

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 6:06-cv-1583-Orl-31KRS

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

Plaintiffs,

v.

CITY OF ORLANDO, FLORIDA,

Defendant.

MEMORANDUM OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY,
NATIONAL COALITION FOR THE HOMELESS, NATIONAL POLICY AND
ADVOCACY COUNCIL ON HOMELESSNESS, AND NATIONAL HEALTH CARE
FOR THE HOMELESS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

Amici submit this Memorandum in opposition to Defendant's Motion for Summary Judgment ("Def. Mot.") and in support of Plaintiffs Orlando Food Not Bombs, *et al.*'s Response to Defendant's Motion for Summary Judgment ("OFNB Resp.") and Plaintiffs First Vagabonds Church of God, *et al.*'s Response to Defendant's Motion for Summary Judgment ("FVCG Resp."). This action involves Code of the City of Orlando § 18A.09-2 ("CCO § 18A.09-2"), a provision that prohibits sponsoring, conducting, or participating "in the distribution or service of

food at a large group feeding¹ at a park” without a permit. CCO § 18A.09-2. *Amici* support Plaintiffs in their claim that, as applied to the donors of such food, CCO § 18A.09-2 violates several provisions of the U.S. Constitution as well as the Florida Religious Freedom Restoration Act. *Amici* also join Plaintiffs in their arguments opposing Defendant’s motion for summary judgment.

Amici’s objective here is two-fold: (1) to provide the Court with a better understanding of the challenges faced by homeless persons in Orlando, and (2) to show that CCO § 18A.09-2 violates the rights of homeless persons receiving food in City parks, including their rights of expressive and intimate association, as protected by the First and Fourteenth Amendments, respectively; their free exercise of religion rights under the Florida Religious Freedom Restoration Act; and their Fourteenth Amendment due process rights protecting against unconstitutionally overbroad criminal laws. Thus, *Amici* not only reinforce Plaintiffs’ position that Defendant’s motion for summary judgment is without merit, but also demonstrate that the record before this Court plainly reveals the ordinance’s constitutional and statutory infirmities.

INTEREST OF *AMICI CURIAE*

Amici are organizations that address the problems of homelessness and poverty and represent the interests of persons affected by those conditions. The National Law Center on Homelessness & Poverty (“NLCHP”) is a not-for-profit organization that works to protect the constitutional and statutory rights of homeless families and individuals across the nation.

¹ *Amici* feel that the word “feeding” is deeply offensive and reflects the City’s effort to dehumanize homeless persons living in Orlando. Instead of the word “feeding,” *Amici* prefer the term “food sharing event.”

NLCHP advocates against laws that “criminalize” homelessness by making it a crime to perform life-sustaining activities in public areas and has published eight reports on this topic.

The National Coalition for the Homeless (“NCH”) is a non-profit organization and membership network of local and statewide homeless coalitions committed to the goal of ending homelessness through systemic and attitudinal change. NCH helped establish the National Homeless Civil Rights Organizing Project, which has co-published several reports on civil rights abuses of homeless persons.

The National Policy and Advocacy Council on Homelessness (“NPACH”) is a grass roots anti-poverty organization, whose mission is to ensure that national homelessness policy accurately reflects the needs and experiences of local communities. NPACH works to accomplish its mission through education, grassroots organizing, research, and technical assistance.

The National Health Care for the Homeless Council, Inc., is a membership organization comprised of 91 local service agencies, over 500 individual clinicians, and numerous homeless and formerly homeless persons. The National Council recognizes and seeks to protect the human rights of homeless persons, including the right to food.

