

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

**PRINCIPAL AND RESPONSE BRIEF
OF ORLANDO FOOD NOT BOMBS, RYAN SCOTT HUTCHINSON,
BENJAMIN B. MARKESON; ERIC MONTANEZ; and ADAM ULRICH**

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ERIC MONTANEZ; and ADAM ULRICH

**CERTIFICATE OF INTERESTED PERSONS
OF APPELLEES ORLANDO FOOD NOT BOMBS,
RYAN SCOTT HUTCHINSON, BENJAMIN B. MARKESON;
ERIC MONTANEZ; and ADAM ULRICH**

Appellees ORLANDO FOOD NOT BOMBS, RYAN SCOTT

HUTCHINSON, BENJAMIN B. MARKESON; ERIC MONTANEZ; and ADAM

ULRICH certify 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. Cassamer, Victoria
5. City of Orlando
6. Demings, Val, Orlando Police Chief
7. Dowd, Jacqueline H., Esquire
8. Downs, Mayanne, Esquire
9. Dyer, Buddy, Mayor
10. Early, Lisa, Director of Families, Parks and Recreation,
City of Orlando
11. First Vagabonds Church of God

12. Goodwin Proctor LLP
13. Hager, Eric J., Esquire
14. Hebert, Kenneth, Esquire
15. Hutchinson, Ryan Scott
16. Jones, Bryan
17. Katon, Glenn, Esquire
18. King, Blackwell, Downs & Zehnder, P.A.
19. Legal Advocacy at Work, Inc.
20. Litchford, Jody M., Esquire
21. Lombardy, Martha Lee, Esquire
22. Markeson, Benjamin B.
23. Marshall, Randall C., Esquire
24. Mason, Brett
25. Montanez, Eric
26. Murphy, Megan
27. National Coalition for the Homeless
28. National Health Care for the Homeless Council
29. National Law Center on Homelessness and Poverty
30. National Policy and Advocacy Council on Homelessness

31. Nichols, Brian
32. Orlando Food Not Bombs and its individual members
33. Presnell, Gregory A., Honorable
34. Salam, Zeina, Esquire
35. Sheehan, Patty, Orlando City Commissioner, District 4
36. Skambis & Skambis, P.A.
37. Skambis, Christopher C., Esquire
38. Skambis, Kathleen Maloney, Esquire
39. Smith, James Fash
40. Soffin, Rachel, Esquire
41. Spaulding, Karla R., Honorable
42. Strickland, Brittany
43. Ulrich, Adam
44. Vertlieb, William

STATEMENT REGARDING ORAL ARGUMENT

Appellees Orlando Food Not Bombs, Ryan Scott Hutchinson, Benjamin B. Markeson, Eric Montanez, and Adam Ulrich request that the court permit oral argument in this case. This case involves a precedent-setting ruling by the District Court that is of interest to homeless advocates across the nation. Appellees believe 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 pursuant to 29 U.S.C. § 1291. The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 because Plaintiffs/Appellees alleged they were entitled to relief under the United States Constitution.

STATEMENT OF THE ISSUES

Issue No. 1: Whether, as applied to the OFNB Plaintiffs, the City of Orlando's Large-Group Feeding Ordinance violates their rights to free speech under the First Amendment to the United States Constitution.

Issue No. 2: Whether, as applied to the OFNB Plaintiffs, the City of Orlando's Large-Group Feeding Ordinance violates their rights to due process under the Fourteenth Amendment to the United States Constitution.

Issues No. 3: Whether, as applied to the OFNB Plaintiffs, the City of Orlando's Large-Group Feeding Ordinance violates their rights to expressive association under the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition Below

Appellees Orlando Food Not Bombs, Ryan Scott Hutchinson, Benjamin B. Markeson, Eric Montanez, and Adam Ulrich accept the statement of Course of the Proceedings and Disposition Below of Appellant, City of Orlando.

B. Statement of the Facts

The City's reasons for amending its code to restrict feeding large groups of homeless are set forth in a preamble to the ordinance. The preamble states:

WHEREAS, the City of Orlando encourages use of City owned or controlled parks by City residents in a safe, sanitary, and aesthetically pleasing atmosphere; and

WHEREAS, unregulated large group feeding in public parks in the Greater Downtown Park District (GDPD)¹ has resulted in litter on park grounds and surrounding rights-of-way such as food, food containers, and other food wrappings, creating hazards to the health and welfare of citizens, birds, and animals, and is detrimental to the aesthetic atmosphere of parks; and

WHEREAS, large group feeding in public parks in the GDPD require provision of adequate trash receptors and additional park personnel for inspection and clean up of park grounds which would be more manageable by advance notice and regulation of large group feedings through a permit system; and

WHEREAS, the GDPD area is experiencing a steady and significant increase in residential and other growth and a corresponding competition for park space and usage by citizens; and

WHEREAS, excessive use of parks and park facilities in the GDPD area for large group feeding by single persons or groups denies that park or facility space for use by other citizens, which placement of reasonable time restrictions on use would resolve; and

WHEREAS, testimony before City Council has demonstrated that fear, intimidation, and criminal acts have accompanied or followed some large group feedings in some parks within the GDPD, affecting the safety and welfare of City residents; and

WHEREAS, the City is committed to and has provided for and set aside reasonable, ample, alternative land space within the GDPD for large group feeding of the homeless by religious and other

¹ The ordinance creates the "Greater Orlando Park District," *see* Code of the City of Orlando § 18A.01(24), but uses the acronym GDPD.

organizations which land is not covered by or affected by the restrictions of this ordinance; and

WHEREAS, the current parks and park facilities in the GDPD, and future parks established by City Council in the GDPD, are particularly affected by all these conditions, and confining large group feeding regulations to only a few central downtown parks would likely cause the conditions to spill over or spread to adjacent or nearby parks in the GDPD.

Ordinance of 7-24-2006, Doc. # 0607241012.

However, the record contains little, if any, evidence supporting the preamble's claim that litter was left on park grounds and surrounding rights-of-way, creating hazards to the health and welfare of citizens, birds, and animals.

In its brief, the City states as a simple fact that the food-sharing events "generate garbage." Brief at 15. However, the record shows that the City presented no evidence as to the amount or type of garbage generated, whether extra efforts by city staffers were needed to clean it up² or what hazards to the health and welfare of citizens, birds, and animals, if any, were caused by garbage. The District Court found the City presented no evidence that there is any problem with littering or garbage in the parks, let alone one connected to the food-sharing events. R: 88 at 9.

² The District Court found there is no evidence that the amount of garbage to be collected has increased as a result of large group feedings. R: 88 at 9.

