Case No.: 16-16808

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

THE CITY OF FORT LAUDERDALE,

Defendant-Appellee.

On Appeal from the United States District Court,
Southern District of Florida, Fort Lauderdale Division

APPELLANTS' INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

1. Anderson, Kirsten (formerly Kirsten Clanton), Attorney for Plaintiffs/Appellants

2. Becker, Haylee, Plaintiff/Appellant

3. Boileau, Alain, Attorney for Defendant/Appellee

4. Chappell, E. Hugh, Mediator

5. City of Fort Lauderdale, Defendant/Appellee

6. Costello, Andrea, Attorney for Plaintiffs/Appellants

7. Everett, Cynthia, City Attorney, City of Fort Lauderdale

8. Fort Lauderdale Food Not Bombs, Plaintiff/Appellant

9. Hunt, Hon. Patrick M., Magistrate Judge, Southern District of Florida

10. Law Offices of Mara Shlackman, P.L., Attorney for Plaintiffs/Appellants

11. Legal Advocacy Center of Central Florida, former Attorney for Plaintiffs/Appellants

12. Mediation Firm, Inc., Mediator

13. Pim, Jillian, Plaintiff/Appellant

14. Pim, Nathan, Plaintiff/Appellant

15. Shlackman, Mara, Attorney for Plaintiffs/Appellants

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16. Siegel, Jodi, Attorney for Plaintiffs/Appellants

17. Southern Legal Counsel, Inc., Attorney for Plaintiffs/Appellants

18.Toole, William, Plaintiff/Appellant

19. Zloch, Hon . William J., United States District Judge, Southern District of Florida

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly traded corporations that have an interest in the outcome of this case.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument in this matter, as the Court's decision on the First Amendment issues in this case will impact the activities of many groups besides the litigants in this case. Additionally, while the Court has previously assumed without deciding that sharing food was protected First Amendment expression, *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 758 (11th Cir. 2011) (en banc), deciding this issue is likely to be essential to the resolution of the instant appeal.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is an appeal from a Final Judgment entered on October 3, 2016 (Doc. 80), based on an Order granting Defendant/Appellee's Motion for Final Summary Judgment and denying Plaintiffs'/Appellants' Motion for Summary Judgment, entered on September 30, 2016 (Doc. 78). Plaintiffs'/Appellants' Notice of Appeal was timely filed with the District Court on October 28, 2016 (Doc. 81). The District Court had subject matter jurisdiction to entertain this case pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983, as Plaintiffs/Appellants have challenged the constitutionality of Defendant's/Appellee's ordinances under the First and Fourteenth Amendments to the United States Constitution. This Court has appellate jurisdiction to entertain this appeal pursuant to 28 U.S.C. § 1291, as an appeal from a final decision of a district court.

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale
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STATEMENT OF THE ISSUES

1. Whether Plaintiffs are engaged in protected symbolic speech and expressive conduct under the First Amendment.

2. Whether the District Court disregarded undisputed facts, including the expert report and opinion of Dr. Richard Wilk, to make erroneous legal conclusions.

3. Whether the City's Zoning Ordinance C-14-42 and Park Rule 2.2, facially and as applied to Plaintiffs, violate the Free Speech Clause of the First Amendment.

4. Whether the City's Zoning Ordinance C-14-42 and Park Rule 2.2 violate Plaintiffs' right to expressive association under the First Amendment.

5. Whether the City's Zoning Ordinance C-14-42 and Park Rule 2.2, facially and as applied to Plaintiffs, violate the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs/Appellants Fort Lauderdale Food Not Bombs, Nathan Pim, Jillian Pim, Haylee Becker and William Toole (hereafter collectively "FFNB") share food in a centrally located downtown Fort Lauderdale park as an expression of their political message that hunger and poverty can be ended if society's resources are redirected from the military and war (Doc. 1, at 1-2 ¶ 2). In October 2014, the City of Fort Lauderdale ("City") adopted Ordinance C-14-42 (the "Zoning Ordinance"), amending Section 47-18.31 of the City's Code, and also resumed enforcement of Park Rule 2.2 ("Park Rule") (Doc. 1, at 2-3 ¶¶ 3, 5).

On January 29, 2015, Plaintiffs filed suit for declaratory and injunctive relief, as well as damages, alleging that the Zoning Ordinance and Park Rule effectively banned Plaintiffs from engaging in their First Amendment expressive activities and conduct anywhere in the City, and violated Plaintiffs' due process rights under the Fourteenth Amendment (Doc. 1). The City filed its Answer and Affirmative Defenses on February 23, 2015 (Doc. 8).

FFNB and the City both filed motions for summary judgment on December 16,

2015 (Docs. 41; 42) along with statements of material fact and supporting exhibits (Docs. 38; 39; 40). The parties subsequently filed responses and replies relating to these motions (Docs. 51; 52; 54; 63; 64; 65). On December 23, 2015, the City filed a Motion to Exclude the Opinions, Report, and Testimony of Plaintiffs' Expert Witness, Richard Wilk, and this motion was fully briefed by the parties (Docs. 45; 57; 69).

On September 30, 2016, the District Court entered an Order denying Plaintiffs' Motion for Summary Judgment, and granting the City's Motion for Final Summary Judgment (Doc. 78). This Order did not address the City's motion to exclude the testimony of Plaintiffs' expert, Dr. Wilk, nor did it discuss Dr. Wilk's testimony. Final Judgment was entered on October 3, 2016, and the Final Judgment provided that "[t]o the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot." (Doc. 80) (emphasis in original). FFNB timely filed their Notice of Appeal on October 28, 2016 (Doc. 81).

B. Statement of the Facts

Plaintiff Fort Lauderdale Food Not Bombs (FFNB) is an unincorporated association affiliated with the grassroots international Food Not Bombs movement

that engages in peaceful political direct action to communicate its message that our society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide to all. FFNB shares food with anyone, without restriction, to communicate this message and organize for positive social change. The group does not serve food as a charity, but instead as an act of political solidarity and expression to further its political message. (Docs. 39, at 1-2 ¶ 1; 49, at 1-3 ¶ 1; 38, at 8-9 ¶ 22; 52, at 5 ¶ 22; 40-23, at 1-2 ¶ 5; 40-24, at 1-2 ¶¶ 5-7; 40-26, at 2-3 ¶¶ 6-7; 40-32, at 1.) FFNB serves vegan or vegetarian food to reflect its political dedication to nonviolence against all, including animals. (Docs. 39, at 1-2 ¶ 1; 49, at 1-3 ¶ 1; 40-23, at 1-2 ¶ 5; 40-24, at 1-2 ¶ 5; 40-25, at 3 ¶ 7; 40-32, at 1, 38.)

Weekly FFNB demonstrations involving food sharing take place in Stranahan Park, a traditional public forum. (Docs. 39, at 3-4 ¶¶ 8-9; 49, at 4-5 ¶¶ 8-9; 40-23, at 2-4 ¶¶ 6-8; 40-21, at 6 ¶ 17; 40-31; 62 ("video of Fort Lauderdale Food Not Bombs food sharing during weekly demonstration on April 17, 2015 (Video 13 – 34 seconds)".)[1] Members of FFNB sit down and eat a meal together with all who attend

[1] FFNB was granted leave to conventionally file a DVD containing videos in support of their Motion for Summary Judgment. (Doc. 62.)

their demonstrations. (Docs. 39, at 2 ¶ 3; 49, at 3 ¶ 3; 40-24, at 3 ¶ 8, 4-5 ¶ 11; 40-25, at 2 ¶ 6, 4-5 ¶ 11.) Plaintiffs Jillian Pim, Nathan Pim, Haylee Becker and William Toole are residents of Broward County and members or volunteers of FFNB. They share food in public parks for purposes of political expression to communicate the political message of FFNB. (Docs. 39, at 2 ¶ 2; 49, at 3 ¶ 2; 40-23, at 1-2 ¶¶ 4-7; 40-24, at 1-3 ¶¶ 4-8; 40-25, at 2-5 ¶¶ 6-11; 40-26, at 1-3 ¶¶ 4-7.)

