137, 201-04.

At the feedings, OFNB often displays fliers as well as signs and banners, such as "Money For Food Not Bombs" and "We Won't Stop Until The Last Belly Is Full." T. 108, 129, 91, 191. The OFNB fliers also list the times and locations of their feedings and discuss why the food they serve is vegan. T. 191.[6] Many of the volunteers serving food wear shirts and buttons containing messages, such as "End Hunger Now," "Food Not Bombs," "International Organization Working To End Violence, Militarism And Inequality And Hunger" and "No Hunger." T. 85, 91, 190-91.

In addition to the volunteers and direct participants, the OFNB feedings attract a variety of political participants. Common participants include Code Pink, the Young Communist League, Students for a Democratic Society, Orlando Direct

[6] OFNB also maintains a website. T. 187.

Action and Project Bellies Full Tonight. T. 107, 135, 165-66, 170-71. These other groups also bring signs and literature, and wear t-shirts bearing their group's message. T. 107, 167-68, 170, 192. Not all of the groups have the same message. T. 206-07. The City has never regulated any of the groups' signs, banners, buttons, t-shirts, or fliers. T. 210-11.

The testimony at trial indicated that if OFNB intended to convey a message through the conduct of feeding, that message was ill-defined. OFNB's own members could not consistently communicate the message. *See* T. 110-11, 125-27, 170-71, 204-07. In addition, even with all of the explanatory speech that accompanied the conduct of feeding—the fliers, signs and t-shirts—observers could not discern the message. Several witnesses testified about their conversations with observers of the feedings. At least until the beginning of the massive media coverage of the ordinance, those conversations revealed that the observers did not understand the message of the conduct. *See* T. 94-96, 108-09, 128-29, 171-208-09. In each case, OFNB's message was conveyed verbally and the conduct of feeding simply facilitated the discussion. *Id.*

The evidence OFNB points to as proof that its message was understood is the statement of Mayor Dyer at trial that he does not consider OFNB a homeless advocate and believes OFNB uses the homeless to serve its political purposes. T. 230-31. Mayor Dyer has extensive experience in governmental service

addressing issues involving the homeless. T. 232-33. He has committed substantial personal and governmental resources to efforts to assist the homeless. T. 233-37, 250. One of the City's initiatives was a project called "Homeless Connect," a recurrent day-long activity that brings together providers of homeless services in a single location. T. 237. This event is viewed as valuable by homeless advocates. T. 147-48, 150-51. OFNB was invited to participate, but did not. T. 115-16.

4. The FVCG Plaintiffs

First Vagabonds Church of God ("FVCG") is an unincorporated association that functions as a ministry for the homeless. R: 20 at 3. It was formed in 2005 by Plaintiff Brian Nichols, who was ordained as a Christian minister in 2004. Plaintiffs' Trial Exhibit 1. Nichols has been homeless and established his ministry specifically for the homeless "street Christians." T. 21-27; Plaintiffs' Trial Exhibit 2.

At various times, the FVCG congregation has met in downtown Orlando at Heritage Square Park, Lake Eola Park, and under the State Road 408 bridge. T. 29. Although, now, the congregation meets weekly on Sundays at 1:00 p.m., in the beginning, it did not meet at regular days and times. T. 31, 48. Since Easter 2006, FVCG has met in Langford Park, a City park located within the GDPD defined by the ordinance. T. 30, Defendant's Trial Exhibit 1. Sharing food is an important

part of FVCG's worship service. T. 31. Nichols considers Langford Park an adequate location for FVCG's services; however, he would prefer to be indoors and is working toward that end. T. 32-34. FVCG has 43 members, but it has never had more than 35 attend a service at one time. T. 54. Attendance at services fluctuates between 15 and 35 and averages between 15 and 20. *Id.* Nichols believes that whatever number of people come to his service, God requires that he not turn them away or fail to break bread with them. T. 69.

Nichols believes that changing the location of FVCG's services from park to park within the GDPD would be a serious problem. T. 37. He believes that routine, a set place, and discipline are important to the homeless. *Id.* He believes that communication of a new location would be difficult. T. 37-38. Nichols testified that this is a particular problem because he does not promote his church. T. 43. The church is based on the Spirit of God drawing people to him. *Id.* In addition, if he were to create a flier or post a notice about meeting locations, he believes it would attract non-believing members of the homeless community who would be coming to church solely to get a meal. *Id.* He sees no reason to promote FVCG's services by informing people of their existence. T. 62.

In the past, however, Nichols effectively communicated information about FVCG's services by word of mouth. T. 47-50, 53. Word of mouth and providence

is how new members learn of FVCG. T. 54-56. Nichols maintains a website for FVCG on which he posts service times and locations. T. 58-59.

Nichols testified that the public library computers are not readily accessible to homeless people. T. 59-60. However, Mr. Bruce Shawen, a sometimes homeless man who was camping in the woods at the time of trial, testified that he had a library card and that library cards were fairly common among the homeless. T. 81, 93, 96. He stated that the library computers allowed homeless people to access the internet, where he is able quite often to obtain his email through his Yahoo account and to "surf the internet" to look for work. T. 85-86, 93. Shawen also testified that although he had lost it, he had owned a cell phone and that he knew many other homeless people with cell phones. T. 85-86. Although Shawen lived halfway between Orlando and Kissimmee, he regularly traveled by bus, including changing buses, to attend OFNB's Wednesday evening food sharings. T. 82, 88-89.

C. **Statement of the Standard of Review**

An appellate court reviews "the district court's determination of the 'constitutional facts' in a First Amendment case *de novo*." *CAMP Legal Defense Fund, Inc. v. City of Atlanta,* 451 F.3d 1257, 1268 (11th Cir. 2006). Appellate courts are obligated "to make a fresh examination of crucial facts." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* 515 U.S. 557,

568 (1995). That fresh examination is especially important when, as here, the conclusions of law and findings of fact are so intermingled that in order to pass upon the question of federal law, the appellate court must analyze the facts. *Id.* Thus, review is essentially *de novo*, including on matters of witness credibility. *Id.*

SUMMARY OF THE ARGUMENT

The district court made several errors of law when it ruled that the City's Ordinance violates the Free Speech rights of the OFNB Plaintiffs. First, the court erroneously concluded that the OFNB Plaintiffs' conduct was expressive conduct entitled to First Amendment protection. The Ordinance does not regulate the OFNB Plaintiffs' speech at all; it regulates only their conduct of feeding large groups in certain of the City's parks.