To the contrary, the record evidence shows that any garbage generated in the course of the food-sharing is cleaned up by the participants before they leave the park. Plaintiff Eric Montanez testified that Orlando Food Not Bombs cleans up the picnic area at Lake Eola Park after each food-sharing event. “[W]e make sure that that park is pristine ... We don’t like garbage. We don’t like litter.” T. 198. Joshua Leclair, a frequent participant, although he is not a member of OFNB, testified that OFNB does not use disposable plates or food wrappings. T. 131-32. He also testified that OFNB members and supporters pick up any garbage that was already in the park before the food-sharings began and leave the park cleaner than they found it. T. 132. *See also* T. 33 (testimony of Plaintiff Brian Nichols); T. 87 (testimony of Bruce Shawen); T. 169 (testimony of Cris Field). The District Court found that the evidence presented shows that OFNB does not use disposable items at their events and that its members clean up when they are done and leave the park cleaner than it was when they arrived. R: 88 at 9.

The preamble to the ordinance claims that excessive use of parks for “large-group feedings” denies that park space for use by other citizens. However, in the proceedings below, the City admitted it has no evidence that excessive use of downtown parks for “large-group feedings” has denied use of those parks to other citizens. R: 43 at 5 (citing Resp. to Req. for Admis., No. 5). Although the City

points to the testimony of Mayor Dyer and Ms. Early about “the City’s role in mediating between competing interests in the use of limited park space ...” as a justification for the ordinance, Brief at 11, the ordinance does not provide for the denial of a permit based on multiple requests for use of the same space at the same time. In the proceedings below, the City admitted that the only basis for denial of a permit is an applicant exceeding the two feedings per park per year requirement. R: 33 at 3 (citing §18A.09-2(c); Aff. of Lisa Early para. 6). The District Court found that neither Lisa Early, the city’s director of Families, Parks and Recreation, nor the City offered any credible evidence of overuse. R: 88 at 10 n.11.

The City presented only shreds of evidence to support that preamble’s claim that “intimidation and criminal acts have accompanied or followed some large group feedings in some downtown parks, affecting the safety of citizens.” At trial, the City presented two witnesses who testified about their encounters with people they assumed to be homeless but, more importantly, the City introduced into evidence police reports which it claimed showed an increase in crime in the Lake Eola area. Def. Ex. 12. However, the police reports fail to establish any connection whatsoever between the Wednesday food-sharing events at Lake Eola Park and

crimes committed in the park vicinity. For example, of 19 arrests of “transients”³ reported from January 1 through June 8, 2006, only two⁴ occurred on Wednesday and one of those was at 1 a.m., obviously many hours before the food-sharing event began at 5 p.m. The City’s own evidence establishes that the fewest arrests occurred on Wednesday and Monday, suggesting that food-sharing events may actually reduce crime in the park vicinity.

The City highlights several “specific experiences,” Brief at 8, but mischaracterizes the testimony of the witnesses. Cris Field, who had participated in the food-sharings for about two years, did testify that on one occasion she saw a man – “I will call him a gentleman because he truly is” – with a knife in his possession, but she explained that she was not scared because “I had just been hugging him a few minutes before that.” She added, “Nobody was frightened. Nobody got hurt.” T. 165, 168.

Numerous witnesses testified that they had never seen any criminal activity at the food-sharing events. *See* T. 86 (testimony of Bruce Shawen, a homeless man

³ A “transient,” as defined by the police, is not necessarily the same thing as a homeless person. As Officer James Young explained, a person who cannot or will not give a home address is counted as a “transient.” T. 407.

⁴ The City presented no evidence that the one individual arrested (for the non-violent crimes of panhandling and possession of drug paraphernalia) near the food-sharing event had attended the event.

who regularly attends the food-sharings); T. 114 (testimony of Ryan Hutchinson); T. 197 (testimony of Eric Montanez). The District Court found there is absolutely no evidence of crimes being committed during the food-sharing events. R: 88 at 9.

The City states as fact that witness William Sheaffer, an attorney, “carefully connected” several persons he assumed to be homeless to the food-sharing events. Brief at 8. However, on cross-examination, Attorney Sheaffer admitted that his encounter with one of those persons, a white male he confronted in the bushes on his property, did not occur on the same day as a food-sharing. T. 332-33. He testified that he also saw the man in the park at or about the time of a food-sharing, but he could not say whether his observation was before or after his encounter with the man or what day of the week it occurred. He was unable to testify that he saw any of the individuals “either in possession of some food or holding out some tray for food or possibly even standing in line for food.” T. 334. Further, Attorney Sheaffer did not provide any testimony to support the City’s claim about “issues that would occur post-feedings.” *See* T. 257 (testimony of Charles Smith).

Although the City refers to the “large number of complaints,” *see* Brief at 7-8 (citing T. 240-42, 248, 257), the only record evidence as to the number of complaints was provided as a recollection by Charles Smith, who is an aide to City Commissioner Patty Sheehan, who testified that “roughly about eight” people had

registered some sort of concern or complaint. T. 258 (testimony of Mr. Smith, in response to a question from the court.)⁵

In its brief, the City does not even mention Sylvia Lane, the commonly used name for the “reasonable, ample, alternative land space” set aside by the City “for large group feeding of the homeless.” *See* Preamble to the Ordinance. The record evidence establishes that it is not reasonable or ample. It is an abandoned parking lot surrounded by a chain-link fence topped with barbed wire, under a highway overpass and next to a power distribution substation. It has no bathrooms where people can wash their hands before they eat or serve food. Its limited hours make it impossible for people with jobs, both the homeless people themselves and those who want to provide food to poor and hungry and homeless people, to participate in the evening meal that has been offered at Lake Eola Park since before the ordinance was passed. T. 35, 75 (testimony of Brian Nichols); T. 113-14 (testimony of Ryan Hutchinson); T 144-45, 162-63 (testimony of Diane Kelly); T 192-94 (testimony of Eric Montanez); see also R: 24 at 4 (City’s admission). The District Court described as it a “Ghetto” entirely unacceptable to the Court. R: 79 at 3 n.4.

⁵ During the July 24, 2006, meeting of the Orlando City Council, 9 people spoke in favor of the ordinance and 43 spoke in opposition to it. R: 20 at 18 n.8.

At trial, the City presented a new and different justification for the ordinance – to distribute among the various city parks and adjacent neighborhoods the impact of the “feedings.” T. 18 (opening statement of Ms. Lombardy); T. 244 (testimony of Mayor Dyer); *see also* Brief at 11, 12. The City did not explain the incongruence between its stated desire to distribute the impact of the food-sharings among other parks and its earlier-stated desire to prevent the conditions related to the food-sharings from spreading to nearby parks.