Sharing and gifting of food is a form of communication in all human societies, in many cases more profoundly so than speech itself.[2] (Doc. 40-28, at 1 ¶ 2.) Sharing and gifting of food is among the most primordial forms of communication. (*Id.* at 3 ¶ 11.) Food sharing and gifting have been documented among every distinct clan, tribe, language group, ethnicity, and nationality studied by social scientists. (*Id.* at 3 ¶ 12.) Sharing food is a social act that brings people together and gives them a common sense of membership and affiliation. (*Id.* at 4 ¶ 13.) In every human society, refusal to share food is interpreted as a form of aggression or social distance. (*Id.* at

[2] While the City disputes the relevancy of the statements in this paragraph to Plaintiffs' cause of action, and further disputes whether these are statements of fact or opinion, the City does not dispute the truth of these statements. (*Compare* Doc. 39, at 2-3 ¶¶ 4-6, *with* Doc. 49, at 3-4 ¶¶ 4-6, and Doc. 52, at 6-7 ¶¶ 27-29, *with* Doc. 64, at 5-6 ¶¶ 27-29.)

3 ¶ 14.) Sharing food is one of the key forms of communication that has made civilization possible, as sharing a feast is one of the most common ways that human groups settle disputes (*Id.* at 4 ¶ 13.) Sharing and gifting of food, where the gift is given freely without any reckoning of value or expectation of return, is a powerful way of establishing relationships, making public and political statements, building virtue, and expressing devotion to principles and ethics. (*Id.* at 3 ¶ 10, 5-6 ¶¶ 20-21, 6 ¶ 24.) FFNB is engaged in food gifting, which is communicative conduct. (*Id.* at 7 ¶¶ 26-27.)

The City's Zoning Ordinance Amendments to Section 47-18.31 (a subsection of the specific use requirements section of the City's Unified Land Development Regulations ("ULDR")) included a revision of the definition of Social Service Facility to include an "Outdoor Food Distribution Center." (Docs. 39, at 3 ¶ 7, 4 ¶ 13; 49, at 4 ¶ 7, 5 ¶ 13; 1-3; 40-1, at 8:17-9:6; 40-3, at 13:9-20, 18:2-8.) The City defines "Outdoor Food Distribution Center" as "[a]ny location or site temporarily used to furnish meals to members of the public without cost or at very low cost as a social service as defined herein and is generally providing food distribution services exterior to a building or structure or without permanent facilities on a property." (Docs. 39,

at 5 ¶ 14; 49, at 5 ¶ 14; 1-3, at 3.) "Social services" are defined in the Zoning Ordinance as "[a]ny service provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care, group rehabilitative or recovery assistance or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment or assistance; and day shelter or any combination of same." (Docs. 39, at 5 ¶ 15; 49, at 5 ¶ 15; 1-3, at 3.) Other than the plain language of Zoning Ordinance C-14-42, the City does not have written criteria or a practice of interpreting the terms of the ordinance in a particular way. (Docs. 39, at 5 ¶ 16; 49, at 5 ¶ 16; 40-3, at 27:22-28:9.)

The City prohibits "Outdoor Food Distribution Centers" on all public property in the City, including City parks, unless an individual first applies for and receives a zoning permit. (Docs. 39, at 5 ¶ 17; 49, at 6 ¶ 17; 1-3, at 7-10; 40-21, at 3 ¶ 7, 4 ¶ 11; 40-3, at 76:24-77:11; 40-1, at 98:10-99:5.) There is no minimum number of "members of the public" who need to be receiving meals to trigger the requirements to obtain a zoning permit. (Docs. 39, at 5 ¶ 18; 49, at 6 ¶ 18; 1-3; 40-3, at 107:4-22; 53-1, at 17:13-24.)

Even a temporary one-time event that meets the definition of an "Outdoor Food

Distribution Center" requires a zoning permit. (Docs. 39, at 5 ¶ 18; 49, at 6 ¶ 18; 40-3, at 74:24-75:20, 76:24-77:11.) A zoning permit applies to a specific geographic location (or "development site") so if a person were to have events that meet the definition of an "Outdoor Food Distribution Center" at more than one location, a permit is required for each location. (Docs. 39, at 5-6 ¶ 19; 49, at 6 ¶ 19; 40-3, at 112:17-113:20; 40-15, at 4 (definition of development site).) A City sidewalk is not a permissible location under Zoning Ordinance C-14-42 where a zoning permit could be issued for an "Outdoor Food Distribution Center". (Docs. 39, at 6 ¶ 20; 49, at 6 ¶ 20; 40-1, at 112:14-113:13; 40-3, at 19:18-20:6.)

As part of the requirements for applying for a zoning permit, to engage in activity designated as an "Outdoor Food Distribution Center" on property owned by the City, individuals must also request and receive permission in the form of "written consent" from the City. (Docs. 39, at 6 ¶ 21; 49, at 6 ¶ 21; 52, at 7 ¶ 33; 64, at 6 ¶ 33; 1-3, at 6; 40-21, at 3 ¶ 4; 40-3, at 89:1-90:21; 40-1, at 95:18-98:2; 40-22, at 3 ¶ 15.) The City Manager or his designee would review any requests to determine whether to grant "written consent" for use of City property. (Docs. 39, at 6 ¶ 22; 49, at 6 ¶ 22; 40-1, at 106:19-108:21.) "Written consent" is only one part of the criteria to apply for

a zoning permit for use of City property, and just because the City provides consent does not mean Zoning Ordinance C-14-42 can be disregarded; all other specific use requirements must be met. (Docs. 39, at 6 ¶ 22;49, at 6 ¶ 22; 40-3, at 89:1-90:21.) Where an activity is conducted without a permit, the requirement to obtain "written consent" is subject to enforcement by City police. (Docs. 52, at 7 ¶ 33; 64, at 6 ¶ 33; 53-1, at 28:8-12, 31:5-22, 44:15-22, 53:16-24.)

The City Manager's Memo attached to the City Commission agenda on October 7, 2014, states that the adoption of the Ordinance C-14-42 will permit the City to resume enforcement of Park Rule 2.2, based on the City's asserted legal conclusion that the adoption of the Ordinance will bring the City into full compliance with the 2000 Final Judgment in *Arnold Abbott v. City of Fort Lauderdale,* 783 So.2d 1213 (Fla. 4th DCA 2001). (Docs. 39, at 7 ¶ 24; 49, at 7 ¶ 24; 38, at 3-4 ¶ 9; 52, at 2 ¶ 9; 40-5, at 12.) Park Rule 2.2 states: "Social Services. Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order

to meet their physical needs." (Docs. 39, at 7 ¶ 25; 49, at 7 ¶ 25; 1-4, at 1; 40-22, at 3 ¶ 4.) The City Commission is the legal entity responsible for promulgating park rules. (Docs. 39, at 7 ¶ 26; 49, at 7 ¶ 26; 40-2, at 15:4-25.) Park Rangers and City law enforcement officers have authority to enforce the City's park rules. (Docs. 39, at 7 ¶ 26; 49, at 7 ¶ 26; 40-2, at 18:8-19:4.)

The City has admitted that humans require nourishment and has acknowledged that the only way it can determine whether food is being provided to meet a person's physical needs within the meaning of Park Rule 2.2 is to "ask that person why they are eating." (Docs. 39, at 7-8 ¶¶ 28-29; 49, at 7 ¶¶ 28-29; 52, at 8 ¶ 36; 64, at 7 ¶ 36; 40-22, at 3 ¶ 6; 40-2, at 42:7-43:3.)

Individuals were arrested or cited for participation at FFNB's weekly demonstrations in Stranahan Park occurring on November 7, 2014, November 14, 2014, and November 21, 2014, and the prosecutions are still pending. (Docs. 39, at 2 ¶ 1, 3-4 ¶ 8; 49, at 3 ¶ 1, 4 ¶ 8; 40-20, at 9 ¶ 8; 40-23, at 9-11 ¶¶ 22-25; 40-24, at 5 ¶ 12; 40-25, at 5-6 ¶ 12; 40-26, at 4-5 ¶ 11; 49-1, at 37, Dep. Tr. 36:13-25; 78, at 6). A violation of the ULDR is punishable with a fine up to $500 and/or 60 days in jail. ULDR Sec. 47-34.2(B)-(c) & City Code Sec. 1-6(c). (Docs. 39, at 10 ¶ 39; 49, at 10

¶ 39).

The revisions to the Zoning Ordinance became effective November 1, 2014. (Docs. 39, at 10 ¶ 37; 49, at 10 ¶ 37; 38, at 7 ¶ 19; 52, at 4 ¶ 19; 40-20, at 8 ¶ 7.) Pursuant to a state Circuit Court Judge's order on December 2, 2014, the enforcement of Ordinance C-14-42 was stayed for thirty days and the City voluntarily agreed to extend the court-ordered stay for an additional forty-five days until February 15, 2015. The City has voluntarily maintained the stay and has not enforced Zoning Ordinance C-14-42 since that date, in that the City has not issued new citations or made additional arrests after that date. (Docs. 39, at 10 ¶ 37; 49, at 10 ¶ 37; 38, at 7-8 ¶ 20; 52, at 5 ¶ 20; 40-20, at 8-9 ¶ 7.)