United States Supreme Court precedent narrowly circumscribes the type of conduct protected by the free speech clause of the First Amendment. Only conduct that is inherently expressive and is intended to convey a particularized message with a great likelihood of being understood by those who view it is protected. Conduct that merely serves to facilitate the delivery of a message is not expressive conduct. The cases establish, further, that to be protected under the First Amendment, the expressive component of the conduct must be created by the conduct itself, not by speech that accompanies the conduct.

When the correct legal standard is applied to the evidence in this case, it is apparent that the district court erred in concluding that the conduct of the OFNB Plaintiffs impacted by the City's Ordinance is protected by the First Amendment. However, even if the OFNB Plaintiffs' conduct is protected under the free speech clause, the evidence in this case mandates a conclusion that its incidental limitation by the City's Ordinance is justified. The district court erred in reaching a contrary conclusion.

The evidence at trial was overwhelming that the purpose of the Ordinance was improved preservation and management of the City's parks, including distributing among parks and their adjacent neighborhoods the impact of large group feedings. Nevertheless, the district court erroneously concluded that the Ordinance was an improper and ineffectual exercise of City power. The unwavering and unequivocal jurisprudence of the United States Supreme Court on the issue of whether a regulation addressing conduct abridges free speech rights holds that if the regulation is aimed at an important governmental interest and if the interest would be achieved less effectively without the regulation, then any incidental burdens on expression are justified. The Court has emphasized that it is not the role of the judiciary to second guess the decisions of the regulator regarding the wisdom of neutral regulations that incidentally burden free expression. The

district court erroneously did just that in this case, despite unrebutted evidence that the Ordinance assisted the City in meeting its important goals.

The district court also erred when it ruled that the City's Ordinance violates the Free Exercise rights of the FVCG Plaintiffs. United States Supreme Court precedent establishes that burdens on religious practice incidentally imposed by a valid, neutral law of general applicability do not violate the First Amendment. The City's Ordinance is a neutral law of general applicability. It is not aimed at regulating religious practices. It provides neither secular nor religious exemptions. It applies to all large group feedings within the defined downtown area, irrespective of by whom they are held or in what manner they are conducted. The district court accepted the neutrality of the Ordinance, but erroneously held that the Ordinance was not rationally related to a legitimate governmental interest.

As previously noted, the evidence at trial established that the City's goal in enacting the Ordinance was improved preservation and management of its parks. The Mayor, the City's Director of Families, Parks and Recreation, and an aide to one of the City's commissioners all testified that included as part of that goal was the aim of distributing among parks and their adjacent neighborhoods the impacts of large group feedings. The district court refused to acknowledge that goal as a legitimate governmental interest. The district court erred in concluding that the Ordinance was not rationally related to a legitimate governmental purpose.

ARGUMENT AND CITATIONS OF AUTHORITY

A. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT, AS APPLIED TO THE OFNB PLAINTIFFS, THE CITY OF ORLANDO'S LARGE GROUP FEEDING ORDINANCE VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The City's Ordinance does not regulate speech. It does not regulate what anyone may say or the volume at which they may say it. It does not regulate assembly. It imposes no restriction on the number of people who can gather in any park. It does not regulate the conduct of anyone with regard to approaching others who may also be in the park. It does not regulate signs or pamphlets or t-shirt slogans or banners of any kind. Instead, the Ordinance regulates a certain type of conduct—the feeding of large groups of people. Code of City of Orlando, FL § 18A.09-2 (2008).

The feeding of large groups is not, on its face, expressive activity. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 60 (2006); *United States v. Albertini,* 472 U.S. 675, 687 (1985); *Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1032 (9th Cir. 2006). Thus, a three-part analysis applies to the OFNB Plaintiffs' claim:

(1) Is their conduct that is regulated by the Ordinance expressive conduct?

(2) If the conduct is expressive, is the City's interest in regulating it related to the suppression of free expression?

(3) If not, then are the incidental limitations on the expressive conduct justified by an important governmental interest?

This analysis derives from the seminal modern case addressing the extent to which the First Amendment protects non-speech expressive conduct, *United States v. O'Brien*, 391 U.S. 367 (1968). *O'Brien*, a case involving the burning of draft cards, held that even if non-speech conduct is sufficiently expressive to warrant First Amendment protection, its incidental regulation is justified if the limiting regulation is not related to the suppression of free expression, furthers an important governmental interest, and is no more restrictive than necessary to the furtherance of that interest. *Id.* at 376-77. Subsequent cases have clarified the proper application of the elements of the *O'Brien* test. The district court erred in applying the test to the facts of this case.

1. The OFNB Plaintiffs' Conduct Regulated by the Ordinance Is Not Expressive Conduct Protected by the First Amendment.

The OFNB Plaintiffs assert that when they engage in the conduct regulated by the ordinance, the feeding of large groups of people, it is expressive conduct protected by the First Amendment. R: 83 at 12. The United States Supreme Court has made it clear that OFNB bears the burden of proof on this issue. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 n. 5 (1984). The OFNB Plaintiffs do not meet this burden simply by advancing a plausible contention that their conduct is expressive. *Id.* They must, instead, prove by a preponderance of

the evidence that their conduct meets the current test for expressive conduct articulated by the Court.

The court below correctly stated, but incorrectly applied, the test applicable to the issue of whether OFNB's conduct of feeding large group rises to the level of protected expressive conduct:

> (1) whether an intent to convey a particularized message was present; and
> (2) whether the likelihood was great that the message would be understood by those who viewed it.