In support of its new justification, the City points out the mayor’s testimony that the purpose of the ordinance was to fairly distribute among the various city parks and neighborhoods⁶ the impact of the “feedings.” Brief at 11 (citing T. 241, 144); *see also, e.g.*, T. 253, 257 (testimony of Charles Smith). But the City does not cite, and did not present, any evidence which substantiated the existence of

⁶ The City misstates the evidence presented at trial by contending that “a historic impediment to downtown development is an over-concentration in downtown of social services aimed at low income and homeless persons.” Brief at 7 (quoting T. 238-39, 297). Lake Eola Park is not in the Parramore neighborhood; rather it is on the other side of Interstate 4. *See* T. 73 (testimony of Brian Nichols). In his testimony at trial, the mayor identified the neighborhoods surrounding Lake Eola as Eola South and Thornton Park. T. 242. He did not mention Parramore. *Id.* The mayor also testified that the bulk of the social services are located “right here where the courthouse is and Parramore.” T. 237-38. He also testified that while Parramore has declined, Thornton Park has thrived. T. 238. The City’s Initial Brief also does not mention Parramore as one of the neighborhoods next to Lake Eola Park. Brief at 7. *See also* R: 88 at 3 n.4.

that purported “impact” or “condition.” The City relies on the testimony of Lisa Early, the Director of Families, Parks and Recreation, to state that the ordinance was designed to have the least negative impact on people seeking to use the City’s parks. Brief at 12 (citing T. 369-79). The City fails to acknowledge that the homeless and hungry citizens, as well as the people who come to the park to offer whatever help they can, are “people seeking to use the City’s parks.” The City does not recognize that these citizens were relegated to play a perpetual game of musical chairs, moving from park to park to park,⁷ or holding the food-sharings in an abandoned parking lot that the District Court described as a “Ghetto” entirely unacceptable to the Court. R: 79 at 3 n.4.

The City also neglects to mention the e-mail sent by Charles Smith, the city commissioner’s aide, which contradicts that testimony by stating, “The intent of this ordinance is to try to move the large groups of homeless out of downtown ...” Pl. Ex. 3; T. 256-57; *see also* T. 253-54.

⁷ The City claims there are 42 parks available for use by Plaintiffs, Brief at 12-13, but Ms. Early was able to identify only nine parks (other than the two already used by the Plaintiffs in this case) that have some combination of picnic areas, restrooms and/or pavilions. T. 346-48.

C. Statement of the Standard of Review

In cases in which there is a claim of denial of rights under the Federal Constitution, this Court’s review of the District Court’s findings of “constitutional facts,” as distinguished from ordinary historical facts, is *de novo*. *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006); *Niemothko v. Maryland*, 340 U.S. 268, 271, 71 S. Ct. 325, 327 (1951). However, due to his familiarity with the testimony and exhibits, the trial judge was in a superior position to make determinations about the credibility of the witnesses. *See AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1547 (11th Cir. 1986). The District Court was well within its discretion to rely on what it deemed to be the greater weight of the more persuasive and credible evidence presented at trial.

SUMMARY OF THE ARGUMENT

The District Court correctly ruled that the City of Orlando’s “large-group feeding” ordinance violates the free speech rights of Orlando Food Not Bombs, Ryan Scott Hutchinson, Benjamin B. Markeson, Eric Montanez, and Adam Ulrich (hereinafter “the OFNB Plaintiffs”). In determining that the OFNB Plaintiffs’ acts of sharing food with homeless and hungry people in a downtown public park are expressive conduct protected by the First Amendment, the District Court correctly

relied on the record evidence showing that those Plaintiffs intended to convey a political message and that their message was likely to be, and in fact was, understood by those who observed it. Even the mayor and an Orlando police officer recognized that the OFNB Plaintiffs' food-sharing events conveyed a political message, as the record evidence shows.

The District Court correctly found there is no record evidence that the ordinance furthers a substantial governmental interest. At trial, the City failed to present sufficient evidence to support its professed concerns in support of the ordinance. In addition, previously existing city ordinances address all of the City's professed concerns. Unfounded government justifications are an insufficient basis for restricting constitutionally protected activity.

The District Court's denial of OFNB's claim that the ordinance is unconstitutionally vague should be reversed because the ordinance has been enforced in an arbitrary and discriminatory manner. Three separate provisions of the City's ordinance are unconstitutionally vague because they are subject to arbitrary and discriminatory enforcement. In fact, two of those provisions were actually enforced against OFNB inconsistently and arbitrarily, resulting in the arrest of Plaintiff Eric Montanez.

The ordinance violates the OFNB Plaintiffs' right to expressive association. That right protects more than just a group's membership decisions; it also protects against laws that make group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message. That is plainly the case with respect to the City's criminalization of expressive association in city parks where indigent individuals, as well as prosperous ones, share food with each other.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT CORRECTLY RULED THAT THE CITY'S LARGE-GROUP FEEDING ORDINANCE VIOLATES THE FREE SPEECH RIGHTS OF THE OFNB PLAINTIFFS

A. The District Court correctly held that OFNB's food-sharings qualify as expressive conduct under the First Amendment

Even the mayor and an Orlando police officer recognized that the OFNB Plaintiffs' food-sharing events conveyed a political message, as the record evidence shows. R: 88 at 7 (citing T. 230-31); Pl. Ex. 5. Thus, the District Court correctly determined that OFNB's food-sharing events are protected as expressive conduct under the First Amendment.

In making that determination, the District Court applied the test of *Texas v. Johnson*, 491 U.S. 397 (1989):

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it.

R: 88 at 6 (quoting *Johnson*, 491 U.S. at 404 (internal quotation marks omitted)); see also *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

1. The record evidence is undisputed that the OFNB Plaintiffs intended to convey a message

Although the City now⁸ attempts to dispute whether the OFNB Plaintiffs intended to convey a message, Brief at 16, the record is clear. Plaintiffs Ryan Hutchinson and Eric Montanez, who are members of Orlando Food Not Bombs, both testified that the group intends to convey a message through its food-sharing activities. T. 110-11 (testimony of Ryan Hutchinson), T. 186 (testimony of Eric Montanez); *see also* Markeson Decl. ¶ 5.

The record evidence is undisputed that communicating the tragedy of hunger and homelessness to others is an essential purpose of the activity of sharing food in public parks. T. 106 (testimony of Ryan Hutchinson; T. 186-88 (testimony of Eric Montanez); *see also* Markeson Decl. ¶¶ 4-7.

The District Court rejected the City's argument that the message the OFNB Plaintiffs intend to convey is not particularized because each of the witnesses described their intended message in slightly different terms.⁹ The District Court

⁸ The City previously acknowledged that the OFNB Plaintiffs have the intent to convey a particularized message: "This group [Plaintiff Orlando Food Not Bombs] shares food with the homeless and hungry in Orlando to 'call attention to society's failure to provide food and housing to each of its members and to reclaim public space.'" R: 33 at 6.

⁹ Counsel for the city objected to Mr. Hutchinson speaking for OFNB as a group and his response was limited to his own opinion of his own intent. T. 111.

correctly found that the “minor differences” in their testimony did not undercut the fact that all the members of OFNB described the same basic substantive message.

R: 88 at 7.