C. Standard of Review

The standard of review for summary judgment is *de novo*. *Allen v. Tyson Foods, Inc*., 121 F.3d 642, 646 (11th Cir. 1997). It is black letter law that summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Further, the court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against

the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party has the burden of meeting this exacting standard. *Id.* An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Allen*, 121 F.3d at 646. An issue is "genuine" if the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party. *Id.*

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment in favor of Defendant City of Fort Lauderdale and should be reversed. The District Court used the incorrect legal standard when it reached the conclusion that FFNB is not engaged in symbolic speech and expressive conduct protected by the First Amendment through its peaceful political demonstrations that include sharing food with anyone, without restriction, to communicate the message of the Food Not Bombs movement: that our society should redirect our collective resources from militarism and war to provide food as a human right to all.

The District Court improperly disregarded undisputed facts in the record below, including, but not limited to the expert report and opinion of Dr. Richard Wilk which explained the communicative nature of sharing and gifting food across human society since the dawn of civilization. The District Court also failed to consider the undisputed evidence about the nature of Plaintiffs' political demonstrations, combined with the factual context and environment in which they take place, which demonstrate that Plaintiffs are engaged in protected First Amendment expression.

Under the correct level of scrutiny, the City's regulations violate the First

Amendment because they operate to prohibit Plaintiffs' political demonstrations in traditional public fora in all parts of the City. The City's regulations draw content based distinctions on their face and are aimed at the suppression of expression because the laws differentiate between types of food sharing based on their purpose, intent, or content, singling out food sharing as a "social service." FFNB is prohibited from holding its demonstrations that involve the sharing of food as symbolic speech or expressive conduct, because it cannot apply for or obtain a zoning permit from the City. FFNB is required by the regulations to have written consent or agreement from the City as the property owner to hold its weekly demonstrations at Stranahan Park, though Park Rule 2.2 precludes such consent. The regulations are unlawful prior restraints on Plaintiffs' First Amendment rights because they are costly, burdensome and discretionary.

The City has also violated FFNB's right to expressive association because the laws significantly burden the group's expression by impermissibly intruding on its decision to open participation at its political demonstrations to certain persons. Plaintiffs are forced to choose between not sharing food at their demonstrations or continuing to share food but excluding homeless and hungry persons from the table

to conform to the regulations, which is repugnant to the organization's message that food is a human right, not a privilege.

The Zoning Ordinance and Park Rule are also unconstitutionally vague, facially and as applied to FFNB, because the laws fail to provide fair notice of what is required or prohibited and grant unfettered discretion to City officials to grant or deny Zoning permits.

ARGUMENT

I. The City's Regulations Fail Constitutional Scrutiny Because FFNB's Demonstrations Are Protected by the First Amendment

A. FFNB is Engaged in Protected Speech Under the First Amendment

The District Court's holding about the protection due to Plaintiffs' symbolic and expressive conduct under the First Amendment is erroneous because it rests on an incorrect legal standard. The District Court's analysis consists solely of its conclusion that "outdoor food sharing does not convey Plaintiffs' alleged particularized message unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations." (Doc. 78, at 24.) This was legal error.

When a person communicates through non-verbal conduct, instead of by spoken or written words, the Supreme Court has instructed that it is necessary to determine whether the "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[.]" *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). Courts examine whether "'[a]n 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.'" *Tex. v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence*, 418 U.S. at 410-11). For this

reason, the Eleventh Circuit held that, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (emphasis in original). Courts also examine whether the conduct is "inherently expressive." *Rumsfeld v. Forum for Academic and Inst. Rights* (*FAIR*), 547 U.S. 47, 66 (2006). Factors that are relevant to this analysis include the "nature of [Plaintiffs'] activity, combined with the factual context and environment in which it was undertaken…" *Spence*, 418 U.S. at 410.

FFNB holds weekly demonstrations in a public park that involve sharing food for free with others to communicate the political message that food is a human right, not a privilege, and that our collective societal resources should be redirected from supporting the military to providing food for all who are hungry. (Docs. 40-23, at 1-2 ¶ 5,7; 40-24, at 2-3 ¶¶ 7-8; 40-25, at 3 ¶ 7; 40-26, at 2-3 ¶¶ 6-7.) The question of whether food sharing in this context is protected as symbolic speech or expressive conduct under the First Amendment is one that was left open by the Eleventh Circuit in an en banc opinion upholding the City of Orlando's permit scheme regulating large

group food distribution within a specific 2-mile radius. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc) (assuming, without deciding, that feeding of homeless persons by Orlando Food Not Bombs in public parks is expressive conduct entitled to some protection under the First Amendment). Under the correct legal inquiry, this Court should find that, under the factual context established by the record, FFNB is engaged in a form of symbolic speech and expressive conduct that is protected by the First Amendment.

1. Food Sharing is Symbolic Speech

Food sharing, as utilized by FFNB within the factual context of this case as a form of symbolic expression to communicate a political message, is symbolic speech more akin to "pure speech" due to its history and importance in human communication since time immemorial. (Doc. 40-28.) The Supreme Court has long recognized the importance of symbols and conduct as symbolic speech that have a long history as a form of human communication, "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943).

It is well established that the use of symbolic conduct to communicate ideas is more akin to "pure speech" and, therefore, is protected under the First Amendment. *See, e.g., id.* at 632 (flag salute); *Spence*, 418 U.S. at 410 (longstanding recognition of communicative and symbolic connotations of flags); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 736 (1969) (wearing of black armbands); *Brown v. State of La.*, 383 U.S. 131, 141-42 (1966) ("sit-in" in whites only area of library to protest segregation); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (peaceful picketing); *Hurley v. Irish Am., Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568-69 (1995) (parades and marches are symbolic speech due to inherent expressiveness of marching to make a point); *Leonard v. City of Columbus*, 705 F.2d 1299, 1304-05 (11th Cir. 1983) (removing flag patch from police uniform as protest); *Monroe v. State Ct. of Fulton Cnty.*, 739 F.2d 568, 572 (11th Cir. 1984) (burning flag during protest); *Stewart v. Baldwin Cnty. Bd. of Pub. Educ.*, 908 F.2d 1499, 1505 (11th Cir. 1990) (walking out of public meeting as expression of protest); *Holloman*, 370 F.3d at 1270 (silently raising fist during pledge expressing generalized message of disapproval).

Like many other forms of symbolic speech that have found protection under the

First Amendment, sharing food is one of the oldest forms of human expression. *See First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1295 n.7 (11th Cir. 2010) (Barkett, J., dissenting) ("[W]ithout any explanation, the majority dismisses the act of sharing food as one that has no history of symbolic expression. However, sharing food has significant meaning both in this country's history (e.g., Thanksgiving) and in major world religions (e.g., Passover in the Jewish tradition, Communion in the Christian tradition).") (*reh'g granted en banc, opinion vacated by,* 616 F.3d 1229 (11th Cir. 2010), *opinion reinstated en banc in part by*, 638 F.3d 756. FFNB, like others who utilize symbols to communicate their message, does so "to make their views known, and by their example, to influence others to adopt them." *Tinker*, 393 U.S. at 514. The use of symbolic speech as part of political protest has long been recognized as entitled to constitutional protection and the rights of freedom of speech and assembly have "repeatedly" been recognized as "not confined to verbal expression." *Brown*, 383 U.S. at 141-42.

The symbolic use of food sharing (i.e. gifting food with no expectation of return or exchange for something of value), as demonstrated by the undisputed facts

including Plaintiffs' nationally renowned expert Dr. Richard Wilk,[3] should be recognized as closely akin to "pure speech" because it has an unparalleled history as a form of nonverbal communication in every human society dating back to the dawn of civilization itself. (Doc. 40-28.) *See Holloman*, 370 F.3d at 1270 (conduct which is purely communicative is treated as pure speech while expressive conduct is an act with significant non-speech elements used in a particular context to communicate a message). FFNB shares food with hungry people for free to communicate a message of solidarity with all who are hungry, which is a human condition we all share. Since sharing food is a social act that brings people together, gives them a common sense of membership and inclusion, and establishes relationships (Doc. 40-28, at 4 ¶ 13), there is no more powerful way to communicate this message of solidarity than by offering food to a fellow human being. (Docs. 40-23, at 6 ¶ 13, 7-8 ¶¶ 17-18; 40-24, at 4-5 ¶ 11; 40-25, at 2 ¶ 6, 4-5 ¶ 11; 40-26, at 2-3 ¶ 7; 40-27.)