BACKGROUND FACTS ON HOMELESSNESS

Over the past two decades, homelessness has become a growing problem in the United States. Approximately 840,000 people are homeless in the United States on any given night, while approximately 2.5 to 3.5 million people experience homelessness throughout the year.² Like many cities, Orlando and its surrounding communities have a significant number of people

² Martha Burt *et al.*, *Helping America’s Homeless: Emergency Shelter or Affordable Housing?* 49-50 (2001).

experiencing homelessness. According to the City of Orlando Consolidated Plan for 2005-2010 (“Orlando Plan”), the daily homeless population in Orange County is approximately 6,260.³

The causes of homelessness are complex, but the vast majority of homeless people living in public are doing so involuntarily. In the 2007 U.S. Conference of Mayors Hunger and Homelessness survey of 23 major U.S. cities (“Mayors’ Survey”), cities identified lack of affordable housing as the primary cause of homelessness, followed by poverty and domestic violence.⁴ In 2007, 52 percent of the 23 cities surveyed for the Mayors’ Survey indicated that they had to turn people away from shelter all or some of the time due to lack of capacity.⁵ Fifteen of the 23 cities surveyed expected the requests for emergency shelter to increase in 2008, due to the foreclosure crisis, increases in poverty, and the pattern of increases of families entering the shelter system.⁶

According to the Orlando Plan for 2005-2010, the Orlando area has an inadequate supply of emergency shelter for persons with severe mental illness and substance abuse, single women without special needs, unaccompanied youth, and families with children.⁷ Further, the Orlando area does not have sufficient permanent supportive housing for women, children, men, families, individuals who are “chronically homeless,” and persons with disabilities.⁸ The Orlando Plan indicates that there are a total of 1,380 fewer beds than needed for homeless individuals in

³ City of Orlando Housing Department, *Consolidated Plan for Housing and Community Development Programs: October 1, 2005 – September 30, 2010* HHA 34 (August 12, 2005) [hereinafter *Orlando Plan*].

⁴ U.S. Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities, A 23-City Survey* 11 (Dec. 2007).

⁵ *Id.* at 17.

⁶ *Id.*

⁷ *Orlando Plan*, *supra* note 3, at HHA 33.

⁸ *Id.*

emergency shelters, transitional housing, and permanent supportive housing, with the same shortage of beds for homeless families.⁹ With inadequate places for homeless persons to go, many are forced to live in public spaces.

People experiencing homelessness and living in poverty also struggle with hunger. According to a 1999 national survey of homeless people, 40 percent did not have anything to eat on one or more days during the month previous to the survey.¹⁰ Lack of adequate food resources remains a problem in Central Florida. According to the Second Harvest Food Bank of Central Florida's 2006 survey of partner programs, 24.6% of the food pantries, 22.3% of the soup kitchens, and 12.8% of the emergency shelters have had to turn away clients due to lack of food resources.¹¹ For people living outside on the streets or in public spaces, outdoor food sharing programs are vital sources of food. Placing restrictions on where food sharing programs can operate makes it even more difficult for homeless persons to access healthy, sanitary food.

Even as the City of Orlando has approved the Sylvia Lane site as a place where groups can share food with homeless persons,¹² the City has taken actions to clear homeless people out of that area and to discard a number of their belongings.¹³ In addition, City actions have

⁹ *Id.* at HHA 36-37.

¹⁰ Interagency Council on Homelessness, *Homelessness: Programs and the People They Serve – Findings of the National Survey of Homeless Assistance Providers and Clients* 7-1 (1999).

¹¹ Second Harvest Food Bank of Central Florida, *Hunger in Central Florida 2006* 4 (2006). The Second Harvest Food Bank of Central Florida has partner programs in Brevard, Lake, Orange, Osceola, Seminole and Volusia Counties.

¹² See City of Orlando Council Agenda Item: Adopting Ordinance amending Chapter 18A of the City Code (attachment), *available at*: <http://edocs.ci.orlando.fl.us/asv/paperlessagenda.nsf/fsetMinutes?OpenFrameSet> [hereinafter Council Agenda Item: Adopting Ordinance].

¹³ Jeff Kunerth, *Homeless Clear Out – Against Will*, Orlando Sentinel, Nov. 18, 2006, at B3.

contradicted previous statements submitted to this Court by the City that Sylvia Lane “can be used seven days per week and 365 days a year at no charge, and can be used without a permit.”¹⁴ After making this assertion, the City locked Sylvia Lane and now requires advance permission for its use. Brenner Aff. ¶¶ 8-9. These City efforts discourage homeless persons from accessing food in the one place where providers are allowed to serve food without being subject to the restrictions of CCO § 18A.09-2.