2. The record evidence establishes that the message was understood by those who viewed it

The District Court, relying in part on statements by the mayor and a city police officer, correctly found that the OFNB Plaintiffs are conveying a message that is likely to be, and is in fact being, understood by the public. R: 88 at 7 (citing T. 230-31; Pl. Ex. 5). As the District Court points out, the City’s argument that Plaintiffs’ message is not likely to be understood is undercut by the testimony of Mayor Dyer, who stated that he believed that OFNB provided food to the homeless only to convey its political message -- not necessarily to help the homeless. *Id.* In addition, in a video of the food-sharing event which took place November 24, 2006, Orlando Police Officer Shawn Dunlap tells the participants, “I understand this is more of a political statement than anything else ...” R: 88 at 7 (citing Pl. Ex. 5 (at approximately the 3:55 minute mark)).

Mr. Hutchinson testified that the food-sharing conveys different messages to different audiences, the homeless and hungry people who come to the food-sharing and the community at large. T. 110-11. The record contains unrebutted

evidence that the message intended for those who attend the food-sharings was understood. As Bruce Shawen, a homeless man, testified, the food-sharing “gives the people that are there a sense of hope that they see that not everyone looks down upon them or considers them to be second-class citizens. There are people out there that are willing to say, “Here. Eat this. Take this. You’re not -- I’m not any better than you are.” T. 87.

B. Other courts have found that similar conduct is protected as First Amendment speech

An even more passive activity, sleeping in a public park, has been found to be conduct that is protected speech. *See United States v. Abney*, 534 F.2d 984, 985 (D.C. Cir. 1976); *see also Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983) (sleeping in public parks is “undeniably symbolic” protest against homelessness), *rev’d on other grounds sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (assuming sleeping in park to be conduct that is constitutionally protected speech, but reversing on other grounds). Although the City describes the Supreme Court decision in *Community for Creative Non-Violence* as “particularly relevant,” Brief at 40, the City overlooks one significant distinction. In *Community for Creative Non-Violence*, the Park Service had refused to allow demonstrators to sleep in two parks where camping

was generally prohibited. *Community for Creative Non-Violence*, 468 U.S. at 291-92. In the case at bar, the OFNB Plaintiffs hold their food-sharing events in a picnic area that is generally open to the public. As the District Court observed, some of the City's parks are designed to feed people and the City put amenities there to attract people to come and eat. T. 374.

Other courts have found that conduct analogous to the OFNB Plaintiffs' food-sharing events is protected as First Amendment speech. In *ACORN v. City of Tulsa*, 835 F.2d 735 (10th Cir. 1987), a community group erected tents and shanties to protest federal government policies that it believed contributed to homelessness. *Id.* at 737. The Tenth Circuit held that those activities qualified as expressive conduct within the free speech guarantee of the First Amendment. *Id.* at 742. Similarly, in *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1202-07 (D. Utah 1986), the court held that putting up shanties to protest apartheid in South Africa was protected speech. In *C.C.B. v. Florida*, 458 So.2d 47, 49-50 (Fla. 1st DCA 1984), the District Court of Appeals determined that the act of begging constituted speech protected by the First Amendment.

The act of sharing food with the homeless and hungry in public parks is akin to sleeping in public parks and begging, inasmuch as they all send a strong message, which is very likely to be understood by those who observe such

conduct, that society should not forget the poor and neglected. Thus, the District Court correctly found that Plaintiffs' conduct is speech entitled to First Amendment protection.

C. The OFNB Plaintiffs' chosen location contributes significantly to the communication of their messages

The OFNB Plaintiffs chose to use Lake Eola Park because, as the District Court observed, it is "a meaningful location which, from time immemorial, has been the traditional public forum for free speech." R: 88 at 11. The City itself concedes that Lake Eola Park is Orlando's signature park and that its image is used as a symbol of the city itself. Brief at 6; *see also* T. 20 (opening argument of Ms. Lombardy); T. 339, 340 (testimony of Lisa Early). As Plaintiff Benjamin Markeson stated in his Declaration:

Orlando Food Not Bombs holds its food-sharing events at Lake Eola Park because it is a public park in a middle- and upper-middle class neighborhood of condominiums and businesses ... People of privilege and the people who profit from them are exactly the people that I as an activist and a member of Orlando Food Not Bombs want to reach with my message. I want them to see firsthand the gross social, economic and political inequalities that pervade our society and produce tens of millions of victims, the least fortunate of which almost invariably wind up as homeless people, some of whom we in Orlando Food Not Bombs share food with. I want to prick the consciences of the people in Thornton Park and Lake Eola Heights, if possible. One way of doing this is by sharing food with those who have so little in the midst of those who have so much except concern and compassion for the least fortunate among them.

Markeson Decl. ¶ 6; *see also* T. 106 (testimony of Ryan Hutchinson); T. 186-87, 194-95 (testimony of Eric Montanez).

The Supreme Court has recognized repeatedly that the context in which expression takes place is important, for the context may give meaning to the expression. As Justice Holmes said, “the character of every act depends upon the circumstances in which it is done.” *Schenck v. United States*, 249 U.S. 47, 52 (1919); *see also* *Virginia v. Black*, 538 U.S. 343, 365-66 (2003); *Spence v. Washington*, 418 U.S. 405, 409 (1974); *Tinker v. Des Moines School District*, 393 U.S. 503, 505-514 (1969).

The City argues that speech accompanying the conduct claimed to be expressive cannot be considered when determining whether, in context, the conduct is protected First Amendment speech. Brief at 32 (citing *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006)). However, context can – and must – be considered. Even a well-informed observer can’t know much about the message any conduct conveys, or whether it conveys any message at all, unless he or she knows the context in which it occurs. For example, burning a flag could signal strong disagreement with the nation’s foreign policy (expressive), or it could be accidental (not expressive) or an attempt to generate heat on a cold night (not expressive), or it could simply be disposing of a tattered

flag in the manner prescribed by law¹⁰ (perhaps expressive). Context gave the flag-burning at issue in *Johnson* its expressive character. Occurring as it did at the end of a demonstration that coincided with the Republican National Convention and its renomination of Ronald Reagan for President, the “expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent.”

Johnson, 491 U.S. at 406 (1989).

Food has symbolic and expressive qualities like the flag, with even deeper roots in America’s history. In 1773, before Betsy Ross sewed the first American flag, the Sons of Liberty and other colonists dumped tea into Boston Harbor in a symbolic and expressive demonstration against taxation without representation. The powerful idea that sharing food creates relationships is central to the national holiday of Thanksgiving, when Americans recreate the autumn harvest feast shared in 1621 by the Plymouth colonists and the Wampanoag Indians who had helped them survive their first year.

Relying on *Rumsfeld*, the City argues that the context that can be considered in the case at bar cannot include explanatory signs such as banners. Brief at 32-33. But even if the slogans on the banners, buttons and t-shirts displayed by the OFNB

¹⁰ 4 U.S.C. 1 § 8(k).