"Food sharing" is a form of "gifting." Gifting is a category of exchange that may or may not entail reciprocity, in which the motive and effect is social rather than

[3] Dr. Richard Wilk, a Distinguished and Provost's Professor of Anthropology at Indiana University is co-founder and co-director of the Indiana University Food Institute. (Doc. 40-28, at 1, 9.)

monetary. It takes place outside of market systems of monetary exchange, and differs from barter because there is no obligation for immediate returns. (Doc. 48-28, at 3 ¶ 10.) Sharing and gifting of food, where the gift is given freely without any reckoning of value or expectation of return, is a powerful way of establishing relationships, making public and political statements, building virtue, and expressing devotion to principles and ethics.[4] (*Id.* at 3 ¶ 10, 5 ¶¶ 20-21, 6 ¶ 24.)

Food is more than sustenance necessary to survival as a member of the human species. The undisputed expert opinion in this case, based on more than a century of fieldwork by cultural and social anthropologists, is that food sharing and gifting is a form of communication, sometimes more profoundly so than speech itself. (*Id.* at 1 ¶¶ 2-3.) No explanatory speech is necessary to explain this inherently expressive act, and food sharing should therefore find protection under the First Amendment. *FAIR*, 547 U.S. at 66 (necessity of explanatory speech weighs against finding conduct is inherently expressive).

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[4] At an international level, donations of food are a key part of international diplomacy, a means of asserting power, and are often used for the political purposes of asserting positions on human rights, modernity, and religion. (Doc. 40-28, at 5-6 ¶ 21.) State banquets also involve sharing food as a form of diplomacy, sending and receiving subtle messages in choices of wine, manners of dress, and the content and presentation of food. (*Id.*)

The history of food preparation and sharing dates back to the very early history of our ancestral species more than .5 million years ago, which means sharing and gifting of food (which sets humans apart from our closest primate relatives) are among the most primordial forms of communication. (Doc. 40-28, at 3 ¶ 11.) Food sharing and gifting has been documented among every distinct clan, tribe, language group, ethnicity, and nationality that have been studied by social scientists. (*Id.* at 3 ¶ 12.) Every major world religion has shared ritual meals, including food sharing rituals like the Eucharist which are a form of worship that is intended as communication with a deity. (*Id.* at 4 ¶ 17.)

Food sharing and gifting is also rooted in communicating associational ties because sharing food is a social act that brings people together and gives them a common sense of membership and affiliation. (*Id.* at 4 ¶ 13.) Entire countries share similar holiday meals and foods as a powerful means of creating and reinforcing the messages of belonging and inclusion. (*Id.* at 4 ¶ 16.) Meals can also express degrees of intimacy, greetings and welcome, the ideal roles of different ages and genders, and the status of the household. (*Id.* at 6 ¶ 23.)

Sharing food is one of the key forms of communication that has made

civilization possible, as sharing a feast is one of the most common ways that human groups settle disputes. (*Id.* at 4 ¶ 15.) Anthropologists have uncovered a long history of feasting in the very earliest permanent communities. (*Id.*) In every human society, refusal to share food is interpreted as a form of aggression or social distance. (*Id.* at 4 ¶ 14.)

FFNB communicates their message about the human right to food and the redirection of society's resources through sharing and gifting of food as a form of symbolic speech to communicate a political message. As discussed below, the factual context established by the record in this case demonstrates that food sharing by FFNB as part of their political demonstrations finds protection as symbolic speech and expressive conduct. *See Monroe*, 739 F.2d at 571 (nature of activity, combined with factual context and environment must be considered when determining whether non-verbal communication is protected as symbolic and expressive conduct).

2. The District Court Erred in Ignoring Undisputed Facts

The District Court ignored undisputed evidence regarding the material fact that sharing food is inherently expressive, a legal element for determining whether conduct is protected by the First Amendment. *See* Pt. I.A.1, supra. FFNB submitted

an expert declaration providing information, based on general research and principles of anthropology, on the communicative purpose and nature of food sharing and gifting (sharing with no reciprocity) over history. (Doc. 40-28, at 3-7.) The City did not submit any evidence to rebut Dr. Wilk's expert opinion and instead objected on the basis that Dr. Wilk's testimony was irrelevant and impermissibly reached legal conclusions. (Docs. 39, at 2-3 ¶¶ 4-6; 49, at 3-4 ¶¶ 4-6; 52, at 6-7 ¶¶ 27-29; 64, at 5-6 ¶¶ 27-29.) The District Court did not consider this argument on the merits when it denied the City's Motion to Exclude the Opinions, Report, and Testimony of Plaintiffs' Expert Witness, Richard Wilk as moot. (Docs. 45; 57; 69; 80.) As such, this expert opinion should have been considered by the District Court.

In reviewing the facts in this case, Dr. Wilk opined that Plaintiffs were engaged in food gifting, which is communicative conduct. (Doc. 40-28, at 7.) Dr. Wilk's opinion does not make the ultimate legal conclusion whether Plaintiffs' conduct is protected by the First Amendment. (*See* Doc. 57.) Rather, he concludes that food gifting is considered in his discipline to be a communicative practice and that Plaintiffs are engaged in food gifting as defined by his discipline. (Doc. 40-28, at 3-7.) The District Court ignored this undisputed evidence and completely failed

to analyze whether food sharing and gifting are inherently expressive conduct.

Instead, it concluded without factual analysis that food sharing does not convey a particularized message without other speech. (Doc. 78, at 24.) This is clear error. *See Reese v. Herbert*, 527 F.3d 1253, 1271 (11th Cir. 2008) (district court erred by failing to review the full record on summary judgment and by failing to construe the facts and make all reasonable inferences and credibility choices in favor of the non-moving party); *Webster v. Offshore Food Serv., Inc*., 434 F.2d 1191, 1193-94 (5th Cir. 1970)[5] (general rule is that the trier of fact, or Judge in summary judgment, may not act arbitrarily in disregarding uncontradicted and entirely probable testimony of expert witnesses whose qualifications and judgment have not been discredited).

3. Food Sharing in the Context of FFNB's Political Demonstrations is Expressive Conduct

FFNB's demonstrations that include sharing food as symbolic expression of their political message are also protected by the First Amendment as expressive conduct. *Holloman*, 370 F.3d at 1270 (expressive conduct is an act with significant "'non-speech' elements," that is being used in a particular situation to convey a

[5] *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit prior to September 30, 1981.

message). FFNB intends to convey a particularized message and the likelihood is great that the message would be understood by those who viewed it. *See Spence*, 418 U.S. at 410; *see also Holloman*, 370 F.3d at 1270 (court does not ask whether an observer would infer specific message, but some sort of message).

FFNB holds weekly demonstrations at Stranahan Park, that involve sharing food for free with anyone who wishes to participate, to express the same message conveyed by their group's name (Food Not Bombs): society needs to change so that our collective resources are redirected from bombs and war to end hunger and poverty and provide food for all who need it. (Docs. 40-23, at 1-2 ¶ 5; 40-24, at 2 ¶ 7; 40-25, at 3 ¶ 7; 40-26, at 2-3 ¶ 7.) The group specifically intends to communicate the message to others attending and observing their demonstrations that food is a human right and not a privilege through the symbolic act of gifting food as part of its political demonstration in a public place, with no expectation of money or other reciprocity. FFNB shares food as an act of political solidarity with persons who are homeless and hungry because of its belief that all persons are equal, regardless of socio-economic status, and everyone should have access to food as a human right. (Docs. 40-23, at 1-2 ¶ 5, 7; 40-24, at 2-3 ¶¶ 7-8; 40-25, at 3 ¶ 7; 40-26, at 2-3 ¶¶ 6-7.)

FFNB's use of symbolic speech is how they convey their political message and without it, their demonstrations would be rendered meaningless. (Docs. 40-23, at 6 ¶ 13, 7-8 ¶¶ 17-18; 40-24, at 4-5 ¶ 11; 40-25, at 2 ¶ 6, 4-5 ¶ 11; 40-26, at 2-3 ¶ 7.)

