

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 16-16808
LT No. 15-60185-CIV-ZLOCH

FORT LAUDERDALE FOOD NOT BOMBS, NATHAN PIM,
JILLIAN PIM, HAYLEE BECKER, and WILLIAM TOOLE,

Plaintiffs/Appellants,

v.

THE CITY OF FORT LAUDERDALE,

Defendant/Appellee.

BRIEF OF AMICI CURIAE IN SUPPORT OF
APPELLANTS' ARGUMENT FOR REVERSAL

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 – 26.1-3, *amici curiae* file the following Certificate of Interested Persons and Corporate Disclosure Statement:

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedures 26.1(a) and Eleventh Circuit Rules 26.1-1 through 26.1-3, *amici curiae* hereby certify that there are no parent corporations or publicly traded corporations that have an interest in the outcome of this case.

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INTEREST OF AMICI

The following *amici curiae* join West Palm Beach Food Not Bombs in this Brief in support of Appellants Fort Lauderdale Food Not Bombs, et al.: (1) Sarasota (FL) Food Not Bombs; (2) Miami (FL) Food Not Bombs; (3) Lake Worth (FL) Food Not Bombs; (4) Tampa (FL) Food Not Bombs; (5) St. Petersburg (FL) Food Not Bombs; (6) Orlando (FL) Food Not Bombs; (7) Pensacola (FL) Food Not Bombs; (8) San Francisco (CA) Food Not Bombs; (9) San Diego (CA) Food Not Bombs; (10) South Minneapolis (MN) Food Not Bombs; (11) Warren-Wilson Asheville (NC) Food Not Bombs; (12) Asheville (NC) Food Not Bombs; (13) San Antonio (TX) Food Not Bombs; (14) Seattle (WA) Food Not Bombs; (15) Denver (CO) Food Not Bombs; (16) Bloomington (IN) Food Not Bombs; and (17) Washington, D.C. Food Not Bombs.

Food Not Bombs ("FNB") is a national and international group with well over 500 autonomous chapters. (http://foodnotbombs.net/new_site/faq.php). FNB is a political group, not a charity. *Id.* Its mission is "to build a movement to end the exploitation of the economic and political system" that causes hunger and poverty. (http://foodnotbombs.net/new_site/seven-steps.php). In fact, a desire to support a change in society's perspective to see food "as a right not a privilege" is a requirement for starting new local FNB group. The FNB website cautions, "If you

are not interested in changing society so no one needs to eat at a soup kitchen then you might want to volunteer with a church or government food program." Id.

The first FNB food sharing was outside the Boston Federal Reserve Bank in 1981 during a Bank of Boston stockholder's meeting to protest the government's investment in the nuclear industry and war and the neglect of poverty issues. (http://foodnotbombs.net/new_site/faq.php) The original protestors discovered that the act of sharing food with both the hungry and the general public who passed by the protest attracted more attention and led to people stopping to have conversations with FNB members about what they were doing. Id. In 1992 and 1995, gatherings of FNB volunteers reached a consensus on three principles that all FNB groups share: (1) the food shared at demonstrations is vegan (or sometimes vegetarian) and free to all; (2) the group has no leaders and uses the process of consensus to make decisions; and (3) FNB "is dedicated to nonviolent direct action towards creating a world free from domination, coercion and violence." (http://www.foodnotbombs.net/new_site/seven-steps.php).

In order to convey the FNB message, local FNB groups chose highly visible locations to share food so a diverse population will see their activity. Id. In addition, FNB groups create a context for their food sharing activity by hanging banners with the FNB logo, providing literature on the food tables. As the FNB

website explains, "Your meal is not a Food Not Bombs meal if you don't provide literature and display a banner." Id.

The FNB name calls attention to the fact that approximately half of every tax dollar in the United States is used to fund the military and if that money were instead redirected to human needs, there would be no poverty. (http://www.foodnotbombs.net/new_site/faq.php) People passing by a food sharing demonstration and seeing the FNB banners with the name of the group and the symbol of a carrot in a fist, often stop to ask about the group and the meaning of the FNB name.

By sharing food with all, FNB groups also convey their message that hunger is a problem that can be solved. Loosely organized FNB volunteers are empowered to work cooperatively to solve problems. Members of the public encountering FNB food sharing are often surprised by the "do it yourself" nature of the event. This model for changing society is demonstrated through the FNB food sharing.

