No. 21-2894

In the
UNITED STATES COURT OF APPEALS
for the EIGHTH CIRCUIT

RAYMOND REDLICH, et al.,
Plaintiffs/Appellants,

v.

CITY OF ST. LOUIS,
Defendant/Appellee.

On Appeal from the United States District Court
Eastern District of Missouri, Eastern Division
The Honorable Nannette A. Baker, Magistrate Judge

BRIEF OF APPELLEE CITY OF ST. LOUIS

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SUMMARY OF CASE

Plaintiffs demand the right to express their religious beliefs by distributing potentially hazardous food to the homeless without the permit required of all other distributors of such food under City Ordinance 68597 (the "Ordinance"). (App. 870-871). While Plaintiffs contend that ministering to the homeless is central to their religious beliefs, they admit their religion does not require them to distribute food, or any particular kind of food. (App. 85 R. Doc. 35, at 5).

The Ordinance, amended by Ordinances 71106 ("Amendment") and 71324 ("2021 Amendment"), adopted the 2009 National Food Code, as published by the U.S. Food & Drug Administration ("FDA"), and thereby incorporated its "practical, science-based guidance and enforceable provisions for mitigating risk factors known to cause foodborne illness." (App. 81 R. Doc. 35, at 1). In order to mitigate risk factors known to cause foodborne illness, the Ordinance prohibits the distribution of potentially hazardous foods to the public without a temporary food permit. (App. 81-82 R. Doc. 35, at 2).

The District Court granted summary judgment for City, finding the Ordinance did not substantially burden Plaintiffs' religious exercise, and the Ordinance met rational basis and intermediate review. (App. 901 R. Doc. 57). This appeal follows. City requests 20 minutes for oral argument.

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STATEMENT OF THE CASE

"Precisely because we are a cosmopolitan nation made up of people of almost every conceivable religious preference…and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Emp't Div. v. Smith*, 494 U.S. 872, 888 (1990).

City's homeless deserve safe and healthy food. (App. 81 R. Doc. 35, at 1). The Ordinance helps achieve that. (App. 81-83 R. Doc. 35, at 1-3). It does so by implementing generally applicable standards of food preparation, handling, and sanitation for all who distribute potentially hazardous foods to the public. (App. 81-83 R. Doc. 35, at 1-3). These standards are outlined in the National Food Code, as published by the FDA, and adopted by the Ordinance. (App. 81 R. Doc. 35, at 1). The goal of these standards is to prevent foodborne illness. (App. 82 R. Doc. 35, at 2).

Preventing illness, including foodborne illness, is a legitimate threat to public health and safety, and to the homeless specifically. (App. 86-87 R. Doc. 35, at 6-7). There are multiple examples of donated food contributing to foodborne illness outbreaks amongst the homeless nationally. (App. 87 R. Doc. 35, at 7). Specifically, from 2012-2018, there were foodborne illness outbreaks amongst the homeless in Colorado, Utah, Ohio, California, and North Carolina, the origin of which was donated food. (App. 87 R. Doc. 35, at 7). Notably, of those jurisdictions suffering from foodborne illness outbreaks, the majority of them did not require temporary

food permits for charitable events. (App. 87 R. Doc. 35, at 7). In 2018 alone 5,893 people were hospitalized from foodborne illness, and 120 people died from foodborne illness. (App. 87 R. Doc. 35, at 7). Locally, going as far back as 2012, City police officers have been aware of illegally distributed food leading to illness among the City's homeless. (App. 87-88 R. Doc. 35, at 6-7). Specifically, back in 2012 Captain Kegel remarked that he was concerned about illegally distributed food at Olive and 13th Street, less than a block from where Plaintiffs were distributing food to the homeless in 2018, because the distributed foods resulted in several persons becoming ill. (App. 87-88 R. Doc. 35, at 6-7). Moreover, Police Officer Stephen Ogunjobi estimates that since he was transferred to the Downtown Bike Unit in 2017 he has witnessed and assisted multiple homeless persons whom he suspected suffered from a food-related illness. (App. 87 R. Doc. 35, at 7). Hence, the threat of foodborne illness is real. The threat is real to City's homeless. And the generally applicable standards outlined in the Ordinance should apply to Plaintiffs.

In line with its objective to prevent foodborne illness, the Ordinance prohibits the distribution of potentially hazardous foods – not all foods – to the public without a temporary food permit. (App. 82 R. Doc. 35, at 2). When a person applies for a temporary food permit to distribute potentially hazardous foods, he is required to list the place and time of the event for which the permit is sought, so that a Health Department inspector may appear at the event and inspect the food to be distributed

to ensure the food has been prepared and handled correctly. (App. 84 R. Doc. 35, at 4). In so doing, the health inspector is able to ensure compliance with City's health code, which is based on the FDA's National Food Code. (App 81 R. Doc. 35, at 1). Notably, as stated above, research shows that in a majority of jurisdictions which saw the largest outbreaks of foodborne illness amongst its homeless, there was no temporary food permit process in place. (App. 87 R. Doc. 35, at 7).

While claiming to be champions of the homeless, Plaintiffs advocate to exempt the homeless from health and safety standards in the name of their religion. However, it is not a central tenet of Plaintiffs' religious beliefs that they distribute potentially hazardous food to the homeless. (App. 85 R. Doc. 35, at 5). Plaintiffs admit their religious beliefs do not mandate the distribution of any particular kind of food, whether bologna sandwiches or otherwise. (App. 85 R. Doc. 35, at 5). Plaintiffs could express adherence to their faith by distributing pre-packaged food items or whole fruit, which would not be subject to a permit. (App. 85 R. Doc. 35, at 5). Moreover, prohibiting the distribution of potentially hazardous foods without a permit does not meaningfully curtail Plaintiffs' ability to express their faith. Plaintiffs have acknowledged that adherence to their religious beliefs does not necessarily require the distribution of food. (App. 85 R. Doc. 35, at 5). And the Ordinance does not deny Plaintiffs reasonable opportunities to minister to the homeless as Plaintiffs are free to distribute non-food items and non-potentially

hazardous foods without triggering the Ordinance. (App. 83 R. Doc. 35, at 3). [1]

For reasons that follow, this Court should affirm the District Court's grant of summary judgment for City.

[1] Only when faced with summary judgment did Plaintiffs allege, for the first time, that their religion required them to distribute food, and in particular, "nutritious" food. (App. 631-32 R. Doc. 44-1, at 1-2). In response, City requested the District Court strike the affidavits containing this new and contradictory testimony. (App. 764-65 R. Doc, 52, at 8-9). While the District Court denied City's request to strike, it noted it "would also consider competing evidence while giving each affidavit only the consideration it deserves under Fed. R. Civ. P. 56." (App. 910 R. Doc. 57, at 10). In the memorandum and order, the Court ultimately rejected Plaintiffs' newly-found religious requirements, and so should this Court. (App. 920-23 R. Doc. 57, at 20-23).