The FFNB volunteer members who pass out the food also sit and eat in an act of solidarity that brings together people from all different walks of life around the common shared experience of a meal, a basic human need. (Docs. 40-24, at 3 ¶ 8, 4 ¶ 11; 40-25, at 2 ¶ 6, 4-5 ¶ 11; 40-26, at 2 ¶ 7; 40-27, at 1-2 ¶¶ 2-5, 3 ¶ 13.) In this way, FFNB organizers intend to share a message of equality by sharing their table with others as opposed simply donating food as a charity without engaging in the symbolic act of breaking bread together. (*Id.*; *see also* 40-32, at 1.) The organization believes that our society does not suffer from a lack of resources, but that existing resources need to be reallocated (including away from the military and war) to provide food for all. (Doc. 40-25, at 3 ¶ 7.) The group also intends to communicate through this act that ending hunger is as simple as sharing food with those who are in need. (Doc. 40-24, at 2 ¶ 7.)

The nature of FFNB's activity, combined with the factual context and environment in which it was undertaken demonstrates that the likelihood is great that

the message would be understood by those who observed it. The District Court erred in holding that "outdoor food sharing does not convey Plaintiffs' alleged particularized message" as that is not the test set forth by this Court in *Holloman*. (Doc. 78, at 24.) The inquiry here is an objective one, requiring the Court to ask "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (student raising his fist during the Pledge of Allegiance "clearly expressed a generalized message of disagreement or protest...even if students were not aware of the specific message Holloman was attempting to convey," his conduct was expressive and protected by the First Amendment); *see also Spence,* 418 U.S. at 410 (context is important because it may give meaning to conduct at issue).

This factual context in which the symbolic act of food sharing occurs by FFNB is important because the context gives meaning to the symbol. *See Spence*, 418 U.S. at 410 (display of a flag bearing a peace symbol (which was displayed upside down) occurred simultaneous with the Cambodian incursion and the Kent State tragedy). Similarly, in *Tinker*, the Court analyzed the factual context of the Vietnam War to find that wearing black armbands "conveyed an unmistakable message about a

contemporaneous issue of intense public concern–the Vietnam hostilities." *Id.*; *see also Johnson*, 491 U.S. at 406 (flag burning occurred within the context of a political protest which demonstrated the political nature of conduct was intentional and apparent to observers).

At its weekly demonstrations, FFNB sets up a folding table under a gazebo in Stranahan Park to place vegetarian or vegan food items.[6] (Docs. 40-23, at 2-3 ¶¶ 6-7, 5-6 ¶ 12; 40-24, at 2 ¶ 6; 40-25, at 4-5 ¶¶ 10-11; 40-26, at 2-3 ¶ 7; 40-31; 40-32, at 1; 62 ("video of Fort Lauderdale Food Not Bombs food sharing during weekly demonstration on April 17, 2015 (Video 13- 34 seconds)").) There is a banner with the name "Food Not Bombs" and a picture of the group's emblem (a human fist closed around a carrot) along with literature or flyers that members pass out with political messages about the group's mission and other issues of public concern. (*Id.*) The demonstration is in a public park, is not an exclusive event (i.e. it is not corded off or limited to groups by invitation or ability to pay), and any member of the public who passes by is invited to participate in the demonstration. (*Id.*; *see also* Doc. 40-

[6] The choice to serve vegetarian/vegan food also reflects an intent to convey a particularized message of nonviolence. (Docs. 40-23, at 1-2 ¶ 5; 40-24, at 1-2 ¶ 5; 40-25, at 3 ¶ 7; 40-26, at 2 ¶ 6; 40-32, at 1, 38.) Food choices like this are a common way of communicating messages. (Doc. 40-28, at 6 ¶ 24.)

23, at 7 ¶ 17.) The very fact of inviting all who are hungry (rich or poor, friend or stranger) to share a place at their table, without restriction or expectation of reciprocity, communicates their message of solidarity and social unity. (Docs. 40-23, at 3 ¶ 7, 7-8 ¶ 17; 40-24, at 2-3 ¶¶ 6-7, 4-5 ¶ 11; 40-25, at 4-5 ¶ 11; 40-26, at 2-3 ¶ 7; 40-28, at 4 ¶¶ 13-14.)

The group's message is underscored by the location in which these demonstrations take place: Stranahan Park, a contested public space that has been a lightning rod in the City's public battles about the visibility of homelessness. (Docs. 40-23, at 3-5 ¶¶ 8-11, 7-8 ¶¶ 17-18; 40-34.) Stranahan Park is in downtown Fort Lauderdale which allows the organization to convey its political message–that access to food is a human right – to the government and business leadership of the City whose offices are in the downtown area. (Doc. 40-23, at 7-8 ¶ 17.) Stranahan Park is well known in Fort Lauderdale as a gathering place for homeless persons currently and historically, and by holding their demonstrations in this park it allows the group to associate with homeless people as equals. (*Id.* at 8 ¶ 18.) Prior to arrests of FFNB members for violation of the City's regulations, the City enacted a series of ordinances targeted at the homeless, including ordinances restricting camping in

public places and panhandling. (*Id.* at 5 ¶ 11; 40-30.) FFNB's political demonstrations in 2014 (at which members were arrested) took place amid this factual context, which was well known to persons in the City as a topic of public concern (Docs. 53-5, at 27-30; 53-6, at 25-28) and enhanced the likelihood that a reasonable person would understand that food sharing with homeless persons in Stranahan Park conveyed some sort of message–if not the specific message intended by FFNB. (Docs. 49-1, at 37-46, Dep. Tr. 36:13-45:24; 40-23, at 11-12 ¶¶ 27-28; 40-25, at 6-7 ¶ 13; 40-26, at 5 ¶ 13; 62.)[7]

FFNB is engaged in expressive conduct through its political demonstrations that involve the sharing of food with others to communicate a political message. The undisputed facts clearly demonstrate that the factual context and environment in which FFNB's political demonstrations occur demonstrate the likelihood that a reasonable observer would infer "some sort of message".

[7] Video of Lauren Wright arrest under C-14-42 on November 7, 2014 (Video 3- 37 seconds); Video of William Van Natta citation under C-14-42 on November 14, 2014 (Video 7- 33 seconds); and Video of Lauren Wright arrest under C-14-42 on November 7, 2014 (Video 27- 10 minutes 19 seconds).

B. The City's Regulations Unlawfully Infringe on FFNB's Rights Under the First Amendment

Plaintiffs' weekly demonstrations relate to broad political and social issues of public concern which occupy the "highest rung on the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). Since it is undisputed that Stranahan Park is a traditional public forum (Doc. 78, at 6), the government's ability to restrict speech at such locations is "very limited" because they "'occupy a special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (internal quotes omitted).

The District Court erred when it declined to analyze whether the regulations at issue pass constitutional scrutiny. As discussed above, food sharing by FFNB under the circumstances of this case is protected as symbolic speech and expressive conduct. When subject to First Amendment scrutiny, the City's regulations fail constitutional scrutiny as either a reasonable time, place or manner restriction or as a regulation of expressive conduct. *First Vagabonds Church of God*, 638 F.3d at 761 (applying time, place or manner test and four factor *O'Brien* test to restriction on large group feedings in city parks); *see also Clark v. Cmty. for Creative Non*

Violence, 468 U.S. 288, 298 (1984) (noting there is little if any difference between these standards).[8]

"[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968). A governmental regulation can be upheld under *O'Brien* "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." *Id.* at 377.

1. The City's Regulations Fail First Amendment Scrutiny

The City's regulations suffer from fatal constitutional defects: they are impermissibly content based and related to the suppression of expression. *Id.* The laws explicitly draw content based distinctions among food sharing that is authorized

[8] A reasonable time, place or manner restriction would be upheld if it was content neutral, left open alternative channels of speech and was narrowly tailored to a substantial government interest. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 761, 756 (11th Cir. 2011) (en banc).

and food sharing that is prohibited. As the District Court observed, the Zoning Ordinance and Park Rule "do not regulate all food sharing in the same fashion, but instead, specifically target only the type of food sharing that is provided as a social service." (Doc. 78, at 16.) The definition of an Outdoor Food Distribution Center in the Zoning Ordinance only applies if meals are furnished "to members of the public without cost or at a very low cost as a social service as defined herein." (Doc. 1-3, at 3.) The Zoning Ordinance further defines "social services" as "[a]ny service provided to the public to address public welfare and health such as, but not limited to, the provision of food..." (*Id.*) Similarly, the Park Rule prohibits using the parks for social services which is defined as including, but not limited to, "the provision of food, clothing, shelter, or medical care to persons in order to meet their physical needs." (Doc. 1-4, at 1.)