Further, the Sylvia Lane site is not a safe place for homeless persons to go. *See, e.g.*, Markeson Decl. ¶ 8. In 2006, August Felix, a 54-year old homeless man, was beaten to death by five Orlando teenagers.¹⁵ The apparent motive for the attack was “sport.”¹⁶ The attack occurred in the immediate area of Sylvia Lane,¹⁷ the area set aside by the City for purposes of CCO § 18A.09-2 and described as a “reasonable, ample, alternative land space within the GDPD for large group feeding of the homeless.”¹⁸ The attack on Mr. Felix was not an isolated incident; at least five other homeless people have been beaten in the Sylvia Lane area by attackers seeking “entertainment.”¹⁹

Finally, by prohibiting groups from sharing food with homeless persons in a consistent and accessible location, such as Lake Eola Park, CCO § 18A.09-2 disrupts important outreach

¹⁴ Defendant City of Orlando’s Motion to Dismiss at 6.

¹⁵ Mariana Minaya, *5 Orlando teens arrested in death of homeless man*, Orlando Sentinel, June 27, 2006, at B1.

¹⁶ *Id.*

¹⁷ *See* April Hunt, *Orlando attacks widen homeless divide*, Orlando Sentinel, June 28, 2006, at A1 (reporting that, in addition to the attacks, bottles have been thrown at homeless people as they line up for food at a nearby bridge).

¹⁸ Council Agenda Item: Adopting Ordinance, *supra* note 12.

¹⁹ Minaya, *supra* note 15, at B1 .

efforts that help homeless individuals move beyond homelessness. Outreach has long been at the forefront of efforts to end homelessness. Outreach is designed to provide assistance and care to those homeless persons who, for a variety of reasons, are unserved or underserved by existing agencies. Outreach workers target homeless persons both on the street and in shelters and seek either to provide directly or provide links to counseling, medical and psychiatric treatment, financial assistance, housing assistance, and other services.

Outreach is commonly identified as the initial and single most critical step in connecting or reconnecting homeless individuals to needed services or treatment.²⁰ Outreach efforts employ a variety of methods.²¹ Some outreach programs employ mobile units, while others operate from a fixed position. All outreach programs—regardless of their size or scope—emphasize engaging homeless clients and constructing meaningful relationships between the outreach worker and the client.²² Outreach represents the best—and often the only—way of engaging homeless people living on the streets and linking them with needed services in the community. Outreach is viewed as a process rather than an outcome, with a focus on establishing rapport with the

²⁰ Sally Erickson & Jaime Page, *To Dance with Grace: Outreach and Engagement to Persons on the Street*, in 1998 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 2 (1998); Susan A Barrow et al., *Evaluating Outreach Services: Lessons from a Study of Five Programs*, in 52 NEW DIRECTIONS FOR MENTAL HEALTH SERVICES 29, 29 (Winter 1999); Gary A. Morse et al., *Outreach to Homeless Mentally Ill People: Conceptual and Clinical Considerations*, in 32 COMMUNITY MENTAL HEALTH JOURNAL 261, 261–62 (June 1996).

²¹ Erickson & Page, *supra* note 20, at 7.

²² See e.g., *id.* at 7 (“Outreach is first and foremost a process of relationship building.”); Jay S. Levy, *Homeless Outreach: On the Road to Pretreatment Alternatives*, in 81 FAMILIES IN SOCIETY: J. CONTEMPORARY HUMAN SERVS. 360 (2000); Morse, *supra* note 20, at 263.

client.²³ Successful outreach requires building trust with individuals who have lost faith in and/or are not reached by existing agencies and service providers.²⁴

It is also a bedrock principle that effective outreach takes time.²⁵ Many homeless people are suspicious of intervention because of negative experiences in the past with public or not-for-profit social service agencies or medical providers, inadequate access to health care, histories of emotional and physical abuse, prior criminal convictions, chemical dependency, and mental illness. Outreach workers must meet clients where the clients are.²⁶ They must accept the client's timetable for opening up and move slowly, even in brief encounters, to allow a relationship to develop gradually.²⁷ A simple verbal referral by an outreach worker to a client

²³ See, e.g., Interagency Council on the Homeless, *Reaching Out: A Guide for Service Providers* (1991); Erickson & Page, *supra* note 20, at 2.