R: 88 at 6 (citing *Texas v. Johnson,* 491 U.S. 397, 404-05 (1989)). In *Texas v. Johnson,* a defendant who had been convicted of a misdemeanor for burning a United States flag following a political demonstration claimed that his conduct was protected by the First Amendment. The Court noted that its prior cases "rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" 491 U.S. at 404 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). However, the Court acknowledged that when conduct is "sufficiently imbued with elements of communication," it may become expressive conduct protected by the First Amendment. *Johnson,* 491 U.S. at 404 (quoting *Spence v. Washington,* 418 U.S. 405, 409 (1974)). In particular, the Court noted that conduct involving flags is often found expressive because of flags' symbolic nature. *Id.* at 405. The State of Texas had conceded at oral argument that Johnson's conduct in burning the flag

was expressive, and the Court found that conclusion "overwhelmingly apparent," given the highly political nature and context of the conduct. *Id.* at 405-06.

The *Texas v. Johnson* test of when conduct is sufficiently expressive to come within the First Amendment's protection remains good law. More recently, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the court gave a nuanced interpretation of the test in the very different context of a government's attempt to compel speech. In *Hurley,* the court addressed whether a Massachusetts statute prohibiting discrimination based on sexual orientation could be applied to require a private parade organizer to include a gay rights group in the St. Patrick's Day parade. *Id.* at 561. The parade organizer, the South Boston Allied War Veterans Council ("Council"), did not wish to convey the message of the gay rights group, GLIB, and so had not allowed GLIB to march. *Id.* at 560-61. GLIB filed suit to force its inclusion. *Id.* at 561. The Massachusetts state courts ruled in favor of GLIB that the state's non-discrimination law applied to require the Council to allow GLIB to march in the parade. *Id.* at 561-66. On appeal to the United States Supreme Court, only the Council presented a First Amendment claim. *Id.* at 566. The issue before the Court was: "whether the requirement to admit a parade contingent expressing a message not of the private organizer's own choosing violates the First Amendment." *Id.*

Hurley, therefore, is a case in which the government of Massachusetts, by its statute, sought to compel speech. The conduct that the Court was analyzing to determine if it was expressive speech was the conduct of organizing the parade. *Id.* at 567. In that case and context, the Court appeared to relax its test of expressive conduct, specifically the requirement of a particularized message. *Id.* at 569-70. About the "particularized message," prong of the test, in the context of a parade organizer being compelled to admit a participant, the Court stated: "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.* at 569.

Some of the federal Circuit Courts of Appeal, including the Eleventh Circuit, viewed that language from *Hurley* as liberalizing the test for determining whether conduct is expressive. *See Holloman v. Harland,* 370 F.3d 1252, 1270 (11th Cir. 2004); s*ee also Bar-Navon v. School Board of Brevard County, Florida,* No. 6:06-cv-01434, 2007 Westlaw 121342 at *3-*4 (M.D. Fla. Jan. 11, 2007) (discussing divergent reaction to *Hurley* in federal circuit courts, collecting cases).

In *Holloman*, a panel of this court was presented, in the context of a qualified immunity claim, with the issue of whether a student's raising of his fist during the Pledge of Allegiance, was a protected act under the First Amendment.

370 F.3d at 1263, 1270-71. The court noted that the act may have been "pure speech," since it seemed as purely communicative as a sign language gesture. *Id.* at 1270. The court concluded that, at the very least, the act was expressive conduct. *Id.* In so concluding, the court stated that the *Texas v. Johnson* test had been "liberalized" by *Hurley*. *Id.* Accordingly, the court announced a new test for determining if conduct is expressive: "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Id.* (emphasis in original).

Since *Holloman* was decided, the Supreme Court has clarified that it does not construe *Hurley* as generally liberalizing the test for determining when conduct becomes expressive and, therefore, subject to First Amendment protection. On the issue of the expressive conduct test, therefore, *Holloman* is no longer good law. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), Chief Justice Roberts wrote for the Court in a unanimous[7] opinion that addressed several First Amendment issues. *Rumsfeld* involved an association of law schools and law school faculties (FAIR) which claimed that its (and its members') First Amendment rights were violated by a federal statute. The statute, known as "the Solomon Amendment," required law schools, as a condition of receiving certain federal funding, to offer U.S. military recruiters the most favorable access they

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[7] Arguably, *Rumsfeld* may not properly be termed unanimous because Justice Alito took no part in the consideration or decision of the case.

provide to any non-military recruiter. *Id.* at 56. FAIR members had adopted policies opposing discrimination based on sexual orientation. *Id.* at 52. They restricted military recruiting on their campuses because they objected to the military's sexual orientation discrimination. *Id.* Enactment of the Solomon Amendment forced them to choose between enforcing their nondiscrimination policy by continuing to restrict military recruiters and continuing to receive specified federal funding. *Id.*

The first issue addressed in *Rumsfeld* was whether the Solomon Amendment's effect of compelling law schools that send emails for other recruiters to send one for military recruiters was banned by the First Amendment.[8] *Id.* at 62. Second, the court considered whether forcing law schools to host military recruiters was a compelled speech violation because it affected the law schools' own message. Those first two issues are not implicated in this case. *Id.* at 63-65. OFNB has made no claim that the Ordinance compels their speech in any way. This brief discusses those parts of *Rumsfeld's* analysis only because they inform the Court's analysis of the third issue, whether the expressive nature of the conduct directly regulated by the Solomon Amendment was sufficient to bring that conduct

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[8] The Solomon Amendment did not actually require FAIR or its members to do anything. It conditioned receipt of benefits upon certain conduct. The Court, however, analyzed the First Amendment issues as though the government directly required the conduct. *Id.* at 59-60.

within First Amendment protection. *Id.* at 65-67. That issue is directly relevant to this case.

The Court began its First Amendment analysis by pointing out that the Solomon Amendment does not regulate speech, but instead regulates conduct. *Id.* at 60. The Court noted that law schools remained free to put up signs next to the door of the recruiting room, help organize student protests, and otherwise express their views on the military's employment policies. *Id.* With respect to FAIR's claim that the Solomon Amendment compelled speech by requiring schools to send emails and post notices, the Court found such speech to be incidental to the conduct regulated by the Amendment. *Id.* at 62. The Court stated: "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949) (upholding state's right to enforce its antitrade restraint law by enjoining peaceful picketing)).