Instead of regulating all food provision to groups of a certain size like the Orlando ordinance upheld by this Court (Doc. 78, at 14), the District Court found that the City chose only to regulate "conduct when it is directed toward a specific purpose, i.e., outdoor food distribution as a social service" and "differentiate between types of food sharing based on their aims, or content." (Doc. 78, at 16-17.) By contrast, "[t]he

Orlando Ordinance did not mention any qualification based on the purpose of the food provision, such as food being provided as a social service, or as a charity, or for any other reason." (Doc. 78, at 14.) The District Court found this to be a significant distinction between the two cities' regulations because "these Fort Lauderdale regulations, unlike the Orlando ordinance, make at least some reference to the content of the alleged regulated speech, or, in this case, expressive conduct." (Doc. 78, at 16.)

Unlike the content neutral restriction upheld in *First Vagabonds Church of God*, Fort Lauderdale's regulations are content based and directly related to the suppression of expression. *See Spence*, 418 U.S. at 414 n.8 (when government interest is directly related to expression it fails *O'Brien*); *see also Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) ("the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys.") While "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter... others are more subtle, defining regulated speech by its function or purpose." *Id.* Where, as here, the government has drawn distinctions in its laws that require it examine the purpose or

intent of conduct to determine if a violation has occurred, it has imposed a content based restriction on speech.

On their face, the City's regulations require City officials to draw distinctions between the purpose and function of food sharing to determine whether it is prohibited or not. The City expressly admits that the Zoning Administrator must examine "the purpose" of the event (Doc. 49, at 8 ¶ 30) to determine if an event is providing food as a social service (which is prohibited) as opposed to providing food at no cost as part of a church picnic or for business marketing purposes (which are allowed). (Docs. 39, at 8 ¶ 30; 49, at 8 ¶ 30; 40-3, at 42:7-64:10, 78:3-86:3; 40-8; 40-9; 40-13; 40-19.) As an example, after concerns were raised that a church's description of its "Friends and Family Cookout" would require a zoning permit, the church changed the description of the event and clarified to the City they would not be feeding homeless people. The church was not required to get a permit because they no longer met the definition of a "social service." (Doc. 40-19.)

The City's regulations authorize every message to be communicated by food sharing except for the one intended by FFNB: food is a human right and should be freely shared with those who need it. FFNB would be allowed to engage in food

sharing as part of their political demonstrations, presumably, so long as they charged money (high enough so that it crosses the "low cost" threshold prohibited by the Zoning Ordinance) or if they held a closed members-only event and did not invite hungry persons who need food to meet their physical needs. However, by doing so, the City would force the group to convey the opposite message–that food is a privilege, not a human right available to all. It also would directly contradict their intended message of solidarity and force them to convey a message of exclusion and social distance to homeless and hungry persons.[9] (Docs. 40-23, at 3 ¶ 7; 40-24, at 4 ¶ 11; 40-25, at 4-5 ¶ 11; 40-26, at 2-3 ¶ 7.) This is constitutionally impermissible. *See, e.g., Johnson*, 491 U.S. at 416-17 (State may not foster its own view of the flag by prohibiting expressive conduct critical of the flag); *see also Hurley*, 515 U.S. at 573 (right to speak involves right to decide what not to say and State may not compel affirmance of a belief with which the speaker disagrees).

The City's regulations are "presumptively unconstitutional" because the government cannot "prove[] they are narrowly tailored to serve compelling state interests." *Reed*, 135 S.Ct. at 2226. None of the City's interests asserted as

[9] In every human society, refusal to share food is interpreted as a form of aggression or social distance. (Doc. 40-28, at 4 ¶ 14.)

"objectionable characteristics" justify drawing distinctions to selectively prohibit certain types of food sharing, but not others. The City has applied its regulations to prohibit FFNB's conduct in all City parks and on City sidewalks, but it has not prohibited serving food at outdoor events generally and has allowed church picnics, businesses offering free samples of food as a marketing campaign, and food truck rallies without subjecting them to these same requirements. (Docs. 39, at 8 ¶¶ 30-31; 49, at 7-8 ¶¶ 30-31.) Since the City's interests are clearly not served by the distinction between food sharing for different purposes, the regulations could not be narrowly drawn to achieve the asserted ends. *Solantic, LLC v. City of Neptune Bch.*, 410 F.3d 1250, 1267 (11th Cir. 2005).

Moreover, the City cannot claim any governmental interest is served by arbitrarily applying zoning restrictions (which usually apply to development and land use, see Doc. 40-3, at 13:16-14:10) to prohibit temporary activity in a City park. This is an extraordinary expansion of the City's police powers to criminalize the failure to obtain a zoning permit by a political organization seeking to use a traditional public forum for its intended purpose – to express a political message by using symbolic and expressive conduct (sharing food) which is generally the type of

conduct that is authorized in a City park (such as church picnics). The City is improperly applying zoning laws to effectively ban FFNB's political demonstrations from any public fora. This is not only an impermissible use of zoning power; as explained below, as applied to FFNB's political demonstrations, it imposes an unlawful prior restraint on protected First Amendment expression in any public park or any sidewalk in the City.

There is not an "incidental restriction" on First Amendment freedoms. *O'Brien*, 391 U.S. at 376. The City's regulations operate as a complete prohibition on food sharing as part of FFNB political demonstrations in all traditional public fora in the City. The District Court erred when, contrary to the undisputed facts, it found that the Zoning Ordinance and the Park Rule are "simply requiring them to obtain a permit and follow a detailed protocol if they want to share food at these outdoor gatherings." (Doc. 78, at 26.) This is not a simple permit process, but instead requires FFNB to go through a costly, lengthy and onerous zoning application process usually applicable only to development of private property. (Docs. 40-6; 40-12.)

For these reasons, the regulations are not narrowly tailored to meet any arguable interest asserted by the City. The City has banned "Outdoor Food

Distribution Centers" in all City parks through its Park Rule (prohibiting food sharing as a "Social Service") and by zoning designations (most parks are zoned "P" where an "Outdoor Food Distribution Center" is a prohibited use). Stranahan Park is zoned RAC-CC where a "Outdoor Food Distribution Center" is authorized if a conditional use permit is obtained, but one of the requirements for a zoning application is permission from the landowner which could never be granted due to the prohibition in Park Rule 2.2. (Doc. 40-16, at 1.) Thus, unlike Orlando, in Fort Lauderdale a permit could never be obtained for this use in any City park.

Even if a permit could be obtained for Stranahan Park, this is the only traditional public forum in the City where it is not a prohibited use under the ULDR and where a zoning permit is a potential option. By contrast, Orlando's ordinance allowed permits for a total of 84 large group feedings per year at parks within the downtown district within a two-mile radius of City Hall and had no restrictions on this activity at any of the other 66 parks located outside the downtown district. *First Vagabonds Church of God*, 638 F.3d at 761-62. As discussed below, the permitting schemes applying under either regulation are highly discretionary and cannot count as an ample alternative for speech. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176

F.3d 1358, 1361 (11th Cir. 1999) (discretionary zoning permit is equivalent of a license and does not count as a reasonable alternative location for speech in First Amendment scrutiny of ordinance). Food sharing is presumptively prohibited in all City parks and on all City sidewalks, and there is no public place in the City where FFNB is lawfully allowed to engage in their political demonstrations that includes sharing food as symbolic expression.

2. The City's Regulations Operate as Unlawful Prior Restraints in Traditional Public Fora

Requiring a zoning permit to engage in protected expression is a prior restraint on speech. *Lady J. Lingerie*, 176 F.3d at 1361 (zoning exception requirement for adult entertainment establishment was a licensing scheme and therefore a prior restraint). The City concedes that the regulations are prior restraints because Plaintiffs must request and be granted permission to share food. As a licensing scheme, the City's Zoning Ordinance suffers from two common defects in unlawful prior restraints: discretion and the opportunity for delay. *Id.* at 1361. Prior restraints on expression are presumptively unconstitutional.[10] *United States v. Frandsen*, 212

[10] By contrast, no claim was made or considered that the Orlando ordinance was a prior restraint on expression. *First Vagabonds Church of God*, 610 F.3d at 1281-82.

F.3d 1231, 1236 (11th Cir. 2001).

Unfettered discretion is granted to City officials at each stage of the permitting process here. There is no public place in the City where FFNB is allowed to lawfully engage in their political demonstrations which involve food sharing as of right because the City has deemed FFNB's food sharing a "social service". (Doc. 78, at 16.) This is a discretionary determination made by the City Zoning Administrator who examines the intent and purpose of the event to determine if the event is providing food as a social service. (Doc. 49 ¶ 30.)