²⁴ Anthony C. Tommasello, *Effectiveness of Outreach to Homeless Substance Abusers*, in 22 OFFICE OF SUBSTANCE ABUSE STUDIES: EVALUATION AND PROGRAM PLANNING 285, 296 (1999); Deborah Fisk et al., *Outreach Workers' Experiences in a Homeless Outreach Project: Issues of Boundaries, Ethics and Staff Safety*, in 70 PSYCHIATRIC QUARTERLY 231, 232 (Fall 1999) (noting that outreach workers often operate "outside of the realm of traditional clinical practice"); Susan E. Axleroad & Gail E. Toff, *Outreach Services for Homeless Mentally Ill People*, in THE CLEARINGHOUSE ON HOMELESSNESS AMONG MENTALLY ILL PEOPLE, THE INTERGOVERNMENTAL HEALTH POLICY PROJECT, GEORGE WASHINGTON UNIVERSITY 3-4 (May 1987).

²⁵ S. Segal & J. Baumhol, *News and Views: The Community Living Room*, in 66 SOCIAL CASEWORK 111, 116 (1985).

²⁶ Michael Rowe et. al, *Services for Mentally Ill Homeless Persons: Street-Level Integration*, in 68 Am. J. Orthopsychiatry 490, 491 (July 1998); Anthony C. Tommasello, *Effectiveness of Outreach to Homeless Substance Abusers*, in 22 OFFICE OF SUBSTANCE ABUSE STUDIES: EVALUATION AND PROGRAM PLANNING 285, 296 (1999); Axleroad & Toff, *supra* note 24, at 3-4.

²⁷ Morse, *supra* note 20, at 265; see also Paula Goering et al., *Process and Outcome in a Hostel Outreach Program for Homeless Clients with Severe Mental Illness*, in 67 AM. J. ORTHOPSYCHIATRY 607, 609 (Oct. 1997) ("Th[e] engagement process can be slow and entail

does not suffice,²⁸ and, if done in a threatening manner, may undermine further efforts to engage the person. The importance of patience and perseverance in engaging homeless clients cannot be overstated.²⁹

Furthermore, engagement may be facilitated by providing the homeless client with some desired resource,³⁰ such as, in this case, a nutritious meal. In this case, plaintiff Brian Nichols has indicated that beyond sharing food, his and other groups have helped homeless individuals obtain jobs, housing, and clothing. Nichols Depo. 41:16-42:16. When that outreach network is disrupted, homeless individuals may miss out on opportunities to help them move out of homelessness. *Id.* Requiring groups to change food sharing and outreach locations every week to different parks in the City greatly disrupts the function and purpose of outreach and is simply not practically feasible. Groups that share food and conduct outreach with homeless persons need a consistent location where homeless people know they can go to get the help they need to move out of homelessness.

It is against this background of deprivation and need that the legality of CCO § 18A.09-2 must be judged.

frequent visits over a period of weeks or months. . . . involving brief contacts that may have no other purpose than just being with the client in an attempt to get to know him or her.”).

²⁸ Morse, *supra* note 20, at 266.

²⁹ Morse, *supra* note 20, at 265; *see also* Marcia B. Cohen, *Social Work Practice with Homeless Mentally Ill People: Engaging the Client*, in 34 SOCIAL WORK 505, 506 (1989).

³⁰ Morse, *supra* note 20, at 265.

ARGUMENT

CCO § 18A.09-2(a) makes it “unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park . . . without a Large Group Feeding Permit.” Only two permits per park can be issued to the same person, group, or organization during a twelve month period. *See* CCO § 18A.09-2(c). The ordinance is directed at moving homeless persons out of downtown Orlando. *See* OFNB Resp. at 16. Contrary to the City’s assertions (*see* Def. Mot. at 22), this discriminatory motive is well-documented.³¹ The impact of this ordinance is to substantially restrict the ability of the homeless persons gathering in City parks to meet and communicate with groups such as the First Vagabonds Church of God and Orlando Food Not Bombs. As such, CCO § 18A.09-2 violates the First and Fourteenth Amendments to the U.S. Constitution and Florida statutory law.