SUMMARY OF THE ARGUMENT

The District Court correctly granted summary judgment on Plaintiffs' hybrid rights claim in that Plaintiffs have failed to show the Ordinance substantially burdens their religious exercise, and have otherwise failed to show a violation of any First Amendment claim, and even if this Court applies the hybrid rights doctrine, the Ordinance passes strict scrutiny review. Moreover, the District Court correctly entered judgment for City on Plaintiffs' free expression claim as food sharing is not an inherently expressive activity warranting First Amendment protection, and, in any event, the Ordinance meets intermediate review under *O'Brien*.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Abdullah v. Gunter*, 949 F.2d 1032, 1036 (8th Cir. 1991). The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-250 (1986).

For Plaintiffs to succeed on appeal, there must be enough evidence to allow a rational trier of fact to find for the Plaintiffs on the required elements of their claim. *Estate of Barnwell v. Watson*, 880 F.3d 998, 1004 (8th Cir. 2018). And while the non-moving party receives the benefit of all reasonable inferences supported by the evidence, the non-moving party is still obliged to come forward with specific facts showing that there is a genuine issue for trial. *Id*.

ARGUMENT

I. The District Court correctly rejected Plaintiffs' hybrid rights claim where Plaintiffs failed to establish a substantial burden to their religious exercise, and Eighth Circuit precedent does not, and should not, support a colorable claim standard for a hybrid rights analysis, but even if the hybrid rights doctrine is applied, the Ordinance passes strict scrutiny review.

The hybrid rights doctrine comes from the Supreme Court case *Smith*. *Smith*, 494 U.S. 872. In *Smith*, the Court considered whether a state's prohibition against controlled substances, including peyote, violated the petitioners' free exercise rights under the First Amendment. *Id.* at 874. The Court held the state law was neutral and generally applicable, and therefore applied the rational basis test to hold the law did not violate the petitioners' free exercise rights. *Id.* at 890. In its discussion, the Court commented, "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections…," and the "present case does not present such a hybrid situation." *Id.* at 881-82. Thus, arguably unintentionally, the "hybrid rights" doctrine was born. The hybrid rights doctrine has, in some circuits, evolved into an exception to the otherwise well-settled rule that neutral and generally applicable laws are given rational basis review. Knowing they cannot overcome rational basis review, Plaintiffs advocate for strict scrutiny review under the hybrid

rights doctrine. This Court should reject the hybrid rights doctrine under the facts of this case.

A. Plaintiffs fail to show a substantial burden to their religious exercise, and therefore, the Ordinance does not trigger free exercise protection.

Under a hybrid rights analysis, *Smith* and subsequent caselaw establish there must be a substantial burden on religious exercise. *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 985-86 (N.D. Ill. 2003) citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see also*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 433 U.S. App. D.C. 278, 279-80, 877 F.3d 1066, 1067-68 (2017) (hybrid rights claim failed because no substantial burden to religious exercise); *Parker v. Hurley*, 514 F.3d 87, 98-99 (1st Cir. 2008) (same); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 U.S. Dist. LEXIS 4669, at *64-66 (W.D. Tex. Mar. 17, 2004) (same).

The freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). It is not enough that a legislative restriction burdens one's religious convictions; it must *substantially* burden them. *Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997). To constitute a "substantial burden," governmental action must "significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual [religious] beliefs; must meaningfully curtail a

[person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." *Id.*

Generally, no substantial burden is imposed if the regulation merely makes the practice of a religious belief more expensive. *See Braunfeld*, 366 U.S. at 605 (holding that a law that "operates so as to make the practice of . . . religious beliefs more expensive" did not sufficiently burden plaintiffs under the Free Exercise Clause); *Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983) (concluding that "legislation otherwise legitimate does not violate the Free Exercise Clause merely because financial detriment results"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) (acknowledging that the economic reality of the marketplace does not constitute a substantial burden); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (requiring more expensive building guidelines did not impose a substantial burden on a church); *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172 (4th Cir. 1995) (placing economic burden of purchasing speech services for a student attending a private school did not impose a substantial burden on plaintiffs).

Likewise, inconvenience or incidental logistical burdens do not constitute a substantial burden. *See Aiello v. West*, 207 F. Supp. 3d 886, 902 (W.D. Wis. 2016)

("A mere preference or convenience is not the standard for assessing the existence of a substantial burden on religious beliefs."); *Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1042 (D. Minn. 2016) ("Although the ban may impose monetary and logistical burdens on the Church, it does not prevent the Church's members from worshipping or engaging in activities central to their religious beliefs.").

The District Court correctly held that Plaintiffs failed to show their religious beliefs were substantially burdened by the Ordinance. The Ordinance applies only to the distribution of particular types of foods – namely, potentially hazardous foods. (App. 82 R. Doc. 35, at 2). The Ordinance adopted the FDA's definition of potentially hazardous foods. (App. 81 R. Doc. 35, at 1). The Ordinance lists which foods are considered potentially hazardous, including "pastries filled with cream or synthetic cream, custards, and similar products, and salads or sandwiches containing MEAT, POULTRY, EGGS, or FISH." (App. 82 R. Doc. 35, at 2). The Ordinance does not prohibit the distribution of non-potentially hazardous foods or whole fruit. (App. 83 R. Doc. 35, at 3). The Ordinance is only triggered if a person wishes to distribute potentially hazardous foods to the public. (App. 83 R. Doc. 35, at 3).

It is undisputed that prohibiting Plaintiffs' distribution of potentially hazardous food without a permit does not significantly constrain any central tenant of Plaintiffs' religious beliefs, nor does it meaningfully curtail Plaintiffs' ability to express adherence to their faith, or deny them reasonable opportunities to engage in

those activities that are fundamental to their faith. It is not a central tenet of Plaintiffs' religious beliefs that they distribute potentially hazardous food to the homeless. (App. 85 R. Doc. 35, at 5). Plaintiffs admit that their religious beliefs do not mandate the distribution of any particular kind of food, whether bologna sandwiches or otherwise. (App. 85 R. Doc. 35, at 5). Plaintiffs could express adherence to their faith by distributing pre-packaged food items or whole fruit, which would not be subject to a permit. (App. 85 R. Doc. 35, at 5). Therefore, the Ordinance does not significantly constrain any central tenant of Plaintiffs' religious beliefs.