Plaintiffs are not actually read, they are symbols that a demonstration is taking place and that the food-sharing has a purpose and a message beyond a mere picnic.

A particularly important part of the context that this Court should consider is the location of the food-sharing events in “the traditional public forum for free speech,” Orlando’s signature park in the heart of downtown. R: 88 at 11. The Supreme Court has recognized the importance of location in determining whether conduct is expressive. In *Virginia v. Black*, a statutory provision treating any cross burning as prima facie evidence of intent to intimidate rendered the statute unconstitutional. *Black*, 538 U.S. at 348. While a cross burned in someone’s yard is a threat unprotected by the First Amendment, a cross burned at a Klan rally is a symbol of shared group identity and ideology. *Id.* at 354-56. As the court observed, “The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.” *Id.* at 367.

Location has another importance in the First Amendment context, because laws restricting free speech rights must “leave open ample alternative channels for communicati(ng)” the speaker’s message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*,

468 U.S. 288, 293 (1984)). In the case at bar, the City has not established, through record evidence, that the ordinance leaves open ample alternative channels of communication. When the ordinance was passed in July 2006, the City stated that it was “committed to and has provided for and set aside reasonable, ample, alternative land space ... for large group feeding of the homeless.” However, in its brief, the City does not even mention that alternative space, commonly known as Sylvia Lane, apparently hoping that this Court will overlook the record evidence about it. That evidence, establishing that Sylvia Lane is inadequate because it prohibits Plaintiffs from communicating their message to their desired audiences, led the District Court to describe it as a “Ghetto” entirely unacceptable to the Court. R: 79 at 3 n.4.

In applying the “ample alternative channels” requirement, it must be remembered that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). The basic test for gauging the sufficiency of alternative channels is whether the speaker is afforded “a forum that is accessible and where the intended audience is expected to pass.” *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333, 339 (W.D. Va. 1987); accord *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th

Cir. 1990). A speech restriction does not leave open ample alternative channels if the speakers are left unable to reach their intended audience. *Bay Area Peace Navy*, 914 F.2d at 1229. As the *Vincent* court observed, “While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.” *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (citations omitted). Thus, a restriction may be invalid if it deprives speakers of “a uniquely valuable or important mode of communication,” or if it “threaten(s)” their “ability to communicate effectively.” *Taxpayers for Vincent*, 466 U.S. at 812. In performing this analysis, a court should take account of (1) the speakers’ intended audience and (2) the extent to which their chosen location contributes to their message.¹¹

¹¹ See *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334, 347- 48 (S.D.N.Y. 1998) (holding that New York City violated the First Amendment in denying a permit request by the Nation of Islam to hold a massive rally in Harlem, urging that the rally be held instead on Randall’s Island – stressing that the Randall’s Island alternative was constitutionally inadequate because it thwarted plaintiff’s access to its target audience, the residents of Harlem, and because holding the rally in Harlem was part and parcel of plaintiff’s message, a message that focused on ways to improve the lives of African-Americans); *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 191-93 (D. Mass. 1998) (holding that city officials violated the First Amendment in denying a parade permit to plaintiff organization, a self-styled “pro-democracy, pro-majority” group viewed

The intended audiences of the OFNB Plaintiffs are both the hungry and homeless people who come to the food-sharings and the residents of the downtown area, passers-by in the park and the community at large. *See* Markeson Decl. ¶ 7. Residents, passers-by and the community at large cannot be communicated with from an abandoned parking lot under the expressway. *See* T. 114 (testimony of Ryan Hutchinson); T. 194 (testimony of Eric Montanez). In addition, using Sylvia Lane threatens OFNB’s ability to communicate effectively with the hungry and homeless people who come to the food-sharings. “By accepting that location tells them that they are second-class citizens, that we’re okay with putting them off in the distance where their voices can’t be heard,” Mr. Montanez testified. T. 194.

For these and other reasons, the site which the city has designated for “large-group feedings” is inadequate because it prohibits Plaintiffs from

by its critics as racist, anti-Semitic and anti-gay, because the city failed the alternative channels requirement when it required the plaintiff to hold its parade in downtown Boston rather than the plaintiff’s selected site in South Boston, stressing that the downtown alternative was constitutionally inadequate because it thwarted plaintiff’s access to its target audience in South Boston and because plaintiff’s selected site, the route of the traditional St. Patrick’s Day Parade, was part and parcel of its pro-majority message: “To change the [parade’s] location, however, was to change the character of the message ... [T]he specific place where a message is communicated may be important to the message and, consequently, of constitutional significance itself.”).

communicating their message to their desired audiences and, therefore, violates Plaintiffs' First Amendment rights.

D. There is no evidence that the ordinance furthers a substantial government interest

The District Court correctly found there is no evidence that the ordinance furthers a substantial governmental interest. R: 88 at 11. At trial, the City professed three concerns in support of the ordinance: (1) public safety (in particular, crime); (2) public health (litter and excess garbage); and (3) overuse of the City's parks (including crowding and access issues). R: 88 at 9.

With regard to public safety, the City made no showing that any crime was related to the food-sharing events. R: 88 at 9. The record contains no evidence of crimes committed on the days of the events, in their immediate vicinity or by people who participated in the food-sharings. *Id.*; *see also supra* pp. 5-6. There is absolutely no evidence of crimes being committed during the events. R: 88 at 9. Moreover, as the District Court correctly observed, the City presented no evidence that moving the food-sharing events to different parks would lessen the amount of crime. *Id.*

To the contrary, the police reports presented by the City show that the fewest arrests occurred on Wednesdays and Mondays, the days of the food-sharing

events, suggesting that sharing food with hungry and homeless people may actually reduce crime in the park vicinity. *See* Def. Ex. 12; *see also supra* pp. 5-6.

With regard to public health, the City presented no evidence that there is any problem with littering or garbage in the parks, let alone one connected to the OFNB Plaintiffs' food-sharing events. R: 88 at 9. Rather, the record evidence shows that OFNB does not use disposable items at its events, that its members clean up when they are done and that they leave the park cleaner than it was when they arrived. R: 88 at 9 (citing T. 197-98). The District Court correctly concluded that even if there were an increase in garbage, moving the feedings from one park to another does nothing to lessen the garbage collection burden placed on the City. R: 88 at 9. The Supreme Court has held that the governmental interest in preventing litter was insufficient to justify an ordinance that would have prohibited individuals from handing out literature to those willing to receive it. *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 162-63 (1939). The Schneider court noted that a city has the power to punish individuals who throw leaflets on the ground, rather than those who hand out leaflets. *Id.*; *accord Jews for Jesus, Inc. v. MBTA*, 984 F.2d 1319, 1324 (1st Cir. 1993) ("littering is the fault of the litterbug, not the leafleteer"); *see also Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998). As the *Schneider* court concluded, "the

public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution.” *Schneider*, 308 U.S. at 163.