I. CCO § 18A.09-2 Violates Homeless Persons’ Freedoms of Expressive and Intimate Association.

Freedom of association comes in two types, which the Supreme Court has termed the freedoms of intimate and expressive association. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The freedom of expressive association consists of the “right to associate for the purpose of engaging in those activities protected by the First Amendment - speech, assembly, petition for the redress of grievances, and the exercise of religion.” *Id.* at 618. The freedom of

³¹ Prior to the ordinance’s passage, an email sent on behalf of City Commissioner Patty Sheehan to members of the Orlando business community stated that the “*intent of this ordinance is to try to move the large groups of homeless out of downtown and create less of a ‘situation’ for the businesses, residents, etc. in the Lake Eola/Thornton Park neighborhoods.*” OFNB Resp. at Exhibit A (emphasis added). That email underscores the constitutional infirmity of the ordinance, as it was designed to be “a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

intimate association protects “choices to enter into and maintain certain intimate human relationships.” *Id.* at 617. CCO § 18A.09-2 violates both freedoms.

A. CCO § 18A.09-2 Violates Homeless Persons’ Freedom of Expressive Association as Protected by the First Amendment.

For a valid expressive association claim, the group must first show that it engages in expressive association, *see Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000), which includes the collective pursuit of “a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts*, 468 U.S. at 622. Next, the group must show that the government action at issue significantly affects its ability to advocate its viewpoint. *See Dale*, 530 U.S. at 653. The group’s assertions regarding both elements are entitled to deference. *See id.* at 652.

If a proper showing by the affected group is made, the law falls unless the government demonstrates that it was “adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts*, 468 U.S. at 623. That burden is especially heavy where, as here, an ordinance infringes upon the associational rights of homeless persons. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 505-506 (6th Cir. 2002) (with respect to an ordinance violating the right to intimate association, the court was particularly troubled by the ordinance as applied to “a homeless man, existing at the margins of our society, where he is uniquely vulnerable and in particular need of . . . a buffer against the power of the State”).

As to the first element of an expressive association claim, some members of the Orlando homeless community targeted by CCO § 18A.09-2 engage in religious and political association. For example, plaintiff Brian Nichols is the pastor of plaintiff organization First Vagabonds Church of God, “a homeless fellowship that meets in downtown [Orlando] parks.”

Amend. Compl. ¶ 7. This ministry by homeless individuals and for homeless individuals (*id.* ¶ 7) holds regular religious gatherings in Orlando's Langford Park. Nichols Decl. ¶ 12. Similarly, the simple act of sharing food with homeless persons in a public park is vital for plaintiff Orlando Food Not Bombs' ability to convey its political message. *See* Markeson Decl. ¶ 4 ("sharing food with the homeless in an area of affluence is a political statement by its very nature").

Regarding the second element, CCO § 18A.09-2 significantly affects the ability of these homeless individuals to advocate their viewpoints. Central to both the religious and political association at issue here is the ability of advocates to interact with homeless persons in Lake Eola Park and Langford Park at events where food is provided. *See* Amend. Compl. ¶¶ 6-12, 38-39, 44. By limiting events that can be held at each park to two per year, the ordinance has a significant practical impact on the ability of homeless and non-homeless members of First Vagabonds and Food Not Bombs to collectively advocate their views. *See, e.g.,* Nichols Decl. ¶ 20; Nichols Depo. 17:6-14, 41:16-19. Similarly, people are staying away from food-sharing events because of the ordinance (*see* Def. Mot. at 5, 8), impermissibly diluting each group's message. *See Murphy v. Zoning Com'n of Town of New Milford*, 148 F. Supp. 2d 173, 181 (D. Conn. 2001) (plaintiffs' showing that "some participants in the prayer group meetings stopped attending the sessions out of fear that they would be arrested by town officials" was "sufficient to provide evidence of a chilling effect on plaintiffs' right to associate").