As part of the zoning application process, because this is a prohibited use, the City must authorize this use pursuant to Park Rule 2.2 and as part of the landowner consent required under the ULDR (i.e., the City in a public park or sidewalk). However, the City lacks any criteria or process by which consent may be given. (Docs. 39, at 6 ¶ 22; 49, at 6 ¶ 22; 40-1, at 106:19-108:21; 40-3, at 89:1-90:21.) Even assuming *arguendo* the City would ever exercise its discretion and provide consent for this use, FFNB would still have to apply for a conditional use zoning permit which is a discretionary process and contains criteria which are neither precise nor objective and empower the zoning board to covertly discriminate against FFNB under

the guise of "compatibility" or "nuisance" requirements. (Doc. 1-3, at 9-10.) *Lady J. Lingerie*, 176 F.3d at 1362 (zoning requirements provide too much discretion and empower zoning board to "covertly discriminate" against Plaintiffs under the guise of "compatibility" restrictions). This is unlawful and inherently inconsistent with a lawful time, place or manner regulation because the discretion granted has the potential for and has actually been exercised here to suppress a particular point of view. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150-53 (1969); *see also Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

The zoning restrictions also fail scrutiny because they apply to as few as one person sharing food as a "social service." (Doc. 40-3, at 107:4-22 (no stated minimum number of people in either regulation to trigger requirement for permit); *see also* Doc. 53-1, at 17:13-24.) This is unlike Orlando's ordinance, which only applied to "large-group feeding." *First Vagabonds Church of God*, 638 F.3d at 761-62. Courts have found that even content neutral permitting requirements fail narrow tailoring where very small groups engaged in protected First Amendment activity are subjected to a permitting process. *See Burk v. Augusta Richmond Cnty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004) (striking permit requirement for demonstration that

applied to groups of 5 or more people).

The City's regulations also fail to safeguard against delay as another form of impermissible discretion. *Lady J. Lingerie*, 176 F.3d at 1361 (ordinance that permits public officials to effectively deny an application by sitting on it indefinitely is invalid). There is no time limit by which the Zoning Administrator must make his decision that a zoning permit applies or not; there is no time limit by which the City must make the decision whether to provide "written consent" under the Zoning Ordinance or "written agreement" under Park Rule 2.2 to waive the prohibition against food sharing as a social service; and there is no time limit by which the City must complete its decision-making process on issuing a zoning permit. (Docs. 40-3, at 36:20-40:13; 1-3, at 9; 40-12, at 16, 18; 40-6.) *Solantic, LLC*, 410 F.3d at 1272 (absence of decision-making deadline effectively vests city officials with unbridled discretion by enabling them to "pocket veto" applications for those bearing disfavored messages).

The District Court found there is a dispute among the parties regarding the cost of the zoning permit, but in its judgment this was not material. (Doc. 78, at 11-12.) Although the record evidence demonstrated the cost would be in excess of $6,000,

the City suggested that it had discretion to adjust the cost and that it may not cost that much. (Docs. 39, at 9-10 ¶ 34; 49, at 9 ¶ 34; 40-1, at 100:7-18, 102:12-103:18; 40-7, at 2; 40-6.) Under either version of the facts, the City's fees are unconstitutional. The City may not charge these excessive fees for use of a park for a political demonstration because the fee to use a traditional public forum must be nominal. *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523 (11th Cir. 1985). Further, allowing city officials unfettered discretion to set the fee is unconstitutional. *Id.*

This Court should therefore find that the City's regulations, as applied to FFNB's political demonstrations in City parks, are unconstitutional prior restraints in violation of the First Amendment.

II. The City's Regulations Violate FFNB's Right to Expressive Association

"[T]he freedom to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion," is a fundamental right and "entitled to special protection" where the "purpose of the association is to engage in activities independently protected by the First Amendment." *McCabe v. Sharrett*, 12 F.3d

1558, 1563 (11th Cir. 1994). The "practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 907 (1982).

In analyzing this claim, courts first determine whether a group or persons affiliated with it are entitled to protection as engaged in "expressive association." *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). For the protection of this right to apply, the group must "engage in some form of expression, whether it be public or private." *Id.* The District Court erred in concluding that its determination as to whether FFNB's participation in outdoor food sharing is protected speech, was also dispositive of whether their right to associate has been violated. (Doc. 78, at 26.) This is not the full analysis the District Court was required to undertake in evaluating FFNB's claim that their right to expressive association has been violated, which is analytically distinct from their free speech claim.

The first question, whether the group engages in "expressive association" is more generally focused on the nature of the organization itself. *See, e.g., Dale*, 530 U.S. at 649-650 (undertaking factual analysis of general mission of Boy Scouts to reach conclusion that an association that seeks to transmit a system of values engages

in expressive activity). The undisputed facts demonstrate that Plaintiff FFNB is clearly an association of persons organized for the purpose of engaging in activities protected by the First Amendment – political protest, speech, and assembly. (Docs. 40-23, at 1-3 ¶¶ 5-7; 40-24, at 1-2 ¶¶ 5-7; 40-25, at 2-5 ¶¶ 6-11; 40-26, at 1-2 ¶¶ 5-6; 40-27, at 2-3 ¶ 13; 40-30; 40-31; 40-32.) *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). FFNB is affiliated with the grassroots international Food Not Bombs movement that works for non-violent social change through direct action. (Docs. 40-23, at 1-2 ¶ 5; 40-24, at 1-2 ¶ 5; 40-25, at 4 ¶ 9; 40-26, at 1-2 ¶¶ 4-6; 40-32.) The Constitution extends associational "protection to collective effort on behalf of shared goals" like that engaged in by FFNB because protection of such rights "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts,* 468 U.S. at 622.

Having determined that FFNB is engaged in expressive association, the second question is whether the government action in question significantly burdens the group's expression. Courts must defer "to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653. The right includes protection of a group's membership decisions and protects against laws making group membership

less attractive, even without directly interfering in an organization's composition, such as by requiring groups to disclose their membership lists or imposing penalties "based on membership in a disfavored group[.]" *FAIR*, 547 U.S. at 69. This right also "restricts the ability of the State to impose liability on an individual solely because of his association with another." *Claiborne Hardware*, 458 U.S. at 918-19. Freedom of association is also implicated "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor[.]" *Roberts*, 468 U.S. at 618.

The City's regulations impermissibly interfere with Plaintiffs' selection of those with whom they wish to join in their weekly political demonstrations which involve sharing food. The City is not prohibiting all events where individuals are associating to distribute food, it is examining why food is shared (i.e. as a "social service") and with whom it is being shared (are these "members of the public" or just friends or family) and regulating activities on those bases. (Doc. 41, at 16-18.) Presumably, if FFNB charged a "high cost" for participating in its demonstrations, or if it excluded persons who were homeless and hungry from participating (Doc. 53-1, at 18:5-9), it could proceed without needing a permit. In other words, whether food

sharing is prohibited or authorized depends on who is invited to share a place at the table. The City engaged in this precise inquiry when it determined a zoning permit was not required because the following events did not meet the definition of "social services": a Women's Club food truck rally as a fundraiser in Stranahan Park (Docs. 40-8; 40-9); a church "Friends and Family Picnic" in a City park (Doc. 40-19); or a marketing event by a deli handing out free food in a parking lot (Doc. 40-13, at 1-15).

FFNB's expressive association involves not just the act of sharing food, it is gathering together with others from all walks of life in public spaces to share and convey their political message; their associations are also to build understanding and support for the political mission of FFNB by sharing food with others as symbolic political expression that food is a human right. Sharing food is a means of associating with another individual, and through the act of sharing food FFNB builds its political movement. The organization holds its political organizing meetings immediately after the demonstrations which involve food sharing and invite everyone who attends. Having a members-only demonstration would eliminate this organizing tool and force the group to exclude the very people it wishes to affiliate itself with as part of its campaign for social change – persons who are homeless and hungry. In

this way, the government impermissibly intrudes in their decision to open participation at their political demonstrations (which involve food sharing as expression of their political message) to certain persons, and force them to exclude those individuals which is repugnant to the organization's message. (Docs. 40-23, at 3 ¶ 7; 40-24, at 3 ¶ 8, 4-5 ¶ 11; 40-25, at 2 ¶ 6, 4-5 ¶ 11; 40-26, at 2-3 ¶ 7; 40-27, at 1-3 ¶¶ 3-13; 40-31; 40-32; 49-1, at 55-56, Dep. Tr. 54:19-55:5.)