With regard to overuse of the City’s parks, the District Court correctly found that the City failed to offer any credible evidence of overuse. R: 88 at 10 n.11. In addition, the District Court correctly found that, while the City has the right to regulate the use of its parks, the ordinance at issue does not do so. R: 88 at 10. As the District Court observed, the ordinance does not limit the number or size of groups using a park at a particular time; nor does it regulate their activities, require litter controls, or enhance public safety. *Id.* Even if the expressed concerns were genuine, existing ordinances – which do not place restrictions on First Amendment freedoms – already provide protection for the public. The Supreme Court has recognized that a government’s claimed interest is not implicated when another ordinance addressing that interest exists. *Johnson*, 491 U.S. at 410; *see, e.g., United States v. Albertini*, 472 U.S. 675, 689 (1985) (“an incidental burden on speech is no greater than essential ... so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation”); *Community for Creative Non-Violence*, 468 U.S. at 287 (“if the parks

would be more exposed to harm without the sleeping prohibition than with it, the ban is safe under the First Amendment”).

In the case at bar, the City’s claimed interest in preventing litter on park grounds and surrounding rights-of-way cannot justify the ordinance at issue, because the City already has an ordinance which prohibits littering on public property. Code of the City of Orlando § 43.75. The City’s claimed interest in preventing “hazards to the health and welfare of ... birds” cannot justify the ordinance, as a city ordinance already on the books protects birds and animals on public property. Code of the City of Orlando § 43.74. Nor can the City’s claimed interest in preventing the purported “criminal acts [that] have accompanied or followed some large group feedings in some parks” justify the ordinance, because previously existing city ordinances as well as state law prohibit disorderly conduct and other criminal activity. *See, e.g.*, Code of the City of Orlando § 43.06 (prohibiting disorderly conduct); § 43.30 (prohibiting state misdemeanors).¹² At trial, the City’s own witness admitted that anyone engaging in illegal behavior in the parks can be, and sometimes is, arrested for violating other ordinances and Florida statutes. T. 372-73 (testimony of Lisa Early).

¹² *See also* Code of the City of Orlando §§ 18A.02, 18A.03, 18A.05, 18A.06, 18A.07 (providing for the immediate arrest of any person who enters or remains in a park after closing time).

In short, there is no record evidence that the ordinance furthers a substantial governmental interest.

E. Unfounded government justifications are an insufficient basis for restricting constitutionally protected activity

The City has failed to present record evidence sufficient to support any of its claimed objectives in enacting the ordinance restricting “large-group feedings.” It has not proven, through record evidence, that the food-sharings cause litter, crime, “conditions” which would likely spread to nearby parks, or any of the “impacts” it initially set forth as justifications for the ordinance. Nor has the City presented any evidence to support the contradictory justification it presented at trial, when the City claimed that the purpose of the ordinance was to distribute among the parks and adjacent neighborhoods the impact of the food-sharing events. Rather, the City has merely assumed that the food-sharings cause “problems¹³,” “impacts¹⁴” and “burdens,¹⁵” without defining any of those words in any way or presenting any supporting evidence. The City’s unfounded

¹³ See, e.g., T. 242 (testimony of Mayor Dyer); T. 354 (testimony of Lisa Early).

¹⁴ See, e.g., T. 241, 244, 245-46 (testimony of Mayor Dyer); Brief at 11, 22, 38 (citing Def. Ex. 6), 39, 42, 53, 54.

¹⁵ See, e.g., T. 257 (testimony of Charles Smith); Brief at 38, 42, 47.

justifications and assumptions are an insufficient basis for restricting constitutionally protected activity.

An interest asserted by the government which is simply not implicated on the facts of a case is insufficient to justify any infringement on First Amendment rights. *Texas v. Johnson*, 491 U.S. 397, 407 (1989); *Spence v. Washington*, 418 U.S. 405, 414 (1974). In *Johnson*, the state asserted that preventing breaches of the peace as an interest to justify the defendant's conviction for burning a U.S. flag. *Johnson*, 491 U.S. at 407. But the only evidence offered in support that assertion was the testimony of two witnesses who had been offended by the flag burning. *Id.* Observing that a principal "function of free speech under our system of government is to invite dispute," the Supreme Court concluded that the state's asserted interest in maintaining the peace was not established by the evidence in the case. *Id.* at 410 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). In addition, the Court stated, Texas already had a statute specifically prohibiting breaches of the peace and, therefore, the statute at issue did not serve the state's asserted justification. *Id.* at 410 (citing *Boos v. Berry*, 485 U.S. 312, 327-19 (1988)); *see also supra* pp. 29-30 (discussion of other city ordinances).

Many courts have found that insufficient evidence that the government had studied the issues or found reliable evidence regarding the effect of the regulated

activity upon the governmental interest presumably being harmed precludes an infringement on First Amendment rights. In *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), a case involving a First Amendment free speech and free exercise, as well as an equal protection, challenge to a zoning ordinance, the city failed to provide factual support for the assumptions underlying its ordinance. *Id.* at 470. In *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998),¹⁶ the city failed to establish a factual basis for concluding that a cause-and-effect relationship actually exists between the placement of handbills on parked cars and litter that impacts the health, safety, or aesthetic well-being of the city.¹⁷ As in the case at bar, the city offered evidence that it had received complaints about handbills left on cars and that the ordinances were enacted for the purpose of preventing litter. *Id.* at 1221-22. The court described the city's failure to establish a factual basis for its ordinance as a "flaw" in its position. *Id.* at

¹⁶ The District Court cited *Krantz* with approval in *Bischoff v. Florida*, 242 F. Supp. 2d 1226, 1246 (M.D. Fla. 2003).

¹⁷ Even assuming, for argument's sake, that a logical connection exists between handbilling activities and the actual or potential presence of litter, the *Krantz* court could not find that the ordinances were narrowly tailored to serve the purpose of preventing litter. "Although a governmental restriction does not have to be the least restrictive or least intrusive means of regulation, it may not, under well-established constitutional standards, curtail substantially more speech than is necessary to accomplish its purpose, which is precisely what the ordinances do." *Krantz v. City of Fort Smith*, 160 F.3d at 1221-23.

1222 (citing *Cornerstone Bible Church*, 948 F.2d at 469); *see also Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (city presented no evidence that a homeless person committed any of the crimes reported in the citizen complaints).