The City's position that other parks are available, though also limited to twice a year, rings hollow in the context of the severe lack of communication and other organizational resources available to Orlando's homeless population. *See* Nichols Decl. ¶ 22. Additionally, the City's proffered alternative food sharing site, at Sylvia Lane, is wholly inadequate for expressive

purposes. *See* De Vlieger Decl. at pp. 2-7 (photographs of Sylvia Lane). While Lake Eola Park, for example, is an attractive, much-frequented park,³² Sylvia Lane is located in an isolated area where few residents visit.³³ Forcing homeless persons to congregate in an obscure location eliminates the ability of groups they affiliate with to effectively convey their views to the public. It also has a profound negative effect on First Vagabonds' membership. *See* Nichols Depo. 44:9-13; Nichols Decl. ¶ 22. The First Amendment does not allow the City to exile a group of persons because it does not like the messages focusing on homelessness and poverty conveyed at that group's gatherings, especially when it may result in that group's disintegration.

CCO § 18A.09-2 is invalid when, as required, it is "subject[ed] to the closest scrutiny," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958), as it fails all three components of the standard of review articulated in *Roberts*. First, none of the interests the City advances (such as healthier birds)³⁴ rise to the level of a compelling interest. *Compare Roberts*, 468 U.S. at 623 (eradicating discrimination against women is a compelling interest). Second, CCO § 18A.09-2 is not unrelated to the suppression of ideas; on the contrary, it directly and predictably hampers the exchange of religious and political ideas between Plaintiffs and Orlando's homeless persons. Finally, the interests purportedly served by CCO § 18A.09-2 can

³² The City's website notes that "Lake Eola Park is a popular destination in the downtown area, with many people taking advantage of the beautiful surroundings to walk at lunch or in the evenings." http://www.cityoforlando.net/fpr/net/t_ParkRec.aspx?Park=062 (last viewed 2/25/08).

³³ *See* April Hunt, *Homeless find meals harder to come by*, Orlando Sentinel, August 12, 2006, at B1 ("the [Sylvia Lane] site is part of a maze of one-way streets in a mostly industrial area with few pedestrians").

³⁴ The purported interests are found in the "Whereas" clauses of the ordinance. *See* Council Agenda Item: Adopting Ordinance, *supra* note 12.

easily be achieved through means less restrictive of associational freedoms, such as by enforcing the City's litter ordinance, *see* CCO § 43.75, to address the supposed concern over litter.

B. CCO § 18A.09-2 Violates Homeless Persons' Freedom of Intimate Association as Protected by the Fourteenth Amendment.

The freedom of intimate association was born out of the Supreme Court's recognition that, to be able to safeguard individual liberty, it "must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618. The Supreme Court has not identified the full universe of protected relationships, but has said, in evaluating a particular relationship, that relevant factors may include "size, purpose, policies, selectivity, congeniality, and other characteristics." *Id.* at 620. Government interference with these relationships is subject to strict scrutiny. *See McCabe v. Sharrett*, 12 F.3d 1558, 1566 (11th Cir. 1994).³⁵

While intimate association claims most often arise in the family context, courts will extend the protection to other highly personal relationships. *See McCabe*, 12 F.3d at 1563 (citing *Roberts*, 468 U.S. at 620). For example, in *Johnson v. City of Cincinnati*, the Sixth Circuit held that an ordinance preventing a homeless man from visiting his attorney violated his right to intimate association. 310 F.3d at 505-506. The court highlighted the need to protect the associational rights of homeless persons, as even small legal barriers can make the maintenance of personal relationships an impossibility. *Id.* at 505 (noting the law at issue "was particularly

³⁵ In *McCabe*, the Eleventh Circuit affirmed the denial of a public employee's intimate association claim based on a job transfer that put her in a different workplace from her husband. 12 F.3d at 1559. The court applied strict scrutiny, but in the context of a claim brought by a public employee against a government employer. *Id.* at 1574. The court noted that such public employee cases involve special considerations not normally involved in strict scrutiny analysis. *Id.* at 1564.

problematic because Au France was homeless, thus he had no readily available, realistic alternative to communicate with his attorney”).

Here, Pastor Nichols’ counseling activities with homeless persons are well-documented. *See* Nichols Depo. 22:13-23:5 (describing, in part, how he sometimes counsels people “in a park on a bench”). The close relationships he forms with members of First Vagabonds deserve protection under the doctrine of intimate association. *See Roberts* 468 U.S. at 619 (“the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others”). Relationships with spiritual advisors surely are “an intrinsic element of personal liberty,” *Roberts*, 468 U.S. at 620, meriting protection under the freedom of intimate association.