The Court next considered whether requiring law schools to include military recruiters in interviews and receptions on their campuses was unlawfully compelled speech. *Id.* at 64. FAIR had argued that by treating military and non-military recruiters alike as required by the Solomon Amendment, they could be viewed as sending a message with which they do not agree---that there is nothing

wrong with the military's employment policies. *Id.* at 64-65. The Court disagreed: "Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive." *Id.* at 64 (referring to *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995)). Thus, even in the context of a compelled speech claim, the Court limited its decision in *Hurley*.

The Court moved on, then, from considering whether the Solomon Amendment impermissibly regulates speech to considering whether the conduct regulated by the statute was expressive conduct with the First Amendment's protection. *Rumsfeld,* 547 U.S. at 65.[9] For that analysis, the Court relied upon *Texas v. Johnson,* 491 U.S. 397 (1989), but not upon its two-part test. Instead, the Court characterized *Johnson* as standing for the proposition that First Amendment expression extends "only to conduct that is inherently expressive." *Rumsfeld,* 547 U.S. at 66. The Court noted its long-standing rejection of the view that '"conduct can be labeled 'speech' wherever the person engaging in the conduct intends thereby to express an idea.'" *Id.* at 65-66 (quoting *United States v. O'Brien,* 391 U.S. 367, 376 (1968)).

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[9] As the Court's transitional sentence indicates, the *Rumsfeld* Court analyzed *Hurley* as a compelled speech case, not an expressive conduct case: "Having rejected the view that the Solomon Amendment impermissibly regulates *speech*, we must still consider whether the expressive nature of the *conduct* regulated by statute brings that conduct within the First Amendment's protection." 547 U.S. at 65 (emphasis in original).

FAIR had argued that prior to the Solomon Amendment, the law schools had expressed their disagreement with the military's discriminatory policies by treating military recruiters differently from non-military recruiters. *Rumsfeld,* 547 U.S. at 66. Despite FAIR's arguments to the contrary, the Court found that the different treatment was expressive only because the law schools accompanied their conduct with explanatory speech. *Id.* An example of different treatment was that law schools required military interviews to be conducted on the undergraduate campus rather than the law school campus. *Id.* The Court reasoned that the purpose of such conduct was not "overwhelmingly apparent" as was the conduct in *Johnson. Id.* Thus, the Court concluded:

> The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien.* If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it.

547 U.S. at 66.

Under *Rumsfeld,* speech accompanying the conduct claimed to be expressive may not be considered when determining whether, in context, the conduct is protected expressive speech. Thus, the context that may be considered in this case cannot include explanatory signs, such as banners, picket signs or t-shirts,

pamphlets, or verbal discourse with observers. Without resort to that explanatory speech, OFNB cannot carry its burden of proof that its conduct is protected expressive conduct. There is insufficient proof in this record that without the assistance of signs, buttons, pamphlets or explanatory discourse, the point of the OFNB Plaintiffs' conduct would be apparent, overwhelmingly so or not. *See Rumsfeld*, 547 U.S. at 66 (point of requiring military interviews to be conducted off campus is not "overwhelmingly apparent.") OFNB has not shown that the feeding of large groups of people without explanatory speech is inherently expressive conduct. As the Court made very clear in *Rumsfeld,* First Amendment protection extends "only to conduct that is inherently expressive" without considering the speech that accompanies it. *Id.*

The district court in this case erroneously failed to account for how much of the claimed understanding of OFNB's conduct might have been attributable to the significant explanatory speech that accompanied it. R: 88 at 7. In fact, the court expressly, and erroneously, considered it more likely that the message was understood because of the accompanying speech. *Id.* The court stated: "Finally, the testimony at trial established that the likelihood of the OFNB Plaintiff's message being received is enhanced by their use of signs, t-shirts and buttons. TR at 190-01." R: 88 at 7. Thus, the district court's analysis failed to comply with the Supreme Court's direction in *Rumsfeld.* It yielded an erroneous conclusion that the

OFNB Plaintiff's conduct regulated by the Ordinance is protected by the First Amendment.

OFNB may have intended to send a non-verbal message by the act of feeding at their events, but that message is extraordinarily ill-defined. *See* T. 110-11, 125-27, 170-71, 204-07. Even with all of the banners, t-shirts, and other explanatory speech, the conduct was not sufficiently expressive that observers understood the point. The testimony of several participants in OFNB's feedings, including some of the named individual Plaintiffs, revealed that observers did not understand the message by only observing the conduct. *See* T. 94-96, 128-29, 171, 208-09.

The conduct of the OFNB Plaintiffs is much like the conduct of the law schools in *Rumsfeld*, about which the Court said:

> An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

547 U.S. at 66. Here, OFNB's conduct of feeding in the park could be a picnic, a party, a field trip, a festival or something else entirely.

It is worth noting that *Rumsfeld's* conclusion that explanatory speech should not be considered in determining whether conduct is expressive does not break new ground. Few of the Supreme Court's cases directly address the issue of

whether the conduct is expressive, usually assuming, expressly or impliedly, without deciding, that is. *See, e.g., United States v. Albertini,* 472 U.S. 675 (1985) (implied assumption without analysis); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288-93 (1984) (express assumption); *United States v. O'Brien,* 391 U.S. 367, 376 (1968) (express assumption). In *Virginia v. Black,* 538 U.S. 343, 352-57 (2003), the conduct was cross burning, which the Court concluded was inextricably intertwined with the Ku Klux Klan and always a symbol of hate, if not intimidation. The feeding of large groups in a park is not so uniformly expressive as cross burnings. In *Texas v. Johnson,* 491 U.S. 397, 405-06 (1989), the conduct not only involved a potent symbol, but occurred as the culminating event of a political protest at the Republican National Convention. In *Spence v. State of Washington,* 418 U.S. 405, 409-10 (1974), the conduct was display of an upside down flag with a peace symbol sewn on it, which the State conceded was a form of communication. Along with that concession and the potent symbolism of the flag, the Court noted the timing of the display, which was "roughly simultaneous" with the U.S. incursion into Cambodia and the Kent State tragedy. *Id.* at 410. In contrast, OFNB's conduct occurred on uneventful days in an otherwise peaceful park setting.