Prohibiting the distribution of potentially hazardous foods without a permit does not meaningfully curtail Plaintiffs' ability to express their faith. When pressed on this issue, Plaintiff Redlich acknowledged that adherence to his religious beliefs does not necessarily require the distribution of food to the homeless. (App. 85 R. Doc. 35, at 5). Instead, he testified that food is merely one of several methods he uses to minister to the homeless. (App. 85 R. Doc. 35, at 5). Other methods have included distributing religious tracts, and distributing blankets, coats, hats, and gloves in the winter. (App. 85 R. Doc. 35, at 5). According to Plaintiffs, their religion does not require ministering to the homeless by distributing food, therefore, City's ordinance requiring a permit to distribute merely a sub-set of food – namely, potentially hazardous foods – does not substantially burden Plaintiffs' religious

beliefs. Because Plaintiffs can, and have, expressed adherence to their faith by ministering to the homeless with non-food items, City's permit requirement as to potentially hazardous foods is not a substantial burden to Plaintiffs' religious beliefs.

Only when faced with summary judgment did Plaintiffs allege, for the first time, that their religion required them to distribute food, and in particular, "nutritious" food. (App. 631-32 R. Doc. 44-1, at 1-2). However, it is well-established in the Eighth Circuit that an affidavit filed in opposition to a summary judgment motion that directly contradicts earlier deposition testimony is insufficient to create a genuine issue of material fact. *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1362 (8th Cir. 1983); *see also Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 498 (8th Cir. 2008). The rationale for this rule is that "[i]f testimony under oath . . . can be abandoned many months later by the filing of an affidavit, probably no cases would be appropriate for summary judgment." *Popoalii*, 512 F.3d at 498. A party should not be allowed to create issues of credibility by contradicting his own earlier testimony. *Id.* Because Plaintiffs' contradictory affidavits are submitted merely to contradict prior testimony, the District Court ultimately rejected Plaintiffs' newly-found religious requirements, and so should this Court. (App. 920-23 R. Doc. 57, at 20-23).

Prohibiting the distribution of potentially hazardous foods without a permit does not deny Plaintiffs reasonable opportunities to minister to the homeless.

Plaintiffs are not denied reasonable opportunities to minister to the homeless because, as discussed above, Plaintiffs are free to distribute non-food items and non-potentially hazardous foods without triggering the Ordinance. Plaintiffs allege the Ordinance denies them reasonable opportunities to minister to the homeless because of fees associated with the permit. (App. Br. at 9-12). Notably, however, courts hold a regulation that merely makes the practice of a religious belief more expensive does *not* impose a substantial burden. *See Braunfeld*, 366 U.S. at 605 (holding that a law that "operates so as to make the practice of . . . religious beliefs more expensive" did not sufficiently burden plaintiffs under the Free Exercise Clause); *see also*, *Donovan*, 722 F.2d at 403 (concluding that "legislation otherwise legitimate does not violate the Free Exercise Clause merely because financial detriment results").

Additionally, Plaintiffs' argument as to expenses is undercut by Plaintiffs' employment and close association with New Life Evangelical Center ("NLEC"). Plaintiff Redlich is the Vice President of NLEC, which owns a building one block from where Plaintiffs were distributing bologna sandwiches on the day in question. (App. 85 R. Doc. 35, at 5). Plaintiff Ohnimus also works for NLEC. (App. 85 R. Doc. 35, at 5). Plaintiffs' job duties with NLEC include ministering to the homeless through homeless outreach, which includes the distribution of food to the homeless. (App. 86 R. Doc. 35, at 6). Plaintiffs typically perform such duties for NLEC on Monday, Wednesday, Thursday, Friday and Saturday evenings. (App. 86 R. Doc.

35, at 6). During the week, they usually work from 9 a.m. to 5 or 5:30 p.m. (App. 86 R. Doc. 35, at 6). On the day in question – a Wednesday – Plaintiffs were distributing bologna sandwiches to the homeless around 5 p.m., while they were working for NLEC. (App. 86 R. Doc. 35, at 6). In a sworn statement to a federal court in July 2005, NLEC estimated its assets and real estate value at over forty to fifty million dollars. (App. 86 R. Doc. 35, at 6). Accordingly, Plaintiffs cannot convincingly claim that a small fee of twenty-five dollars acts to deprive them of reasonable opportunities to minister to the homeless. Finally, Plaintiff Redlich has applied for and received a temporary food permit for events associated with NLEC two or three times since 2000. (App. 86 R. Doc. 35, at 6). There was no suggestion at that time the Ordinance was a substantial burden on Plaintiff Redlich's religious beliefs, and there is no substantial burden now.

Plaintiffs other complaints with respect to mandatory equipment, attending a training course, and the fixed location requirement, are similarly unconvincing. Plaintiffs lament the Ordinance requires them to obtain certain mandatory equipment, such as three food-grade washtubs, a 5-gallon or larger container of portable water, a handwashing facility, and an "overhead cover" or shelter to be placed over the food preparation area. Plaintiffs have failed to show any plausible reason why maintaining such equipment is un-doable, and as such complain merely of incidental logistical burdens which do not qualify as substantial burdens to their

religious exercise. *See Aiello v. West* and *Church v. City of St. Michael*, *supra*. Moreover, Plaintiffs' assertions that the required training course under the 2021 Amendment might be laborious is speculative, and speculative claims do not demonstrate a substantial burden to free exercise. *Desimone v. Bartow*, 355 F. App'x 44, 46 (7th Cir. 2009) (speculation does not constitute the sort of evidence necessary to establish a substantial burden). Finally, Plaintiffs protest that the Ordinance is "thoroughly incompatible with the way the [Plaintiffs] seek out homeless persons," but self-imposed burdens are not substantial under the free exercise analysis. *See Andon, LLC v. City of Newport News*, 813 F.3d 510, 515 (4th Cir. 2016) (explaining that burdens are not substantial if they are self-imposed); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 655 (10th Cir. 2006) (holding free exercise right does not permit the plaintiff to operate exactly as it pleases).

Because the Ordinance is not a substantial burden to Plaintiffs' sincerely held religious beliefs, Plaintiffs' rights under the free exercise clause – hybrid or not – are not triggered, and the District Court holding should be affirmed.

B. Even if Plaintiffs established a substantial burden to their religious beliefs, Plaintiffs claims fail to warrant heightened scrutiny under the hybrid rights doctrine.

1. Circuits are split over the validity of the hybrid rights doctrine, and are fractured as to what standard triggers its protection.

Circuits are split over the validity of the hybrid rights doctrine. *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 353 (4th Cir.), cert. denied, 132 S. Ct.