The ordinance harms these intimate relationships because, just like in *Johnson*, it leaves the former counseling recipients with “no readily available, realistic alternative to communicate with [Pastor Nichols].” *Johnson*, 310 F.3d at 505. Neither Pastor Nichols nor those seeking his spiritual guidance have the resources to successfully coordinate constantly rotating meetings. And even if they were to meet regularly in the one place allowed by the City, Sylvia Lane’s unsafe conditions and depressing atmosphere, *see Markeson Decl.* ¶ 8 and *De Vlieger Decl.* at pp. 2-5, would surely harm these relationships.

Because the ordinance interferes with these protected relationships, CCO § 18A.09-2 is subject to strict scrutiny. This Court, like the one in *Johnson*, should take into account the heightened need to protect the intimate association rights of homeless persons given that otherwise manageable obstacles become insurmountable where one person to the relationship lacks virtually all access to communication resources. In *Johnson*, “the Ordinance not only blocked Au France’s physical access to his attorney’s office, it effectively blocked all access to

his attorney.” 310 F.3d at 505. The situation here is just like *Johnson*. By “effectively” destroying an intimate relationship, this overly broad ordinance utterly fails strict scrutiny’s requirement that restrictions on intimate association be narrowly tailored to address the proffered government interests. Additionally, because the ordinance serves no compelling government interest, as discussed above, the Court has its choice of grounds for finding that CCO § 18A.09-2 fails strict scrutiny review.

II. CCO § 18A.09-2 Violates Homeless Persons’ Free Exercise of Religion Rights Guaranteed Under the Florida Religious Freedom Restoration Act.

Pursuant to the Florida Religious Freedom Restoration Act (“FRFRA”), Fla. Stat. § 761.02 *et seq.*, ordinances that substantially burden the exercise of religion are subject to strict scrutiny. Thus, Florida goes further than the First Amendment in protecting the free exercise of religion. *See Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004) (“FRFRA expands the free exercise right as construed by the [U.S.] Supreme Court”). In *Warner*, the Supreme Court of Florida held that a substantial burden is more than a mere inconvenience. *Id.* at 1035. Rather, a “plaintiff who claims that a governmental regulation constitutes a substantial burden must ‘prove that a governmental regulatory mechanism burdens the adherent’s practice of his or her religion by . . . preventing him or her from engaging in conduct or having a religious experience which the faith mandates.’” *Id.*

CCO § 18A.09-2 violates FRFRA because it prevents homeless persons in City parks from engaging in religious practices mandated by their faith. The sharing of food is a practice mandated by the tenets of the First Vagabonds Church of God. *See Nichols Decl.* ¶¶ 8, 13, 20, 27. Also, for First Vagabonds’ “ministry by the homeless for the homeless,” Amend. Compl. ¶ 6, food sharing is not some generic charitable act that is interchangeable with other charitable

acts; rather, it is a central and irreplaceable part of that ministry. *See* Nichols Depo. 16:2-3 (“the food is actually a part of the worship”); Nichols Decl. ¶ 13.

The ordinance is a substantial burden as it is unrealistic to expect homeless persons to be able to take part in constantly moving food sharing events and because Sylvia Lane is an unreasonable alternative location for these events. It thus has the *practical effect* of preventing homeless persons from performing these required religious practices. *See* Nichols Decl. ¶ 27 (the ordinance “effectively prohibit[s] my church and me from following our religious belief”). That *de facto* prohibition is a substantial burden. *See Freeman v. Dep’t of Highway Safety and Motor Vehicles*, 924 So. 2d 48, 55 n.8 (Fla. Dist. Ct. App. 2006) (the definition of substantial burden includes burdens “rendering religious exercise . . . effectively impracticable”). These homeless persons do not have access to resources—such as personal phones and computers—necessary to receive information on food sharing events to be held in 40 different locations. Nor does Sylvia Lane, with its unsanitary conditions,³⁶ dangerous surroundings,³⁷ and regularly-locked gates,³⁸ provide these persons with a reasonable alternative location. Commenting on a case with very similar facts, the Florida Supreme Court recognized that a law restricting people from giving food to homeless persons in public places may violate FRFRA, *even if* an alternative site for food sharing is provided. *See Warner*, 887 So. 2d at 1036 (discussing *Abbott v. City of Fort Lauderdale*, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001)).