As far back as 1984, the Court indicated a reluctance to expand the types of conduct protected by the First Amendment. In *Clark v. Community for Creative*

Non-Violence, 468 U.S. 288, 293 (1984), the Court assumed without deciding that the banned conduct of sleeping was expressive, but declined to endorse the circuit court of appeal's analysis or conclusion in that regard and disavowed the circuit court's analysis of the burden of proof. Later in its opinion, the Court obliquely criticized the circuit court's conclusion that the conduct was expressive, stating: "[A]lthough we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would have been facilitative."[10] *Id.* at 296. The conduct of OFNB in this case is not inherently expressive, and under the Supreme Court's cases it is not entitled to protection under the First Amendment. Just as the law schools did in *Rumsfeld*, OFNB "has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities those doctrines protect." 547 U.S. at 70.

2. Even if the OFNB Plaintiffs' Conduct Is Protected by the First Amendment, the Ordinance Does Not Impermissibly Abridge Their Right to Free Speech.

Even if this court concludes that the OFNB Plaintiffs' conduct in feeding large groups of people is expressive conduct, the City's Ordinance does not abridge OFNB's First Amendment right to free speech. Under *United States v.*

[10] The Court noted the particular manner in which sleeping in the tents would have facilitated the protest was by attracting the homeless to the demonstration. 468 U.S. at 296. That is the same manner in which the OFNB Plaintiffs use the conduct of feeding.

O'Brien, 391 U.S. 367 (1968) and its progeny, if the Ordinance is not related to the suppression of free expression, then an important governmental interest regulating the non-speech elements of the conduct can justify incidental limitations on the expressive conduct.

a. The Ordinance is not directed to the suppression of expression and, instead, furthers the important governmental interests of preserving the City's parks and dispersing a disproportionate burden on its neighborhoods.

The trial court did not expressly address whether the Ordinance is related to the suppression of expression, instead holding that it is content neutral. R: 88 at 8. The record overwhelmingly supports both that the Ordinance is content neutral and that its regulation of conduct is not related to suppressing free expression. The Ordinance does not regulate speeches, rallies, parades, or signs. Code of the City of Orlando § 18A.09-2; *see also* T. 210-11 (testimony of Plaintiff Montanez). It does not exempt from its reach either feedings that have some asserted expressive content different from OFNB's feedings or those feedings that have no expressive content at all.

Even if some part of OFNB's conduct of feeding large groups rises to the level of protected expressive conduct, which the City disputes, the Ordinance is not directed to that aspect of the conduct. To conclude otherwise would require the court to find that all large group feedings in the parks in the GDPD have expressive components protected by the First Amendment. Similarly, there is no evidence

that application of the Ordinance was ever directed at OFNB's message. The evidence indicates that during the time the City was applying the Ordinance, it did so consistently and without regard to what person or group intended to feed or what their message might be. *See* Defendant's Trial Exhibit 4.

There is substantial evidence in this case that the purpose of the Ordinance is not suppression of expression, but is, instead, improved preservation and management of the City's parks, including distributing among parks and neighborhoods the impacts of large group feedings. That is the purpose stated in the explanation of the Ordinance on the City's website. Defendant's Trial Exhibit 6. The record is replete with evidence that supports that purpose. *See* Statement of the Facts, *supra,* at 8-13.

On this record, there are only two reasonable conclusions to be drawn. First, the Ordinance is not related to the suppression of free expression. Second, the Ordinance is directed to furthering important governmental interests, including preserving and managing the City's parks in an equitable manner and alleviating a disproportionate burden on surrounding neighborhoods.

The district court concluded that while the City has the right to regulate in the areas of park management and public health and safety, the Ordinance was, nevertheless, improper and an ineffectual exercise of City power. R: 88 at 8-11. The court appeared to conclude that the Ordinance failed to address any real public

safety, health, or park management concerns. *Id.* at 9-10. It then addressed the City's interest in mitigating the impact of park usage on surrounding neighborhoods both by implying that this interest was somehow a secret motive of the City and by dismissing it as a valid basis for regulation.[11] *Id.* at 10.

The district court erred in its application of the law and its analysis of the evidence presented. The court recognized that the starting point for analysis is the Supreme Court's opinion in *United States v. O'Brien,* 391 U.S. 367 (1968), but misapplied the law, especially as it has evolved in subsequent Supreme Court decisions. The test as stated in *O'Brien* is:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. The Supreme Court assumed without deciding that burning a draft card held enough communicative elements to make it subject to protection under the First Amendment. *Id.* at 376. It then held that a federal statute making it a crime to destroy a draft card served a legitimate and important governmental

[11] How the court could have viewed this basis for the Ordinance as "perhaps real, though unstated," R: 88 at 10, is beyond the understanding of the City. The record is replete with references to this interest, which the City views as a parks management issue. *See* Statement of Facts, *supra,* at 7-8, 11-12. In addition, the City expressly argued it in the post-trial brief. R: 82 at 19, 21.

interest unrelated to the suppression of free expression and that its incidental regulation of O'Brien's expressive conduct did not violate the First Amendment. *Id.* at 382.

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) is particularly relevant to this case. The issue in *Clark* was whether Park Service regulations prohibiting camping in certain parks violated the First Amendment when applied to demonstrators who wished to sleep in tents in Lafayette Park and the National Mall in connection with a demonstration intended to call attention to the homeless. *Id.* at 289. The Park Service had permitted the demonstration to include the erection of two sizeable symbolic tent cities. *Id.* at 291-92. However, the Park Service would not allow the demonstrators to sleep in the tents, relying on its regulations that did not permit camping in those parks. *Id.*

The Court recognized the government's "substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence" and the camping ban's narrow focus on that interest. *Id.* at 296. The protestors argued that they just wanted to sleep, not cook, dig, or engage in other aspects of camping. *Id.* They reasoned that the incremental benefit to the parks of not sleeping in the tents was so minor that it could not justify the ban, especially in view of the importance they attached to that conduct. *Id.* Before considering the

protestor's arguments, the Court restated the *O'Brien* test, changing the wording of the element regarding the extent of the restriction, from "no greater than is essential to the furtherance of that interest" to "narrowly drawn to further a substantial governmental." *Id.* at 294.