590 (2011). There are generally four approaches to the doctrine: (a) the "refusal-to-recognize" approach, (b) the "independently-viable-claim" approach, (c) the "colorable-claim" approach, and (d) the "open recognition" approach. *Comment: Addressing the Hybrid-Rights Exception: How the ColorablePlus Approach Can Revive the Free Exercise Clause*, 63 Case W. Res. 257, 265 (Fall 2012).

The Eighth Circuit falls into the "open recognition" approach. Unlike the Second, Third, and Sixth Circuits, the Eighth Circuit has recognized the hybrid rights doctrine. *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 759-60 (8th Cir. 2019). Additionally, the Eighth Circuit has held that when the doctrine applies, strict scrutiny review is appropriate. *Id.* But the Eighth Circuit has yet to discuss what standard triggers the doctrine's protection – i.e., whether a colorable claim standard, an independently-viable-claim standard, or something else entirely. In fact, to date, only four Eighth Circuit cases have substantively discussed the hybrid rights doctrine. *B.W.C. v. Williams*, 990 F.3d 614 (8th Cir. 2021); *Telescope Media Grp.*, 936 F.3d 740; *Olsen v. Mukasey*, 541 F.3d 827 (8th Cir. 2008); and *Cornerstone Bible Church v. Hastings*, 948 F.2d 464 (8th Cir. 1991).

In *Telescope Media Grp. v. Lucero* and *Cornerstone Bible Church v. Hastings*, this Court applied the hybrid rights doctrine, or instructed the lower court to consider it, after the Court found the plaintiffs had an independently viable First Amendment claim separate from the hybrid Free Exercise claim. 936 F.3d at 759

(finding independently viable free speech claim); 948 F.2d at 473 (8th Cir. 1991) (same). And in *B.W.C. v. Williams*, this Court refused to apply the hybrid rights doctrine where each of the plaintiff's claims failed on its own. 990 F.3d at 622. Taken together, Eighth Circuit precedent requires that at least one of the two hybrid claims be independently viable for the hybrid rights doctrine to apply. As the District Court noted, that is not the case here. (App. 941 R. Doc. 57, at 41).

Plaintiffs admit they cannot succeed on a standalone free exercise claim. (App. Br. at 21). And, as discussed below, they cannot show a violation of their free expression rights. *See* Point II. Thus, under the Eighth Circuit approach, they have failed to establish that the hybrid rights doctrine applies here. *See also, Wieland v. United States HHS*, No. 4:13-cv-01577-JCH, 2016 U.S. Dist. LEXIS 2165, at *5 n.2 (E.D. Mo. Jan. 8, 2016) ("Because the Court finds that Plaintiffs have also failed to state claims under the Due Process and Free Speech Clauses, the Court rejects their hybrid-rights theory."); *Boone v. Boozman*, 217 F. Supp. 2d 938, 955 (E.D. Ark. 2002) (plaintiff cannot proceed under a hybrid rights theory by combining her free exercise right with a constitutional right that is not implicated under the facts of the case).

Plaintiffs' claims fail similarly under other hybrid rights approaches. In contrast to the Eighth Circuit, the Second, Third, and Sixth Circuits refuse to recognize the hybrid rights doctrine because it is merely dicta, completely illogical,

and/or needs further direction from the Supreme Court. *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) (interpreting Smith hybrid-rights language as dicta); *Combs v. Homer-Ctr. Sch. Dist.*, 540 F.3d 231, 246-47 (3d Cir. 2008) (refusing to apply an undefined hybrid-rights doctrine without further Supreme Court direction); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (describing hybrid rights doctrine as "completely illogical" and declining to recognize it until Supreme Court expressly does so itself); *see also*, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 12.3.2.3 at 1215-16 (2d ed. 2002) (calling doctrine's contours "unclear"). Under this approach, Plaintiffs' hybrid rights claim would obviously fail as no such claim is recognized.

Along the same lines as the Eighth Circuit's approach, the DC Circuit applies the independently-viable-claim approach. *See Archdiocese of Wash.*, 437 U.S. App. D.C. 461, 897 F.3d 314. In *Archdiocese*, for example, a religious institution challenged an interstate transit authority's guideline prohibiting religious advertisements, alleging the guideline violated the Free Speech Clause and Free Exercise Clause. *Id.* at 318. Finding the plaintiff's free speech and free exercise claims unlikely to succeed, the court held their hybrid rights claim fared no better because "it requires independently viable free speech and free exercise claims, and 'in law as in mathematics zero plus zero equals zero.'" *Id.* at 331; *see also*, *Henderson v. Kennedy*, 346 U.S. App. D.C. 308, 253 F.3d 12, 19 (2001) (rejecting

argument that the combination of two untenable constitutional claims equals a tenable one under the hybrid rights doctrine). Under this approach, as with the Eighth Circuit's approach, Plaintiffs claim fails as they cannot establish any independently viable First Amendment claim.

Plaintiffs advocate that this Court adopt the colorable claim approach from the Tenth Circuit.[2] *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1297 (10th Cir. 2004) (the hybrid-rights claimant must show that the companion constitutional claim is "colorable."). In adopting the colorable claim approach, the Tenth Circuit cautioned that "colorable" is not synonymous with non-frivolous, as the "adoption of a 'non-frivolous' standard would open the floodgates for hybrid-rights claims." *Id.* at 1295. Instead, a "colorable" claim is where the plaintiff establishes a "fair probability, or a likelihood" of success on a companion claim. *Id.* Plaintiffs admit they cannot establish a standalone free exercise claim, (App. Br. at 21), and, as discussed below,

[2] Contrary to Plaintiffs' assertions, the Fifth and Ninth Circuits do not apply the colorable claim approach. Other than a footnote mentioning a "colorable claim" in a case where the Fifth Circuit refused to apply the hybrid rights doctrine, Plaintiffs fail to demonstrate the Fifth Circuit adopted the colorable claim approach. *See Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009). Moreover, the Ninth Circuit in *Parents for Privacy v. Barr*, recently found there is no binding Ninth Circuit authority deciding the issue of whether the hybrid rights exception exists and requires strict scrutiny. 949 F.3d 1210, 1237 (9th Cir. 2020) (noting that *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999) should not be given any weight for the suggestion the hybrid rights exception has been established in the Ninth Circuit).

they fail to establish a likelihood of success on their free expression claim, and thus, even under the approach for which they advocate, their hybrid rights claim fails.[3]

Irrespective of the approach applied, Plaintiffs hybrid rights claim fails as they have failed to establish an independently viable or colorable first amendment claim, and so, judgment for City should be affirmed on Plaintiffs' hybrid rights claim.