Courts weigh the government's interest in any restriction against the plaintiffs' right of expressive association. *Dale*, 530 U.S. at 656. Infringements on the right to expressive association may only be justified by regulations adopted to serve compelling state interests, unrelated to suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U.S. at 623 (citations omitted). Any of the City's interests (e.g., food safety) are not furthered by restriction of food sharing to specific persons or for specific purposes. The City cannot demonstrate that these restrictions are unrelated to the suppression of ideas. The City has failed to show that its interests cannot be achieved through means significantly less restrictive of associational freedoms – namely, placing FFNB's food sharing on the same legal footing as a church picnic, a food truck rally,

or a marketing event. For these reasons, the District Court's finding that the City, through the Zoning Ordinance and Park Rule, was not restricting FFNB's right to expressive association, but "simply requiring them to get a permit a follow a detailed protocol if they want to share food" at "outdoor gatherings" is erroneous. (Doc. 78 at 26.)

As explained in Point I.B.1., supra, the City does not have any compelling state interest that would justify such a regulation to prohibit certain persons from associating with others in public spaces. *See*, *e.g.*, *Roberts*, 468 U.S. at 623-25. Freedom of association is part of the constitution's guarantee of the right of people to make their voices heard on public issues. *Claiborne Hardware*, 458 U.S. at 908. Political expression may not be made illegal simply because it is performed in concert with others; the City may not permissibly do so here. *Id.*

III. The City's Regulations Are, Facially and as Applied, Void-For-Vagueness Under the Due Process Clause of the Fourteenth Amendment

The Zoning Ordinance and Park Rule are unconstitutionally vague, both facially and as applied, because of: (1) the failure to provide fair notice of what would be considered required or prohibited conduct; and (2) the lack of precision and guidance so that those enforcing the law do not act in an arbitrary or discriminatory

manner. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Due process requires the invalidation of laws that are impermissibly vague. *Id.* at 2317.

The lack of precision about what is required or prohibited is apparent by, *inter alia*, the City's own lack of understanding about what the Zoning Ordinance requires. The Zoning Ordinance lacks any notice about how many "meals" must be provided to "members of the public" prior to being considered an "Outdoor Food Distribution Center" subject to the onerous requirements of a zoning permit. Because the Zoning Ordinance lacks any specified minimum or maximum number of persons to trigger the requirements, the provision of food to as few as one person could require a zoning permit. (Docs. 39, at 5 ¶ 18; 49, at 6 ¶ 18; 1-3; 40-3, at 107:4-22; 53-1, at 17:13-24.) These deficiencies stand in stark contrast to the specificity in the Orlando law regulating food sharing that was upheld by this Court. *First Vagabonds Church of God*, 638 F.3d at 758-59 (regulating "large group feedings" defined as "an event intended to attract, attracting, or likely to attract twenty-five (25) or more people []…for the delivery or service of food" within a two-mile radius of City Hall).

Due process requires that Plaintiffs must have fair notice that contemplated conduct is prohibited. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-67

(1972). The laws are so vague FFNB is left to guess whether they must comply with the regulations or could be subject to arrest; the laws also leave City officials to subjectively interpret unclear terms. As the District Court recognized, the City is indeed required to scrutinize the purpose for which food is provided. (Doc. 78, at 24.) City officials admit that the terms "social service," (both laws) "public welfare and health," (Ordinance) and "meet[ing] [their] physical needs" (Park Rule), lack precision and guidance which results in City officials having to examine the purpose of why food is distributed or shared to determine the line between lawful and unlawful conduct. (Docs. 39, at 8 ¶ 30; 49, at 8 ¶ 30; 40-3, at 42:7-64:10, 78:3-86:3; 40-8; 40-9; 40-13; 40-19.) The fact that members of FFNB were cited or arrested for violating the laws does not mean they have fair notice or certainty about what is covered by the regulations and what is not. *See*, *e.g., City of Chicago v. Morales*, 527 U.S. 41, 57-58 (1999) (fair notice means that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of" laws penalizing conduct). The laws here, lacking fair notice, are void-for-vagueness.

The regulations also suffer from a lack of guidance and precision that fail constitutional scrutiny for vagueness. Lacking guidance, City officials engage in

arbitrary decision-making about what food distribution activities are allowed and which are not by relying on their own unrestrained discretion. In doing so, they examine the purpose and intent of why food is provided to decide if it is allowed – criteria that are not stated in the laws or in any City guidance. These decisions are entirely at the whim of a City official. The District Court was incorrect that these decisions are "not left to any other officials' discretion." (Doc. 78 at 28.)

Further, the District Court's reading of the regulations together to remedy the lack of fair notice and precision in the regulations merely because both are challenged is contrary to the undisputed facts in the record. The laws are not interdependent on one other; result in distinct punishments; and City officials do not read, interpret or enforce the laws in this manner. A person can be charged with a violation of one regulation and not the other and the City developed the Ordinance in response to a legal challenge to the Park Rule that resulted in a stay of its enforcement.

The Zoning Ordinance requires that to obtain a zoning permit to operate an "Outdoor Food Distribution Center," one must receive "written consent" from the City to conduct this activity on City property such as a public park, but there is no specific process or criteria for City officials to make determinations about park use

for this purpose. Instead, the law vests that discretion entirely within the purview of the City Manager or his designee without any guidance. (Docs. 39, at 6 ¶¶ 21-22; 49, at 6 ¶¶ 21-22; 52, at 7 ¶ 33; 64, at 6 ¶ 33; 1-3, at 6; 40-21, at 3 ¶ 4; 40-3, at 89:1-90:21; 40-1, at 95:18-98:2, 106:19-108:21; 40-22, at 3 ¶ 15; 53-1, at 28:8-12, 31:5-22, 44:15-22, 53:16-24.)

Similarly, the Park Rule requires a "written agreement" to undertake an activity considered to be an otherwise prohibited "social service," but the City admits that deciding whether food is provided to meet people's physical needs is "very subjective." The Park Rule is so devoid of any guidance that the City does not know how it would determine if food is provided to meet a person's "physical needs" as stated in the regulation. The only way it could do so is to "ask the person why they are eating" and examine the intent and purpose behind why food is provided. (Docs. 39, at 7-8 ¶¶ 28-29; 49, at 7 ¶¶ 28-29; 52, at 8 ¶ 36; 64, at 7 ¶ 36; 40-22, at 3 ¶ 6; 40-2, at 42:7-43:3.) The District Court acknowledged the notice problems with the Park Rule in finding it was even "less detailed than the Ordinance." (Doc. 78, at 29.)

These deficiencies allow City officials to arbitrarily pick and choose to allow events that involve distributing food in public parks to members of the public without

being subject to the requirements of the laws. These include food sharing activities: by family members, as part of a picnic among church members, and free food samples by a deli for business marketing purposes. (Docs. 40-8; 40-9; Doc. 40-13, at 1-15; 40-19.) While neither a church picnic, free deli samples, or FFNB's weekly political demonstrations have as their intended purpose providing food as a social service, all involve distributing food to members of the public. If the Ordinance and Park Rule were clear and applied in an even-handed and non-arbitrary manner, none of these referenced activities, including Plaintiffs', should be subject to the regulations because they are not intended to be a social service "to address public welfare and health" as stated in the Ordinance. The City, however, does not allow FFNB to engage in the same conduct as others because the regulations authorize arbitrary and discriminatory enforcement.

The Park Rule's definition of "social service" is so vague ("the provision of food … to meet physical needs") that allowing any food to be provided in a public park or on a sidewalk would meet this definition. The failure to provide specific limits on the "vast amount of discretion" provided to enforcement officials due to the law's broad sweep are grounds for invalidation based on vagueness. *Morales*, 527

U.S. at 63-64.

As these examples show, the regulations empower City officials to pick and choose between food sharing that is authorized or that is prohibited based on imprecise and unascertainable standards and the purpose of why it is provided (including to whom). This type of subjectivity in enforcement due to a lack of precise standards is grounds for invalidation. *Id.* at 60-62.

IV. Conclusion

For the foregoing reasons, Plaintiffs/Appellants respectfully request that the Court reverse the District Court's decision and judgment; grant a declaratory judgment and a permanent injunction in favor of Plaintiffs/Appellants on the basis that the Zoning Ordinance and Park Rule violate the First and Fourteenth Amendments; and remand this matter for a trial on Plaintiffs' damages. In the alternative, if the Court finds there are disputed issues of material fact relevant to the constitutionality of the City's Zoning Ordinance and Park Rule, Plaintiffs/Appellants respectfully request that the Court reverse the summary judgment entered in favor of the City, and remand for a trial on liability and damages.

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale
Case No. 16-16808-F

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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 WordPerfect 12 in 14 font Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six copies of the foregoing brief were sent to the Clerk of Court, 56 Forsyth Street, N.W., Atlanta, GA 30303, and that the brief was electronically filed with the Court and served on all counsel on the attached Service List via the CM/ECF system, on this 18th day of January, 2017.

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