The District Court has previously held that “the Court may not be guided by ... community fear ...” *Ray v. School District of DeSoto County*, 666 F. Supp. 1524, 1535 (M.D. Fla. 1987). Three HIV-positive hemophiliac schoolchildren were kept out of regular classrooms by the school board, which asserted future theoretical harm, including transmission of the disease in the classroom setting. In granting a preliminary injunction admitting the Ray boys to regular classrooms, this court found that “[s]uch theoretical harm as to transmission is *not* supported by the evidence in this case.” *Id.* at 1535 (emphasis in original).¹⁸

Many other courts have held that unsubstantiated fear is an insufficient basis, as a matter of law, for restricting constitutionally protected activity. *See, e.g., Tinker v. Des Moines Independent Community School District*, 393 U.S. 503,

¹⁸ Despite the unquestioned danger of AIDS and the near-hysteria that existed in the 1980s about its possible spread, courts repeatedly refused to allow school districts to exclude children from regular classes where the evidence showed no legitimate cause for concern. *See, e.g., Thomas v. Atascadero Unif. Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1986); *Doe v. Dolton Elementary Sch. Dist.*, 694 F. Supp. 440 (N.D. Ill. 1988); *New York State Ass’n for Retarded Children v. Carey*, 612 F.2d 644 (2nd Cir. 1979); *see also School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987).

508 (1969) (“Any variation from the majority’s opinion may inspire fear But our Constitution says we must take this risk.”); *J.W. v. City of Tacoma*, 720 F.2d 1126, 1129 (9th Cir. 1983) (striking down a municipal ordinance that restricted group homes for former mental patients).

The United States Supreme Court has rejected the idea that criminality can be ascribed to the unfortunate, stating that no one can seriously contend that a person without funds and without a job constitutes a “moral pestilence.” *Edwards v. California*, 314 U.S. 160, 177 (1941); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) (criticizing presumption of criminality in vagrancy statutes).

Like the legislature¹⁹ in *Edwards*, the City perpetuates the same discriminatory assumption that homelessness and poverty is a proxy for “moral pestilence.” Thus, the City seeks to exclude people it views as unsafe, unsanitary, and displeasing based on generalized, unsubstantiated prejudices and fears rather than on any legitimate government interest.

¹⁹ The California Legislature had passed a law prohibiting the transport of vagrants into the state. *Edwards*, 314 U. S. at 161. The law was struck down as unconstitutional. *Id.* at 177.

II. THE DISTRICT COURT’S DENIAL OF OFNB’S CLAIM THAT THE ORDINANCE IS UNCONSTITUTIONALLY VAGUE SHOULD BE REVERSED BECAUSE THE ORDINANCE HAS BEEN ENFORCED IN AN ARBITRARY AND DISCRIMINATORY MANNER

Three separate provisions of the City’s ordinance are unconstitutionally vague because they are subject to arbitrary and discriminatory enforcement. In fact, two of those provisions were actually enforced against OFNB inconsistently and arbitrarily, resulting in the arrest of Plaintiff Eric Montanez.

It is well-established that the Fourteenth Amendment, which guarantees that no state shall “deprive any person of life, liberty, or property, without due process of law,” ensures that the individual need not “speculate as to the meaning of penal statutes” and is “entitled to be informed as to what the State commands or forbids.” *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618 (1939); U.S. Const. amend. XIV, § 1. While economic regulations are “subject to a less strict vagueness test,” courts apply a more stringent analysis when examining laws that impose criminal penalties because the consequences of imprecision are qualitatively more severe. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S.Ct. 1186 (1982).

A statute can be unconstitutionally vague for one of two reasons: either it “fails to provide people of ordinary intelligence a reasonable opportunity to

understand what conduct it prohibits” or it “authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56-57 (1999)). When a statute implicates First Amendment rights, courts may “consider the *risk* of arbitrary enforcement – the possibility that the statute will chill expression.” *Konikov v. Orange Co., Fla.*, 410 F.3d 1317, 1330 (11th Cir. 2005) (original emphasis) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 n.5, 92 S.Ct. at 2299 & n.5 (1972)). Otherwise, courts look to the facts of the case at hand. *United States v. Fisher*, 289 F.3d 1329, 1333 (11th Cir. 2002) (except where First Amendment rights are involved, vagueness challenges must be evaluated in the light of the facts of the case at hand).

Notably, in the *Konikov* case, this Court reversed the trial court’s grant of summary judgment on a rabbi’s vagueness claim because two code inspectors differed in their opinions of the frequency of religious meetings at the rabbi’s house that would violate a local zoning ordinance. *Konikov*, 410 F.3d at 1331. The Court found that because the rabbi “has produced evidence that the Code has an inherent risk of discriminatory enforcement, he has established the vagueness of the Code.” *Id.*

In the case at bar, the City actually enforced the ordinance against OFNB in an arbitrary and discriminatory manner; thus, the ordinance does not pose a mere “risk” of such enforcement, but a reality. Most significantly, on at least one occasion, police counted the number of groups represented at the food sharings to make sure there was at least one group for every 25 people having food. Montanez Decl. ¶ 9. Upon confirming that one group was present for every 25 people, the police were satisfied and gave no indication that those providing the food were violating the ordinance. *Id.*²⁰

A few months later, police arrested and jailed Plaintiff Eric Montanez notwithstanding that three groups were sharing food with approximately 40 people, without any notice that the City had changed its interpretation of the ordinance. *Id.* At Mr. Montanez’s criminal trial, the arresting officers admitted that there had been an “unanswered question” as to the effect of multiple groups sharing food at the same time and that it was not until the day of Mr. Montanez’s arrest that police were told that having multiple groups sharing food – at 25 people per group – was, in fact, a violation of the ordinance. *Id.* An ordinance that permits

²⁰ That police were satisfied upon confirming there was one group represented for every 25 people present can be seen clearly in the video shown at trial. Pls.’ Trial Ex. 5.

such contradictory enforcement is the definition of unconstitutionally vague, and, in the case at bar, its arbitrary enforcement resulted in the arrest of Mr. Montanez without any notice that he was doing something wrong.²¹

Although the second example of the City's contradictory enforcement of the ordinance did not result an arrest, it still reflects the City's arbitrary and discriminatory enforcement of the ordinance. On July, 26, 2006, the first Wednesday after the ordinance was passed, OFNB and others served food from a van parked about one block from Lake Eola Park. Ulrich Decl. ¶ 4; Montanez Decl. ¶ 5. A participant asked a police officer on the scene if sharing food from that location violated the ordinance. Ulrich Decl. ¶ 5; Montanez Decl. ¶ 5. After contacting counsel for the City by mobile phone, the officer informed the participant that they were not violating the ordinance. Ulrich Decl. ¶ 5; Montanez Decl. ¶ 5. One week later, OFNB shared food from the same location, but this time a different officer told the group it was violating the ordinance because the location was "adjacent" to the park. Ulrich Decl. ¶ 6; Montanez Decl. ¶ 6; *see also* T. 262 (testimony of Peter Lamar). Again, police enforcement of an ordinance one

²¹ After his arrest, Montanez was charged with violating the large group feeding ordinance, tried, and acquitted. Montanez Decl. ¶ 9.

week that is exactly opposite of the way they enforced it the previous week is the definition of arbitrary.