2. If this Court does not apply the hybrid rights analysis, the Ordinance is reviewed under the rational basis test, and the Ordinance passes rational basis review.

It is well-established that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. 520 at 531. Instead, neutral and generally applicable laws are entitled to rational basis review. *Smith*, 494 U.S. at 879.

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[3] As for the remaining Circuits, the First Circuit applies an "open recognition" approach wherein the court gives the two rights at issue interdependent consideration in that the "two sets of interests inform one another." *Parker*, 514 F.3d at 98-99. Noting the doctrine's circuit split and controversy, the Fourth Circuit has not adopted an approach. *Workman*, 419 F. App'x at 353. The Seventh Circuit has aligned itself with the Ninth Circuit in largely avoiding the issue, but has noted "a plaintiff does not allege a hybrid rights claim entitled to strict scrutiny analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another alleged fundamental right." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 764-65 (7th Cir. 2003). The Eleventh Circuit, in attempts "to do the best [they] can with the hybrid rights doctrine," acknowledges the doctrine, but limits the hybrid rights analysis to the hybrid claims specifically recognized in *Smith*. *Henderson v. McMurray*, 987 F.3d 997, 1006 (11th Cir. 2021).

The Ordinance is neutral and generally applicable. If the objective of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. *Lukumi*, 508 U.S. at 533. Here, the objective of the Ordinance is to protect public health and safety by preventing foodborne illness, and so the Ordinance is neutral. (App. 82 R. Doc. 35, at 2). On appeal, Plaintiffs do not argue otherwise.

The law of general applicability is a principle which emphasizes that "government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. The Ordinance is generally applicable in that it applies to all people who distribute potentially hazardous foods to the public. (App. 83 R. Doc. 35, at 3). Plaintiffs argue the law is not generally applicable because the Ordinance does not apply to those distributing potentially hazardous foods at potlucks, BBQs, or tailgating events. And while Plaintiffs are correct that the Ordinance does not apply to potlucks, BBQs, house dinner parties, and/or tailgating parties, if those events are shared amongst family, friends, and acquaintances in private spaces, the Ordinance would apply if such events were open to the public. (App. 83 R. Doc. 35, at 3). Even still, Plaintiffs cannot and will not be able to produce evidence that the Ordinance burdens conduct motivated by religious belief in a selective manner. Because the Ordinance is neutral and generally applicable, the Ordinance requires rational basis review.

Under the rational basis test, courts will uphold a governmental policy or law if it "bears a rational relation to a legitimate government objective." *Barket, Levy & Fine v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 240 (8th Cir. 1994) (*citing Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 461-62 (1988)). Under rational basis review, the Ordinance carries a "strong presumption of validity" and the City is given "wide latitude" to enact social and economic policies if there is any reasonably conceivable state of facts that could provide a rational basis for the enactment's classifications. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Fcc v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). Legislative choices are not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. *Id.*

City's Ordinance exists for the benefit of public health and safety by preventing foodborne illness caused by the distribution of potentially hazardous foods, and the ordinance is rationally related to that objective. The purpose of the Ordinance is to promote public health and safety by protecting the public from foodborne illness. (App. 82 R. Doc. 35, at 2). As outlined by the FDA, potentially hazardous foods are those foods that "require time/temperature control for safety to

limit pathogenic microorganism growth or toxin formation." (App. 82 R. Doc. 35, at 2). Food contaminated by pathogenic microorganism growth and toxin formation causes foodborne illness. (App. 82 R. Doc. 35, at 2). In order to prevent foodborne illness, the Ordinance requires those who are distributing potentially hazardous foods, whether or not for cost, to obtain a temporary food permit so that one of City's health officials may inspect the food and its handling on site to ensure the food is safe for public consumption. (App. 83 R. Doc. 35, at 3). Because the Ordinance is rationally related to the legitimate government objective of public health and safety, the Ordinance survives rational basis review, and judgment should be entered for City on Plaintiffs' Free Exercise claim.

This case is similar to *Gallagher v. City of Clayton*, 699 F.3d 1013 (8th Cir. 2012). In that case, the city passed an ordinance prohibiting outdoor smoking on certain public property for the benefit of public health and safety. *Id.* at 1015. The plaintiff brought claims against the city, claiming, amongst other things, violations to his First Amendment rights. *Id.* The Court reviewed the case using the rational basis standard. *Id.* at 1019. The Court upheld the ordinance because the city could reasonably believe that there is "no risk-free level of exposure to second-hand smoke," and thus, the ordinance was rationally related to the city's legitimate objective of public health and safety. *Id.* at 1019-20. Here, the legitimate objective of City's Ordinance is public health and safety in the form of preventing foodborne

illness. (App. 82 R. Doc. 35, at 2). As the Court found in *Gallagher*, public health and safety is a legitimate government interest. Moreover, like in *Gallagher*, the Ordinance is rationally related to the legitimate government interest in that the regulation of potentially hazardous foods protects the public health and safety by ensuring said foods are properly prepared and handled for public consumption. (App. 81-82 R. Doc. 35, at 1-2). Hence, just like in *Gallagher*, this Court should find that the Ordinance satisfies rational basis review.

3. Even if this Court applies strict scrutiny under the hybrid rights doctrine, the Ordinance passes strict scrutiny review.

   i. The objective of the Ordinance is to prevent foodborne illness, and preventing foodborne illness is a compelling state interest.

The purpose of the Ordinance is to promote public health and safety by preventing foodborne illness. (App. 82 R. Doc. 35, at 2). The Ordinance adopted the 2009 National Food Code, which "establishes practical, science-based guidance and enforceable provisions for mitigating risk factors known to cause foodborne illness." (App. 82 R. Doc. 35, at 2). The Amendment to the Ordinance was designed to continue to help assure public health and prevent foodborne illness. (App. 84 R. Doc. 35, at 4). Jeanine Arrighi ("Arrighi"), Health Services Manager II, who oversees inspectors tasked with enforcing the Ordinance, confirms the Ordinance's purpose of preventing foodborne illness. (App. 82 R. Doc. 35, at 2). Hence, the purpose of the Ordinance is to promote public health and safety by preventing foodborne illness.

Public health is a compelling state interest. Public health and well-being have been recognized as compelling governmental interests in a variety of contexts. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.,* 452 U.S. 264, 300 (1981) (holding that "protection of the health and safety of the public is a paramount governmental interest" which justifies summary administrative action in the prevention of mining disasters); *Rubin v. Coors Brewing Co.,* 115 S. Ct. 1585, 1591 (1995) (stating that the government has a significant interest in protecting the health of its citizens by preventing brewers from competing on the basis of alcohol strength, which might lead to increased alcoholism); *Prince v. Massachusetts*, 321 U.S. 158, 165-67, (1944) (sustaining child labor laws against a free exercise challenge based on the government's paramount interest in protecting the health and welfare of children).