The Court upheld the camping ban and the sleeping ban. *Id.* at 297-98. It reasoned that while there might be better ways, some more intrusive on speech, some less so, that the Park Service could have chosen to accomplish its purpose, the Park Service had the duty and discretion to make its own call. *Id.* at 299. The Court stated that no First Amendment jurisprudence had: "assign[ed] to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow[ed] the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.*

Subsequent Supreme Court cases have maintained both *Clark's* construction of the *O'Brien* test and its insistence that courts defer to decisions by the regulator regarding the wisdom of neutral regulations that incidentally burden expressive conduct. In *United States v. Albertini,* 472 U.S. 675, 689-90 (1985), the Court upheld the military's enforcement of letters banning individuals from military bases even on a day when an "open house" made the base generally accessible to the public. The Court reasoned that neutral regulations that incidentally burden

speech are not invalid just because some imaginable alternative might be less burdensome on speech: "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Id.* at 689. Similarly, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 67-68 (2006), after holding that the conduct was not expressive, the Court went on to conclude, quoting *Albertini,* that if it had been, it would not have been unlawfully abridged.

In this case, the Ordinance is not related to the suppression of expression. It is directed toward the City's legitimate interests in furthering public health and safety and in managing its parks efficiently and in a manner that avoids a disproportionate burden on its neighborhoods. There was ample evidence at trial regarding the negative impacts of large group feedings on the parks and surrounding neighborhoods. *See* Statement of the Facts, *supra,* at 7-8. Mayor Dyer and the City's Director of Families, Parks and Recreation, Ms. Early, testified about the need for the City to mediate, by its regulation, between competing needs for the use of limited park space and negative impacts on neighborhoods surrounding parks. *Id.* at 11-12. Ms. Early responded to numerous questions from the district court regarding how the Ordinance furthered these goals. T. 368-78. Her testimony clearly revealed her well-considered and emphatic opinion that the

Ordinance served a legitimate governmental purpose that would be accomplished less effectively without it. *See especially* T. 375-78. Apparently, she did not convince the Court, but the Supreme Court in *Clark* and *Albertini* made it clear that the appropriate opinion regarding the efficacy of a regulation is that of the entity charged with regulating the interest, not the opinion of the judiciary. That the purposes of the Ordinance might have been accomplished more effectively, or even that they could have been accomplished with less impact on expressive conduct, is not relevant and may not be considered by the court. *See Albertini,* 472 U.S. at 689; *Clark,* 468 U.S. at 299. Thus, even if OFNB's conduct was expressive, the Ordinance does not abridge the OFNB Plaintiffs' First Amendment rights. The district court erroneously concluded otherwise.

b. The incidental limitations on the OFNB Plaintiffs' expressive conduct are justified.

The court below compounded its error by concluding that even if the Ordinance furthered a substantial governmental interest, it violated the OFNB Plaintiffs' First Amendment rights because its restrictions on expressive conduct "are much greater than that which are essential." R: 88 at 11. Again, the court erroneously applied binding First Amendment precedent.

As discussed above, *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) is very similar to this case, because it involves purportedly expressive conduct that was incidentally impacted by a regulation intended to

preserve parks. The similarity continues in that the parks at issue in *Clark* were of particularly central and symbolic importance to the United States, much as the City's downtown parks, especially Lake Eola Park, are to it. *Id.* at 296. *Clark* updated the earlier *O'Brien* test of the extent to which a regulation that furthers a substantial governmental interest may infringe on expressive conduct. *Id.* at 294. The Court stated: "Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is *narrowly drawn to further a substantial governmental interest* and if the interest is unrelated to the suppression of free speech." *Id.* (emphasis supplied); *compare O'Brien,* 391 U.S. 367 at 377 ("no greater than is essential to the furtherance of that interest").

This standard for permissible incidental regulation of expressive conduct is nominally different than the time, place, or manner standard used to determine content neutral regulation of speech. However, in *Clark,* the Court analyzed the impact of the Park Service's ban on camping in Lafayette Park and the Mall under both the time, place, or manner standard and under the modified *O'Brien* standard. *Id.* at 294-95, 298-99. The Court concluded that, in the final analysis, the standards were "little, if any, different."[12] *Id.* at 298. The Park Service's

[12] The Court pointed out, however, that the reasonable time, place, or manner test limits regulations that directly constrain speech; whereas the *O'Brien* test limits only incidental restriction of the expressive elements of conduct. 468 U.S. at 298 n. 8. The Court noted that it would, thus, make little sense for the *O'Brien* test to

regulation, which completely banned a specific type of conduct, camping, from the two most politically visible parks in the nation, withstood scrutiny under both standards, even though the Court had assumed for purposes of its decision that the type of camping it was addressing was protected by the First Amendment. *Id.* at 298-99.

The Court discussed at some length the protestor's contentions that the Park Service's ban of camping was ineffectual and that the incremental benefit to the parks could not justify the ban on sleeping as part of their permitted demonstration. Its comments are relevant here. The Court noted that the Park Service does not ban sleeping generally, just camping, and does not ban camping in all of its parks. *Id.* at 295. The Court noted that perhaps the Park Service's purposes would have been "more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas." *Id.* at 297. That possibility did not in the Court's view, "impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks." *Id.* The Court reiterated that if the regulation was aimed at a legitimate governmental interest and "if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner

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be more stringent and implied that the *O'Brien* test might reasonably be considered less stringent. *See id.*

in which a demonstration may be carried out." *Id.* at 298. Finally, the Court stated:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park and the Mall. The Court of Appeals' suggestions . . . represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be maintained. We do not believe, however, that either United States v. O'Brien or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Id. at 299 (specific suggestions of the Court of Appeals omitted).