There are more than 25 FNB local groups within Florida, Georgia and Alabama. (http://www.foodnotbombs.net/new_site/contacts.php). By way of example, the West Palm Beach FNB began in 2007. The group shares food every Saturday afternoon at the Centennial Square and Fountain Park in downtown West Palm Beach, which is often busy with families whose children play in the

fountains, as well as locals and tourists visiting the water front. Some of the people who join West Palm Beach FNB to share a meal lack housing, some have housing but are food insecure, and some find themselves hungry while enjoying the park and are happily surprised to be offered food without any charge. The members of West Palm Beach FNB, like other FNB chapters, see their food sharing protest in contrast to other groups that offer food as charity or a social service. For this reason, FNB members generally sit and eat along with community members and do all they can to express solidarity with the community.

The district court's opinion in this case impacts every FNB chapter because the import of the decision is that FNB chapters are not political organizations engaged in symbolic speech and expressive conduct protected by the First Amendment, but rather are charitable "social service" groups. This is the exact opposite of FNB's mission and its reason for sharing food with others to communicate an anti-war message of human rights. Moreover, the district court's finding that sharing food does not constitute expressive conduct is contrary to decades of established jurisprudence protecting political protest, such as the food sharing central to the FNB mission and message.

Pursuant to Federal Rule of Appellate Procedure 29(c)(4), the *amici curiae* will have authority to file this Brief of *Amici Curiae* if their contemporaneous motion for leave to file a brief of *amici curiae* is granted. Pursuant to Federal Rule

of Appellate Procedure 29(c)(5), no party's counsel authored this Brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this Brief, and no person (other than pro bono counsel for the *amici curiae*) contributed money that was intended to fund preparing or submitting this Brief.

SUMMARY OF ARGUMENT

The district court's grant of summary judgment should be reversed. The district court's opinion departs from a long line of decisions of the Supreme Court and this Court recognizing the centrality of political protest to our democracy and providing First Amendment protection to symbolic speech and expressive conduct. The district court also failed to follow the binding precedent of Holloman ex rel. Holloman v. Harland, 370 F. 3d 1252 (11th Cir. 2004) and therefore erred in its ruling.

ARGUMENT

The District Court's Opinion Departs from Well-Established First Amendment Principles Concerning Symbolic Speech and Expressive Conduct as Applied to FNB Demonstrations.

The American tradition of political protest through symbolic actions is older than our nation itself. In 1765, as many as 3,000 people rallied in the streets of Boston to protest a tax imposed by the British and illustrated their anger by hanging effigies of the officials charged with enforcing the tax from the "Liberty

Tree.” (<http://blog.constitutioncenter.org/2016/03/the-seeds-of-revolution-the-stamp-act-protests-in-boston/>). The Constitutional protections given to freedom of expression and the right to political protest are bedrock principles of our jurisprudence. Slaughter-House Cases, 83 U.S. 36, 79 (1872) (“The right to peaceably assemble ... are rights of the citizen guaranteed by the Federal Constitution.”); U.S. v. Cruikshank, 92 U.S. 542, 552 (1875) (“The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”).

As Justice Brandeis explained, political discussion and dissent are essential to the fabric of our democratic society:

Those who won our independence believed ... that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; ... that political discussion is a political duty; and that this should be a fundamental principle of the American government. ... Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375 (concurring) (1927) *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also* Tinker v. Des Moines Indep. Commun. School Dist., 393 U.S. 503, 508-09 (1969) (“[O]ur history says that it is this sort of hazardous freedom - this kind of openness - that is the basis of our national strength and of the independence and vigor of Americans who grow up

and live in this relatively permissive, often disputatious, society.”) To provide a venue for this vital exchange of ideas, the use of streets and parks for the expression of political views "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Hague v. Committee for Indus. Organization, 307 U.S. 496, 515 (1939).

The protection of the right to protest has long included symbolic speech. In Stromberg v. People of State of Cal., 283 U.S. 359, 369 (1931), the Court found that the display of a red flag was protected symbolic speech and reversed a conviction under a statute prohibiting the display of emblems of opposition to organized government. 283 U.S. at 369. Likewise, wearing an armband to protest the Vietnam War was protected as symbolic speech in Tinker. 393 U.S. 503. The Tinker court read the Constitution "to permit reasonable regulation of speech-connected activities in carefully restricted circumstances," but it cautioned that its willingness to accept some regulation of expressive speech did not "confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet." Id. at 513.

The Court further explained the scope of symbolic speech in finding a flag misuse statute unconstitutional as applied to a student who taped a peace symbol onto his American flag and hung it upside down from a window. Spence v. State of Washington, 418 U.S. 405 (1974). The Spence court's test for whether an activity

is "sufficiently imbued with elements of communication" and therefore protected speech requires: (1) "an intent to convey a particularized message;" and (2) "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Id. at 409, 411. The Court emphasized that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." Id. at 410. Considering the timing of the flag display with the Cambodian incursion and the Kent State tragedy, the Court concluded "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression." Id. at 409-410.