The prevention of disease and illness, as a subset to public health, is a compelling state interest. In 1905, the Supreme Court held that a mass vaccination program withstood constitutional liberty challenges because it served the government's interest in "the public health and the public safety." *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). Most recently, the threat of the COVID-19 pandemic has demonstrated why public health, and specifically the prevention of disease and illness, is a compelling state interest. *See S. Bay United Pentecostal Church v. Newsom*, No. 20-55533, 2020 U.S. App. LEXIS 16464, at *2 (9th Cir.

May 22, 2020) (denying preliminary injunction to appellants who fought California's stay-at-home order on religious grounds because the spread of disease and illness is a compelling interest); *see also*, *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (holding state had compelling interest to stave off disease and illness). As the above cases demonstrate, the public's health, and specifically the prevention of disease and illness, are compelling state interests.

The prevention of foodborne illness is a compelling state interest. *See e.g.*, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, No. 15-60185-CIV, 2019 WL 10060265, at *8 (S.D. Fla. Aug. 16, 2019) (ordinance restricting food sharing as a social service served significant government interests including unsafe food service and unsanitary conditions); *American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18, 23 (D.C. Cir. 2014) ("the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak" is a substantial government interest motivating mandated disclosure of country-of-origin information about meat products); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 538 (S.D.N.Y. 2005) (City had a substantial government interest in ensuring the health of its food supply and of customers of food service establishments).

City's compelling interest to prevent foodborne illness is not speculative as the distribution of potentially hazardous foods has resulted in illness amongst the homeless in the City and beyond. As far back as 2012, City police officers have

been aware of illegally distributed food leading to illness among the City's homeless. (App. 86-7 R. Doc. 35, at 7-8). Specifically, back in 2012 Captain Kegel remarked that he was concerned about illegally distributed food at Olive and 13th Street, less than a block from where Plaintiffs were distributing food to the homeless in 2018, because said distributed foods resulted in several persons becoming ill. (App. 86-87 R. Doc. 35, at 6-7). Moreover, Police Officer Stephen Ogunjobi estimates that since he was transferred to the Downtown Bike Unit in 2017 he has witnessed and assisted multiple homeless persons whom he suspected suffered from a food-related illness. (App. 87 R. Doc. 35, at 7). Moreover, Matt Haslam, an Epidemiologist with the City's Health Department, cites multiple examples of donated food contributing to foodborne illness outbreaks amongst the homeless nationally. (App. 87 R. Doc. 35, at 7). Specifically, Haslam found that from 2012-2018, there were foodborne illness outbreaks amongst the homeless in Colorado, Utah, Ohio, California, and North Carolina, the origin of which was donated food. (App. 87 R. Doc. 35, at 7). Importantly, Haslam notes that of the jurisdictions that suffered from foodborne illness outbreaks, the majority of them did not require temporary food permits for charitable events. (App. 87 R. Doc. 35, at 7). Moreover, Haslam's research shows that in 2018 alone 5,893 people were hospitalized from foodborne illness, and 120 people died from foodborne illness. (App. 87 R. Doc. 35, at 7). Notably, Plaintiffs acknowledge that the homeless are entitled to safe and healthy food. (App. 81 R.

Doc. 35, at 1). Based on the above, it is not speculative that City needs to regulate the distribution of potentially hazardous food to prevent foodborne illness amongst all its citizens, but especially for its vulnerable homeless population. Thus, the Ordinance addresses a non-speculative compelling state interest of preventing foodborne illness.

Plaintiffs' attempts to downplay City's compelling interest are unavailing. In attempts to argue the Ordinance does not promote a compelling government interest, Plaintiffs mis-characterize the press release of Jimmie Edwards. Edwards, Director of Public Safety at the time, issued a press release shortly after Plaintiffs received municipal citations in this matter. (App. 80 R. Doc. 34-1). The context of Edwards' press release makes clear that his comment about the Ordinance was specific to issuing citations – or the criminal enforcement – of violating the Ordinance not being a priority, as compared to the enforcement of violent crime in the City. (App. 80 R. Doc. 34-1). In his statement, Edwards emphasized the importance of educating those who violate the Ordinance, and bringing said individuals into compliance with the Ordinance. (App. 80 R. Doc. 34-1). Arrighi echoes Edwards by emphasizing her inspectors, who appear at events and patrol areas where food is often distributed, are concerned with educating violators and bringing them into compliance, not criminal enforcement. (App. 84-85 R. Doc. 35, at 4-5). Hence, try as Plaintiffs might to

contort his words, Edwards' statement does not negate City's compelling interest in preventing foodborne illnesses.

Similarly, Plaintiffs arguments with respect to prevalence and their lack of prosecution are fruitless. Plaintiffs allege that, by their calculations, only 0.01% of the United States population are hospitalized as a result of "enteric disease," and therefore, City's interest in preventing foodborne illness is not compelling. (App. Br. at 34). Notably, Plaintiffs fail to support their contention with any legal authority requiring a percentage-per-population to show a compelling state interest. To the contrary, in *Workman*, the Fourth Circuit held there was a compelling state interest even though the disease at issue was not very prevalent. 419 F. App'x at 353. Nor is Plaintiffs' lack of prosecution indicative of a lack of compelling interest, as there may be many reasons why City attorneys opted not to prosecute Plaintiffs, including City's aim to emphasize compliance, as opposed to criminal enforcement, of the Ordinance. (App. 80 R. Doc. 34-1; App. 84-85 R. Doc. 35, at 4-5).

Thus, despite Plaintiffs' arguments to the contrary, preventing foodborne illness is a compelling state interest.

ii. The Ordinance is narrowly tailored to prevent foodborne illness.

Narrow tailoring does not demand perfect tailoring. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015). What it does require is a close fit between the means and the end to be achieved. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Stated

another way, this narrow tailoring requirement means that the regulation must "promote[] a substantial government interest that would be achieved less effectively absent the regulation," *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and also that "the factual situation demonstrates a real need for the government to act to protect its interests." *Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 595 (8th Cir. 1991). In other words, there must be a genuine nexus between the regulation and the interest it seeks to serve. *See United States v. Grace*, 461 U.S. 171, 182-83 (1983); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

The objective of preventing foodborne illness would be achieved less effectively absent the Ordinance. In line with its objective to prevent foodborne illness, the Ordinance prohibits the distribution of potentially hazardous foods – not all foods – to the public without a temporary food permit. (App. 82 R. Doc. 35, at 8). When a person applies for a temporary food permit to distribute potentially hazardous foods, he is required to list the place and time of the event for which the permit is sought, so that a Health Department inspector may appear at the event and inspect the food to be distributed to ensure the food has been prepared and handled correctly. (App. 84 R. Doc. 35, at 4). In so doing, the health inspector is able to ensure compliance with City's health code, which is based on the FDA's National Food Code. (App. 81 R. Doc. 35, at 1). Notably, as stated above, Haslam's research

shows that in a majority of jurisdictions which saw the largest outbreaks of foodborne illness amongst its homeless, there was no temporary food permit process like the one established by the Ordinance. (App. 87 R. Doc. 35, at 7). These facts demonstrate that without a regulation like City's Ordinance, the objective of preventing foodborne illness is achieved less.