The Supreme Court's later decisions apply the *O'Brien* test to expressive conduct, using the same deferential approach as *Clark.* In *United States v. Albertini,* 472 U.S. 675 (1985), the Court declined to consider that some different regulation might be less burdensome to the expressive conduct, stating: "Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

472 U.S. at 689. *See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47. 67-68 (2006) (quoting *Albertini*).

The difference between the time, place or manner test and the *O'Brien* test that the OFNB Plaintiffs focused on below is the requirement of the time, place or manner test that a regulation expressly regulating speech must "leave open ample alternatives for communication of the information." *See Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). That requirement has no real place in the analysis of a regulation that on its face regulates conduct rather than expression. In addition, the time, place or manner cases make it clear that the First Amendment requires only that the government refrain from denying a "reasonable opportunity" for communication. *See City of Reston v. Playtime Theatres, Inc.,* 475 U.S. 41, 54 (1986). Even pure speech can be regulated so as to deny the speaker his choice of location. *See Heffron v. Int'l Soc'y for Krishna Consciousness,* 425 U.S. 640, 647 (1981).

The evidence in this case establishes that Lake Eola Park would be more exposed to harm without the Ordinance than with it. It further establishes that the City's legitimate goal of managing its parks by dispersing the burden of their use among its neighborhoods is met more effectively with the Ordinance than without it. In addition, under the Ordinance, the OFNB Plaintiffs may hold political rallies, demonstrations, or a multitude of other communicative activities of any size at

Lake Eola Park as often as they wish. They may conduct large group feedings just as they have been and wish to continue to do at Lake Eola Park twice per year. There are 41 other parks within a two-mile radius of City Hall in which they may conduct two large group feedings per year. In addition, they may stage large group feedings as many times per year as they wish at any one or more of the approximately 67 other parks in the City of Orlando. The incidental limitations imposed on the OFNB Plaintiffs' expressive conduct, if it is expressive, are justified.

B. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT, AS APPLIED TO THE FVCG PLAINTIFFS, THE CITY OF ORLANDO'S LARGE GROUP FEEDING ORDINANCE VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

In the Amended Complaint and at trial, the FVCG Plaintiffs brought two claims that the City's Large Group Feeding Ordinance impinged on their religious practices. In Count I, they contended that the Ordinance violated their rights under the Florida Religious Freedom Restoration Act of 1998 ("FRFRA"), sections 761.01-.05, Florida Statutes. In Count II, they contended that the Ordinance violated their rights under the free exercise clause of the First Amendment to the Constitution of the United States. This section of the brief addresses the district court's ruling on the FVCG Plaintiffs' free exercise claim under the First

Amendment, but it is helpful to that discussion to first briefly consider the court's disposition of their FRFRA claim.

Following the trial, the district court granted the City's *ore tenus* trial motion for judgment on partial findings on the FRFRA claim. R: 79. The court correctly held that the FRFRA claim was governed by the Florida Supreme Court's opinion in *Warner v. City of Boca Raton,* 887 So. 2d 1023 (Fla. 2004). R: 79 at 2-3. The court recognized two key FRFRA holdings of *Warner.*[13] First, that to establish a claim under FRFRA, a plaintiff must establish that " 'the government has placed a substantial burden on a practice motivated by a sincere religious belief.'" *Id.* (quoting *Warner,* 887 So. 2d at 1032). Second, that "under FRFRA 'a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.'" R: 79 at 3 (quoting *Warner*, 887 So. 2d at 1033). Analyzing the evidence presented at trial under *Warner*, the court correctly concluded that the City's Ordinance did not place a substantial burden on the FVCG Plaintiffs' practice of their religion. R: 79 at 3-4.

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[13] The Florida Supreme Court in *Warner*, answered two questions certified by the Eleventh Circuit. 887 So. 2d at 1024. In doing so, the court not only construed FRFRA, it extensively analyzed federal precedent regarding the right of an individual to engage in the free exercise of religion. *Id.* at 1027-30. The court concluded that FRFRA provided broader protection to the free exercise of religion than does United States Supreme Court precedent construing the First Amendment. *Id.* at 1032-33.

Accordingly, the district court upheld the City's Ordinance under FRFRA. *Id.* With respect to the FVCG Plaintiffs' free exercise claim under the First Amendment, the district court accepted further argument from the parties in their post-trial briefs.

1. The District Court Applied the Correct Standard: A Neutral Law of General Applicability Does Not Violate the Free Exercise Clause Even If the Law Has the Incidental Effect of Burdening the Exercise of Religion.

In their briefs, the City and the FVCG Plaintiffs agreed that the free exercise claim would fail if the Ordinance was both neutral and generally applicable and was rationally related to a legitimate governmental interest. *See* Plaintiffs' Post-Trial Brief, R: 83, at 5-6; Defendant's Post-Trial Brief, R: 82, at 3-4. That standard derives from the United States Supreme Court case of *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990). In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531 (1993), the Court stated: "In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (citing *Employment Division*).

The Eleventh Circuit applied the standard in *First Assembly of God, Inc. v. Collier County, Florida,* 20 F.3d 419, 423 (11th Cir. 1994). In *First Assembly*, the

court held that a zoning ordinance preventing a church from operating a homeless shelter at the church's location did not violate the church's rights under the Free Exercise Clause of the First Amendment. *Id.* at 424. The court applied the rule reiterated in *Lukumi* that incidental burdensome effects need not be justified by a compelling governmental interest so long as the ordinance is neutral and of general applicability, which it found the ordinances before it were. *Id.* at 423.

Neither the United States Supreme Court nor the Eleventh Circuit has specifically stated the governmental interest required of a neutral ordinance to justify incidental burdens on religious practice. However, the contexts of the opinions indicate that only a rational relationship between the law and the governmental interest is required. *See, e.g., Employment Division,* 494 U.S. at 885-87; *First Assembly,* 20 F.3d at 423-24. Other federal circuit courts have expressly recognized that a rational relationship is all that is required. *See, e.g., Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 649 (10th Cir. 2006); *Miller v. Reed,* 176 F.3d 1202, 1206 (9th Cir. 1999). The district court also applied the rational basis test. R: 55 at 6-7; R: 88 at 13.