³⁶ *See* April Hunt, *Homeless find meals harder to come by*, Orlando Sentinel, August 12, 2006, at B1 (at Sylvia Lane, “there is no place to wash up, either for those eating or those serving”).

³⁷ *See* April Hunt, *Orlando attacks widen homeless divide*, Orlando Sentinel, June 28, 2006, at A1 (describing the fatal attack on August Felix, a homeless man, by five teenagers in the Sylvia Lane area; noting attacks on five other homeless people in the area; reporting on bottles thrown at homeless people as they line up for food at a nearby bridge).

³⁸ *See* Def. Mot. at 4.

Furthermore, the record shows that the ordinance has been a substantial burden in preventing people from participating in First Vagabonds' events even when they know about the events. *See Nichols Depo.* 41:16-17 (the ordinance "does keep some people from coming"). The City's tactic of scaring people away from opportunities to worship amounts to a substantial burden on the exercise of religion. *See Murphy*, 148 F .Supp. 2d at 188-89 ("the allegation that people are afraid to attend a prayer group meeting because they fear being arrested is a substantial burden that the defendants have imposed on the prayer group participants"). As a substantial burden, the ordinance is subject to strict scrutiny, and it fails that review as it neither serves a compelling governmental interest nor is the least restrictive means of furthering the asserted interests. *See Warner*, 887 So. 2d at 1034.

III. CCO § 18A.09-2 is Unconstitutionally Overbroad, Violating Homeless Persons' Rights Under the Due Process Clause of the Fourteenth Amendment.³⁹

As the Court is well aware, "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). Plaintiffs' associational rights, as discussed in detail above, provide more than an adequate foundation for an overbreadth claim. *See id.* at 53.

³⁹ The ordinance also violates due process because it impermissibly deprives homeless persons of their right to food, a right long-recognized under international law. *See Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food"); *see also International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (III) (1966) (recognizing "the fundamental right to freedom from hunger and malnutrition"). Some U.S. courts have also recognized a constitutional right to food. *See In re Mosier*, 59 Ohio Misc. 83, 90 (Ohio Com. Pl. 1978) (stating that the Supreme Court's *Papachristou* decision means that "obtaining food and drink, surely must be fundamental rights"); *Doe v. Mich. Dept. of Social Services*, 439 Mich. 650, 693 (1992) (suggesting there is "a fundamental right to . . . food . . . free of unreasonable governmental restrictions").

And that claim is strong, given that the ordinance's "chilling effect is substantial in relation to the provision's purpose in controlling harmful, constitutionally unprotected conduct." *Blue Moon Enter., Inc. v. Pinellas County Dep't of Consumer Prot.*, 97 F. Supp. 2d 1134, 1143 (M.D. Fla. 2000). Indeed, its "chilling effect" of scaring people away from food-sharing events has been well-established by the record, (*see* Nichols Depo. 17:6-14, 41:16-19; Def. Mot. at 5, 8), and the legitimacy of its purpose undeniably tarnished. OFNB Resp. at Exhibit A (email from city official stating that the "intent of this ordinance is to try to move the large groups of homeless out of downtown" and that the ordinance was "drafted with staff to restrict homeless feedings").

Thus, CCO § 18A.09-2 is impermissibly overbroad as it tramples on homeless persons' First Amendment rights in one of the only places this vulnerable group can exercise those rights, all so the City can supposedly make the parks cleaner and safer. Criminalizing associational food-sharing events without plausible justification is similar to situations in which the federal courts in Florida have applied the overbreadth doctrine to in the past. *See Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992) (homeless "plaintiffs have shown that the challenged ordinances as applied to them are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places").

CONCLUSION

For the foregoing reasons, as well as those set out by Plaintiffs, the Court should deny the relief requested by Defendant.

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on February 29, 2008.

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