The factual situation of City's homeless falling ill to foodborne illness demonstrates a real need for City's Ordinance. As mentioned above, as far as back as 2012, the City has record of illegally distributed food causing illness amongst its homeless. (UMF #45). Since 2017, Officer Ogunjobi has witnessed and assisted multiple homeless persons who he suspects have become ill from consuming unsafe food. (App. 86-87 R. Doc. 35, at 7-8). Moreover, as mentioned above, Haslam's research shows that in 2018 alone 5,893 people were hospitalized from foodborne illness, and 120 people died from foodborne illness. (App. 87 R. Doc. 35, at 7). The Center for Disease Control ("CDC") estimates that one in six people get sick from contaminated food each year. (App. 87 R. Doc. 35, at 7). Hence, the factual situation of City's homeless falling ill to foodborne illness, coupled with national statistics about foodborne illness, demonstrate a real need for City's Ordinance.

City's Ordinance adopted guidelines and best practices advised by the FDA's National Food Code, and therefore, is narrowly tailored to preventing foodborne illness. Plaintiffs lament the requirements of the Ordinance because it "prohibits

food prepared in a home, and it states that any person distributing food must have present three food-grade washtubs/containers and a 5-gallon or larger container of potable water, a waste receptacle, a handwashing facility, and hair coverings." Said requirements are all guidelines advised by the National Food Code. Chapter Three, Subsection 202.11(B) of the Food Code states that "[f]ood prepared in a private home may not be used or offered for human consumption in a food establishment." (App. 82 R. Doc. 35, at 2). The Code defines "food establishment" as "an operation that…provides food for human consumption…, and relinquishes possession of food to a consumer directly"… "regardless of whether there is a charge for the food." (App. 82 R. Doc. 35, at 2). The requirement for three washtubs is specific to situations where utensils are being used, and complies with the Food Code's Fourth Chapter, Section Six, which advises the need to clean, rinse, and sanitize utensils. (App. 82 R. Doc. 35, at 2). Chapter Five, Section Five, of the Food Code describes the requirement for waste receptacles. (App. 83 R. Doc. 35, at 3). The requirement of a handwashing facility is outlined in Chapters Two and Five of the Food Code. (App. 83 R. Doc. 35, at 3). And Chapter Two, Section Four, of the Food Code speaks to the importance of hair restraints to keep hair from contacting food. (App. 83 R. Doc. 35, at 3). Each requirement in the Ordinance has its origin in the National Food Code, and therefore, is narrowly tailored to the FDA's science-based guidance of preventing foodborne illness.

As the above demonstrates, the Ordinance satisfies strict scrutiny review in that the compelling objective of the Ordinance is the prevention of foodborne illness, and the Ordinance is narrowly tailored to that end.

II. The District Court correctly dismissed Plaintiffs' freedom of expression claim because Plaintiffs' actions of distributing potentially hazardous food to the homeless is not inherently expressive conduct, and even if so, the Ordinance passes intermediate scrutiny under *O'Brien*.

A. Plaintiffs' actions of distributing potentially hazardous food to the homeless is not inherently expressive conduct warranting First Amendment protection.

The First Amendment guarantees all people the right to engage not only in 'pure speech,' but 'expressive conduct' as well. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). In *O'Brien*, the Supreme Court recognized that some forms of "symbolic speech" were deserving of First Amendment protection. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006) (citing *O'Brien*, 391 U.S. at 376). But the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* Instead, the Supreme Court has extended First Amendment protection only to conduct that is inherently expressive. *Id.* Examples of inherently expressive conduct that warrant constitutional scrutiny when burdened by legislation include the burning of the American flag, *Texas v. Johnson*, 491 U.S. 397, 406 (1989), the burning of draft cards, *O'Brien*, 391 U.S. at 376, and

marching in a parade, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568-70 (1995).

The Supreme Court's holding in *Rumsfeld* is instructive as to what constitutes inherently expressive conduct. In *Rumsfeld*, the Forum for Academic and Institutional Rights, Inc. (FAIR), which is an association of law schools and law faculties whose members have policies opposing discrimination based on, *inter alia,* sexual orientation, wanted to restrict military recruiting on their campuses because they objected to the Government's policy on homosexuals in the military. *Rumsfeld*, 547 U.S. at 51-52. However, the Solomon Amendment--which provided that educational institutions denying military recruiters access equal to that provided other recruiters will lose certain federal funds--forced members of FAIR to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive those funds. *Id.* at 53. Members of FAIR filed suit against the government regarding the enforcement of the Solomon Amendment arguing, amongst other things, that it violated their rights to free expression under the First Amendment. *Id.* The Supreme Court held that the conduct regulated by the Solomon Amendment – namely, the inclusion of military recruiters – was not inherently expressive because an observer "who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the

military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* at 66. The Court held that the FAIR members' exclusion of military recruiters was not inherently expressive conduct warranting First Amendment protection because "the expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it." *Id.*

Here, Plaintiffs' conduct of distributing potentially hazardous food to the homeless is not an inherently expressive act warranting First Amendment protection because the expressive component of Plaintiffs' distribution of food to the homeless – namely, that God cares for and provides for his children – is not created by the conduct of distributing food itself but by the speech that accompanies it. Here, Plaintiffs argue that their distribution of food to the homeless is a religious expression that God cares for and provides for his children. (App. Br. at 27). However, under the same reasoning used by the Supreme Court in *Rumsfeld*, the actions alone of distributing food to the homeless could mean a myriad of things separate and apart from God caring for and providing for his children. It is not evident that by distributing food to the homeless, and more specifically, that sharing a specific kind of food with the homeless – namely, bologna sandwiches – expresses that God cares for and provides for his children, as Plaintiffs describe. Plaintiffs admit as much. When asked how a passer-byer would know Plaintiffs are distributing food to the homeless because of their religious beliefs, Plaintiff Ohnimus

responded "they wouldn't." (App. 86 R. Doc. 35, at 6). Surely, there are non-religious reasons why someone might distribute food to the homeless – concern for one's fellow citizen, irrespective of religion, being the most obvious. But also others including, the desire to stop food waste, drawing awareness to the lack of government assistance to the homeless, assisting those in poverty, etc. Because Plaintiffs' expression of God's care and provision is only created by the speech that accompanies their distribution of food to the homeless, their conduct is not inherently expressive speech warranting First Amendment protection.