In addition to the argument that the ordinance is vague as to whether multiple groups can serve food to a greater number of people and that the term “adjacent” is vague, OFNB asserted in the District Court that the ordinance authorizes or even encourages arbitrary and discriminatory enforcement because it leaves police officers unbridled discretion to determine whether an event is “likely to attract 25 or more people.” The trial court found that although these “terms may be open to interpretation, they are not unconstitutionally vague.” R: 55 at 12. The court did not, however, address the argument that the term “adjacent” is unconstitutionally vague because it determined that such term does not appear in the ordinance. R: 55 at 11.

The District Court determined incorrectly that the term “adjacent” does not appear in the ordinance. Section 18A.09-2 restricts and requires a permit for a “Large Group Feeding,” which is defined at § 18A.01(23) 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.

Code of the City of Orlando § 18A.01(23) (emphasis added). Thus, law enforcement is required to interpret the term “adjacent” when enforcing the ordinance, and different police officers did so differently on different occasions.

In addition, the trial court determined incorrectly that the term “likely to attract 25 or more people” is sufficiently precise to withstand constitutional scrutiny under the *Hill* and *Hoffman Estates* cases. R: 55 at 11. Because the ordinance leaves police officers with unbridled discretion to determine whether an event is “likely to attract 25 or more people,” it allows for arbitrary and discriminatory enforcement. The ordinance is also constitutionally impermissible because it imposes criminal penalties while “fail[ing] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” *See supra* at pp. 36-37 (discussion of *Hill* and *Hoffman Estates*).

Based upon the foregoing, this court should reverse the District Court’s summary judgment ruling against Plaintiffs/Appellees and render judgment in their favor on their claim that the unconstitutionally vague provisions of the ordinance violate the Due Process Clause of the Fourteenth Amendment.

III. Expressive association is protected by the First Amendment

The Supreme Court has afforded constitutional protection to freedom of association²² in two distinct senses, termed “freedom of private association” and “freedom of expressive association.” *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). While freedom of association is not explicitly enumerated in the First Amendment, protection for freedom of expressive association flows from the premise that “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.” *Id.* at 622.

Two elements are required for a valid expressive association claim. First, the group must show that it engages in expressive association. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The types of expressive association protected by the First Amendment include pursuing “a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts*, 468 U.S. at

²² Although the District Court suggested that Plaintiffs did not mention their rights to expressive association in the complaint, R: 55 at 7 n.7, the Amended Complaint does refer to Plaintiffs’ constitutional right to free association and free expression. R. 20 at ¶¶ 22, 57-58, 60-63. In addition, the parties’ Concise Statement of Nature of the Action in their Joint Pretrial Statement refers to Plaintiffs’ free association claim. Joint Pretrial Statement at 2.

622. Second, the government action at issue must significantly affect the group's ability to advocate its viewpoint. *Dale*, 530 U.S. at 653. If these elements are satisfied, the restriction on expressive association can stand only if the government shows that the law was "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Dale*, 530 U.S. at 648 (quoting *Roberts*, 468 U.S. at 623).

The City's ordinance restricting the sharing of food in public parks infringes upon the freedom of expressive association of those providing food and those being fed, and as such is "subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). First, the members of the Orlando homeless community affected by the ordinance engage in political and social association. The OFNB Plaintiffs protest society's failure to adequately address the problems of hunger and homelessness through the act of sharing food in public places. Central to this association is the ability of outside political advocates to interact with homeless people in city parks at events where food is provided. By making such activity illegal, the ordinance has a draconian impact on the ability of homeless people and their advocates to collectively advocate their views. The un rebutted evidence in the case at bar establishes that, after the ordinance was

passed, several groups stopped participating in food-sharing events because they feared arrest or simply did not want to violate the law. *See, e.g.*, T. 42-43, 74 (testimony of Brian Nichols); T. 142-43, 146 (testimony of Diane Kelly); T. 262, 263, 265, 267 (testimony of Peter Lamar).

Indeed, practical experience of those of us who are more prosperous will attest that the provision of food and drink is often part of group meetings where expressive association will take place. The provision of food can be an essential part of a group's fellowship. Moreover, the provision of food to hungry people is a significant political expression for the donors. Indigent people have a right to associate in groups with those donors through the receipt of not just the donors' verbal expressions of political views, but also their symbolic speech and acts of sharing food. The right of expressive association encompasses both the symbolic speaker and the recipient. That is, as the Supreme Court has held more than once, the protection afforded speech by the First Amendment is "to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (consumers have a right to receive commercial speech from advertisers).

A unanimous Supreme Court noted recently that “the freedom of expressive association protects more than just a group’s membership decisions.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 68 (2006). It also protects against laws that do “not directly interfere with an organization’s composition,” but instead make “group membership less attractive, raising the same First Amendment concerns about affecting the group’s ability to express its message.” *Id.* That is plainly the case with respect to the City’s criminalization of expressive association in city parks where indigent individuals, as well as prosperous ones, share food with each other.

CONCLUSION

For the forgoing reasons, Appellees ORLANDO FOOD NOT BOMBS, RYAN SCOTT HUTCHINSON, BENJAMIN B. MARKESON, ERIC MONTANEZ, and ADAM ULRICH respectfully request that this Court:

A. Affirm the District Court’s judgment that the Large Group Feeding Ordinance, Code of the City of Orlando § 18A.09-2, violates Plaintiffs’ right to free speech under the First Amendment.

B. Affirm the permanent injunction entered by the District Court prohibiting the City of Orlando from enforcing the Large Group Feeding Ordinance, Code of the City of Orlando § 18A.09-2.

C. Reverse the District Court’s ruling that the Large Group Feeding Ordinance, Code of the City of Orlando § 18A.09-2, does not violate Plaintiff’s rights under the Due Process Clause of the Fourteenth Amendment.

D. Find that the Large Group Feeding Ordinance, Code of the City of Orlando § 18A.09-2, violates Plaintiffs' rights to expressive association.

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION,
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1. This brief complies with the type-volume requirements of FED. R. APP. P. 32(a)(7)(B) because it contains 10,374 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-1.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, in 14-point size, in WordPerfect X3.

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BENJAMIN B. MARKESON;
ERIC MONTANEZ; and ADAM ULRICH

Dated this _____ day of March, 2009.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this ____ day of March, 2009 to: Kathleen Maloney Skambis, Esquire, 715 Vassar St., Orlando, FL 32804; Martha Lee Lombardy, Assistant City Attorney, P.O. Box 4990, Orlando, FL 32802-4990; Mayanne Downs, City Attorney, King, Blackwell, Downs & Zehnder, P.A., 25 East Pine Street, Orlando FL 32801; and Glenn Katon, Esquire, ACLU Foundation of Florida, Inc., 112 N. Delaware Ave., Tampa FL 33606-1430.

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