The district court found the City's Ordinance to be content neutral, but did not expressly address whether it was also neutral and of general applicability. R: 88 at 12-13. In determining if the object of a law is a neutral one, courts consider whether its object is something other than the infringement or restriction

of religious practices. *See Lukumi,* 508 U.S. at 533: *Grace United,* 451 F.3d at 649-50. Both the text of the law and its effect are considered. *See Lukumi,* 508 U.S. at 533-35. Because virtually all laws are selective to some extent, in determining if a law is of general applicability, a court must consider whether it imposes a burden only on conduct motivated by religious belief, including whether it contains secular exemptions. *See Lukumi,* 508 U.S. at 542-46.

Here, the City's Ordinance is unquestionably neutral. It contains no language even remotely suggestive of a religious object. Code of the City of Orlando, FL §§ 18A.09-2, 18A.01(23), (24) (2008). In *Lukumi*, the ordinances of the City of Hialeah contained words such as "sacrifice" and "ritual" that had strong religious connotations. 508 U.S. at 533-34. Also, the City of Hialeah had enacted the ordinances based on religiously based complaints it had received. *Id.* at 541-43. In this case, the evidence is that the complaints were entirely secular in nature.

Similarly, the City's Ordinance is clearly one of general applicability. It contains no exemptions, whether of a secular or a religious nature. Code of the City of Orlando, FL §§ 18A.09-2, 18A.01(23), (24) (2008). It applies to all large group feedings within the GDPD, irrespective of by whom they are held or in what manner they are conducted. *Id.* The City of Hialeah ordinances, by contrast, permitted the secular practice of some of the prohibited conduct. *Lukumi,* 508 U.S. at 543-45.

2. The District Court Erroneously Concluded That The Ordinance Is Not Rationally Related To Any Legitimate Governmental Interest.

The district court, although it appeared to accept the parties' proferred legal standard and applied the rational basis test, nevertheless, concluded that the City's Ordinance violated the FVCG Plaintiffs' rights under the free exercise clause of the First Amendment. R: 88 at 13. The court held that there was no rational basis for the Ordinance. *Id.* In that conclusion, the district court erred.

The rational basis test requires only a minimal relationship between a legitimate governmental interest and a legislative enactment. The Supreme Court recently reiterated the hornbook principle that "almost all laws would pass rational-basis scrutiny." *District of Columbia v. Heller,* 128 S. Ct. 2783, 2817 n. 27 (2008).

As discussed in a prior section of this brief, the City's Ordinance is not only rationally related to a legitimate governmental interest, it furthers an important governmental interest. *See supra,* at 37-47. The Ordinance furthers the City's interest in improved preservation and management of its parks, including distributing among parks and their adjacent neighborhoods the impacts of large group feedings. The record is replete with evidence that the Ordinance serves that purpose. *See* Statement of the Facts, *supra,* at 8-13. A government task force on homeless issues recommended that the City enact such an ordinance. T. 230, 233-34. The City's Director of Families, Parks and Recreation, Ms. Early, testified that

the Ordinance assisted the City in meeting its interests. T. 368-78. The district court refused to accept the City's goal of distributing the impacts of the large group feedings among its various neighborhoods as a legitimate governmental purpose. *See* R: 88 at 10. Ms. Early testified that the Ordinance furthered both that goal and the goal of preserving Lake Eola Park and the goal of improving the City's efficiency in providing services to its parks. T. 368-78. Notwithstanding that unrebutted testimony, the district court adopted its own perspective, which was that the Ordinance merely moved the problem around. T. 373-76; R: 56 at 11-15. Thus, the court concluded that the Ordinance was not rationally related to a legitimate purpose based on an unsupported factual conclusion regarding the effectiveness of the Ordinance and an equally unsupported legal conclusion that one of the City's goals was illegitimate. R: 88 at 13.

The City's Ordinance is rationally related to legitimate governmental interests. The district court erred in holding otherwise. The Ordinance is a neutral law of general applicability. Under binding Supreme Court precedent, even if the Ordinance burdens the FVCG Plaintiffs religious practices, it does not violate their rights under the First Amendment.

CONCLUSION

For the foregoing reasons, the City respectfully requests that this court: (1) reverse the district court's judgment that the City's Large Group Feeding Ordinance violates the First Amendment to the Constitution of the United States as applied to the conduct of the Plaintiffs/Appellees Orlando Food Not Bombs, Ryan Scott Hutchinson, Benjamin B. Markeson, Eric Montanez, and Adam Ulrich, and render judgment in favor of the City; (2) reverse the district court's judgment that the City's Large Group Feeding Ordinance violates the First Amendment to the Constitution of the United States as applied to the conduct of the Plaintiffs/Appellees First Vagabonds Church of God and Brian Nichols, and render judgment in favor of the City; and (3) affirm the district court's judgment of September 29, 2008, in all other respects.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,797 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-4.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, size 14, in Microsoft Office Word 2003.

Kathleen Maloney Skambis
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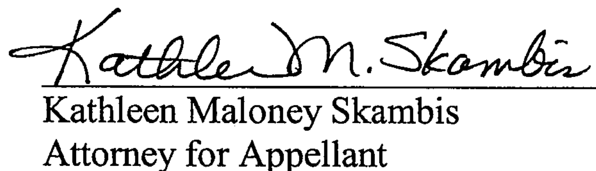
Dated this 26th day of January, 2009.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to Mayanne Downs, City Attorney, King, Blackwell, Downs & Zehnder, P.A., 25 East Pine Street, Orlando, Florida 32801, Martha Lee Lombardy, Assistant City Attorney, P.O. Box 4990, Orlando, Florida, 32802-4990; and Jacqueline H. Dowd, Esquire, 809 E. Harwood Street, Orlando, Florida, 32803; and by Federal Express overnight delivery to Randall C. Marshall, Esquire, 4500 Biscayne Boulevard, Suite 340, Miami, Florida, 33137-3227; and Glenn M. Katon, Esquire, ACLU Foundation of Florida, Inc., 112 N. Delaware Avenue, Tampa, Florida, 33606-1430, this 26th day of January, 2009.



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