In their brief, Plaintiffs point to *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018), for support that their activity of distributing food to the homeless is inherently expressive activity protected by the First Amendment. Notably, an Eleventh Circuit case is not binding on this Court, so it need not be considered. However, even if the Court considers it, *Fort Lauderdale* is distinguishable from this case. First, in *Fort Lauderdale*, the Eleventh Circuit applied its own, much more lenient, standard when determining whether or not conduct is inherently expressive activity – namely, "whether the reasonable person would interpret [the activity] as *some* sort of message…" *Id.* at 1240. Such a standard has not been adopted by the Supreme Court or by district courts within the Eighth Circuit. *See Rumsfeld*, 547 U.S. at 66; *see also*, *Wieland*, No. 4:13-cv-01577-JCH, 2016 U.S. Dist. LEXIS 2165, at *19-20 (whether conduct is inherently

expressive the Court must ask "whether an intent to convey a particularized message is present, and whether the likelihood is great that the message will be understood by those who view it."); *Ark. Times Lp v. Waldrip*, 362 F. Supp. 3d 617, 624 (E.D. Ark. 2019) (applying the *Rumsfeld* standard). Second, the plaintiffs in *Fort Lauderdale* set up tables and banners and distributed literature at its events. *Fort Lauderdale,* 901 F.3d at 1242. Here, Plaintiffs did not set up banners or distribute literature. (App. 86 R. Doc. 35, at 6). Third, in *Fort Lauderdale*, the plaintiffs and the homeless partook in a meal together at the same time. *Fort Lauderdale*, 901 F.3d at 1242. This fact led the Eleventh Circuit to consider the history of sharing meals together and its expressive significance; the Court's examples included Jesus sharing meals with tax collectors and this country's Thanksgiving traditions. *Id.* at 1243. Here, however, unlike the plaintiffs in *Fort Lauderdale*, Plaintiffs did not share a meal with the homeless, but instead distributed food and left the area. (App. 86 R. Doc. 35, at 6). Based on these dissimilarities, *Fort Lauderdale* is not instructive here.

B. Even if this Court finds that Plaintiffs' actions warrant First Amendment protection, City's Ordinance satisfies intermediate scrutiny under *O'Brien*.

When "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. A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental

interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 376-77.

The Ordinance passes the *O'Brien* test. First, Plaintiffs have not argued that City does not have the power to regulate health and safety standards within the City of St. Louis. Second, as shown above, the Ordinance furthers an important and substantial government interest of preventing foodborne illness. (App. 82 R. Doc. 35, at 2). Third, the government interest of preventing foodborne illness is unrelated to the suppression of free expression. (App. 83 R. Doc. 35, at 3). Finally, the incidental restrictions of prohibiting the distribution of potentially hazardous food without a temporary food permit is essential to the furtherance of preventing foodborne illness, as seen above in City's strict scrutiny review discussion. Therefore, the Ordinance satisfies the *O'Brien* test, and does not infringe upon Plaintiffs' rights to free expression. *See e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 295 (2000) ("As we have said, so long as the regulation is unrelated to the suppression of expression, the government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."); *Hill v. Colorado*, 530 U.S. 703, 725–26 (2000) ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring

requirement even though it is not the least restrict or least intrusive means of serving the statutory goal."); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (rejecting argument that a regulation banning sleeping in the park was unnecessary because there are less speech-restrictive alternatives that could satisfy the government interest in preserving park lands).

This case is similar to *Davis v. Norman*, 555 F.2d 189 (8th Cir. 1977). In that case, the plaintiff, who lost his son to a high speed police chase and displayed the wrecked truck wherein his son died in his front yard as a symbolic protest against police abuse of authority, argued that a city ordinance prohibiting the display of a wrecked truck on his front lawn violated his First Amendment rights to free speech. *Davis*, 555 F.2d at 190. The Court, utilizing the *O'Brien* test, held that the ordinance served the basic purpose of protecting the community from the health and safety hazards created by abandoned, wrecked and inoperable vehicles, the effectuation of this objective by requiring enclosed storage was within the constitutional power of the city and furthered important and substantial government interests, that the furthering of those interests was unrelated to the suppression of free expression, that the governmental interest and operation of the ordinance were limited to the noncommunicative aspect of the plaintiff's conduct, and there was no less restrictive means to achieve the enunciated governmental interests than enclosed storage. *Id*. at 191. On that basis, the Court upheld the city ordinance as constitutional. Here,

similarly, City's Ordinance serves a basic purpose of protecting the community from the health and safety hazards of foodborne illness, the effectuation of this objective by requiring a temporary food permit when distributing potentially hazardous foods to ensure its safety is within City's constitutional power and furthers an important and substantial government interests, the ordinance is unrelated to the suppression of free expression, and there are no less restrictive means to regulate the distribution of potentially hazardous foods. (App. 81-82 R. Doc. 35, at 1-2). Thus, this Court should find as it did in *Davis*, that City's Ordinance satisfies the *O'Brien* test, and does not infringe upon Plaintiffs' freedom of expression.

CONCLUSION

The District Court correctly granted summary judgment on Plaintiffs' hybrid rights claim in that Plaintiffs failed to establish any substantial burden to their religious belief and failed to establish any underlying constitutional claim, and even if the hybrid rights doctrine is applied, the Ordinance passes strict scrutiny review. Moreover, the District Court correctly entered judgment for City on Plaintiffs' free expression claim as food sharing is not an inherently expressive activity, and, in any event, the Ordinance meets intermediate review under *O'Brien*.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I hereby certify that the text of the foregoing document contains 9,987 words of proportionally spaced text as determined by the automated word count of the Microsoft Word 2010 word processing system and has 14 point print size.

/s/ Abby Duncan
Associate City Counselor

VERIFICATION OF VIRUS-FREE ELECTRONIC FILE

I hereby certify that the electronic files presented to the Clerk of this Court containing a copy of the Appellee's brief has been scanned for viruses and is virus free.

/s/ Abby Duncan
Associate City Counselor

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 11th day of March, 2021, a copy of the foregoing brief was served on counsel of record for Cooper by means of the Court's electronic filing and service system.

/s/ Abby Duncan
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