Not just symbols, but also expressive conduct can be protected forms of expression. West Virginia St. Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) (holding that the school district's decision to compel students to salute the flag was unconstitutional because the flag salute was a form of speech); Brown v. State of La., 383 U.S. 131 (1966) (noting that the guarantee of freedom of speech is "not confined to verbal expression" and reversing conviction for a peaceful sit-in protesting a segregated library); Texas v. Johnson, 491 U.S. 397 (1989) (finding that flag burning at a political protest was expressive conduct subject to First Amendment protection); Leonard v. City of Columbus, 705 F. 2d 1299 (11th Cir. 1983) (holding that the removal of a flag from a police uniform as part of a protest

of the department's racially discriminatory practices constituted symbolic speech and dismissal for doing so was therefore unconstitutional).

The Court has wrestled with the fact that expressive conduct and symbolic speech may be less exact in their message than the use of language, but are still entitled to Constitutional protection. Justice Jackson described symbolism as "a primitive but effective way of communicating ideas" that acts as "a short cut from mind to mind." Barnette, 319 U.S. at 632. He noted that "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." Id. at 632-33. Examining the line of cases protecting symbolic speech, Justice Souter noted more than fifty years later that "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 Schönberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-Amer. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995).

This observation in Hurley is consistent with prior Supreme Court precedent. In Barnette, for example, it was apparent that students deliberately refused to salute the flag, but their reasons could not be known without explanatory speech. 319 U.S. 624. Likewise in Johnson, the flag burning took place at a political demonstration during the Republican National Convention and so it was apparent

that some message was intended. 491 U.S. at 399. The Johnson Court looked however to the context of the demonstration with its speeches, slogans, and literature, to know the specific message involved the consequences of nuclear war. Id.

This Court's articulation of the Spence test in Holloman ex rel. Holloman v. Harland, 370 F. 3d 1252 (11th Cir. 2004), follows this precedent to provide an appropriate measure for the communicativeness of expressive conduct. The Holloman court held that a student who silently raised his fist rather than reciting the Pledge of Allegiance was engaged in either speech or expressive conduct protected by the First Amendment. Following Spence and Hurley, this Court further elucidated the criteria to determine whether conduct is expressive as "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." Id. at 1270 (emphasis in original). This test can be applied with predictability to determine whether conduct is protected expressive speech and should have been applied by the district court.

As set forth in Appellants' Initial Brief, FNB's food sharing falls squarely within the controlling tests for expressive conduct. Appellants' evidence established that sharing food is a form of communication. FNB groups share food in the "context and environment" of highly visible public locations with prominent

displays of banners and literature. Within these "surrounding circumstances" the likelihood is great that the public will know a message is being conveyed through FNB's food sharing. A reasonable person would know "that *some* message is being conveyed."

FNB chapters number in the hundreds (the *amici* represent eight chapters in Florida alone and ten chapters from cities nationwide) and for more than thirty-five years the FNB movement has organized food sharing demonstrations to contribute to the public debate about the human right to food and how society allocates its resources. FNB demonstrations are easily recognizable due to their use of common symbols such as food sharing in public and their logo since 1981: a fist holding a carrot. FNB groups engage in precisely the type of political protest long protected by the courts through the use of a symbol of expression – sharing food – to convey a message that society should stop using its economic resources towards war and instead end hunger. Courts have long viewed this type of political demonstration in the context in which it occurs to determine if it is symbolic speech or expressive conduct protected by the First Amendment. The district court erroneously ignored this well established precedent in examining what FNB does to make its political views known and carry out its mission. Moreover, the district court's decision disregards that FNB's political demonstrations stand at the heart of this country's democratic traditions and established Constitutional protections for

the rights of citizens to meet peaceably to discuss public affairs and express political views in our public parks. Cruikshank, 92 U.S. at 552; Hague, 307 U.S. at 515.

CONCLUSION

For the reasons stated herein and in Appellants' Initial Brief, the *amici curiae* urge this Court to reverse the district court's judgment.

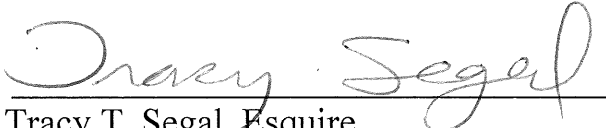
CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(b) because this brief contains 2,655 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
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).

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system. I further certify that a copy of the foregoing document was served this day on the following either by transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing electronically:

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