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, MISSOURI,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI,
No. 4:19-cv-00019 (NAB)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INTRODUCTION

The question in this case is whether the First Amendment to the U.S. Constitution allows the Appellee, City of St. Louis ("the City"), to require the Appellants, Pastor Ray Redlich and his assistant, Chris Ohnimus, to comply with expensive, onerous regulations before they may engage in the expressive, religious act of seeking out homeless people on the City's streets and sidewalks and providing them food prepared at church kitchens certified by health authorities.

The District Court granted summary judgment in favor of the City because it concluded (1) that the City's application of its regulations to the Appellant's expressive conduct survived intermediate scrutiny, and (2) that the "hybrid rights"/strict scrutiny analysis introduced by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), is only triggered if Pastor Ray and Chris could first establish a *violation* of a constitutional right other than the free exercise of religion.

Although an appeal from a grant of summary judgment obliges this Court to consider the facts (and all permissible inferences) in the light most favorable to the Appellants, the City's brief urged the Court to disregard many aspects of the record that support the Appellants' claims. The Court should reject the City's deeply flawed representation of the record and it should reverse the District Court's judgment.

ARGUMENT

I. This Court must view the facts of this case in the light most favorable to the Appellants.

A district court considering a motion for summary judgment is obligated to accept the version of the facts in the record that is most favorable to the non-moving party; if there is any question about the veracity of a witness's testimony in regard to disputed material facts, that is an issue that must be addressed at trial. *Tolan v. Cotton*, 572 U.S. 650 (2014). This Court reviews a grant of summary judgment *de novo*, applying the same standard that should have been applied by the District Court. *Doe v. Hagar*, 765 F.3d 855, 860 (8th Cir. 2014).

Because the District Court resolved this case by granting summary judgment in favor of the City, this Court's task should be limited to viewing the facts in the light most favorable to Pastor Ray and Chris, interpreting the relevant legal provisions, and applying the appropriate standard of scrutiny. The City's brief, however, complicated the Court's task by disputing even the most basic facts that the Appellants have shown the record to support. As this section will show, the Court must reject the City's portrayal of the facts of this case.

A. The District Court did not purport to question or disregard the sworn statements Redlich offered.

The City's brief disregarded the Appellants' own explanation of what their religious beliefs require when it comes to sharing food with the homeless, arguing

instead that the Appellants' religious beliefs do not require them to share food with the homeless at all. Resp. Br., at 3, 11-12. The City went so far as to claim that the District Court "rejected" Pastor Ray's explanation of what his faith requires. Resp. Br., at 12. These assertions are both incorrect. Indeed, contrary to the City's claim, the District Court *overruled* the City's objection to Pastor Ray's affidavits. JA 910; R.Doc. 57, at 10; AD 10. The District Court did state that any contradiction created by the affidavits might impact the "credibility" of Pastor Ray's sworn statements, and stated that it would give each affidavit "only the consideration it deserves under Fed. R. Civ. P. 56." JA 910; R.Doc. 57, at 10; AD 10. It does not appear that the District Court questioned the credibility of Pastor Ray's affidavit statements, but in any event federal judges considering motions for summary judgment are not permitted to weigh the credibility of the sworn testimony presented to them. *See Tolan* at 656-57. If the District Court's judgment was indeed influenced by its assessment of the "credibility" of the testimony before it, its grant of summary judgment would have been improper.

B. Courts considering summary judgment may only reject affidavit statements if they directly contradict the affiant's prior sworn testimony.

The City cites two cases for the proposition that if an affidavit filed in opposition to a summary judgment motion *directly contradicts* the affiant's prior sworn statements, federal courts may conclude that the affidavit does not create a

genuine issue of material fact. Resp. Br., at 12. Careful review of these cases reveals that the relevant holdings are extremely limited and not applicable to the instant case.

The first cited case, *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983), involved a dispute over whether a manager followed instructions the head of the plaintiff corporation had given him. At the Camfield's deposition he specifically testified that he believed that his instructions had been followed and he reiterated that he was not saying that the manager deposited a check before they were supposed to. *Id*. at 1363. In an affidavit submitted a year later, however, Camfield asserted that the check had been presented "contrary to instructions" and that if it had been presented "in accordance with the instructions," the legal issue in question would not have arisen. *Id*. This Court noted some disagreement among federal circuit courts as to whether such inconsistent statements would preclude a court from granting summary judgment, but concluded that the district court was permitted to find that the statement made in the affidavit was a "sham." *Id*. at 1365-66.

The second cited case, *Popoalii v. Correctional Medical Services*, 512 F.3d 488 (8th Cir. 2008), involved an expert witness who submitted two affidavits concerning medical care that, the plaintiff alleged, caused her to go blind. In the first affidavit the expert witness testified that he "had no specific criticisms of the

defendants' medical treatment," that two different conditions might have caused the plaintiff's blindness, that only one of those two conditions might have been responsive to treatment, and that the plaintiff's blindness could still have developed even if the defendants had provided treatment for the potentially-responsive condition. *Id*. at 498-99. The expert witness would not express an opinion as to which of the two possible conditions had actually caused the plaintiff's blindness. *Id*. at 499. In the second affidavit, however, the expert witness claimed that if the defendants had tested for and monitored the treatable condition, they could have likely prevented the plaintiff's blindness. *Id*. This Court held that the second affidavit was "actually inconsistent" with the expert's previous testimony and that the district court had not abused its discretion in striking the second affidavit.[1] *Id*.

C. Pastor Ray's affidavits explaining his faith did not contradict his deposition testimony.

In the instant case, there is no "direct contradiction" between the Appellants' deposition testimony and the statements made in Pastor Ray's affidavits. The City

[1] The expert witness could not suggest that treatment for the potentially-responsive condition likely would have prevented the plaintiff's blindness without concluding (contrary to the expert witness's initial statement) that the potentially-responsive condition was the actual cause of the plaintiff's blindness.

makes three specific representations to the Court concerning the Appellant's religious beliefs, which it claims Pastor Ray and Chris "admitted" in their depositions: (1) the Appellants' religion does not require them to distribute food to the homeless; (2) their religious beliefs do not mandate the distribution of any particular kind of food; and (3) they could express adherence to their faith by distributing only pre-packaged food items or whole fruit. Resp. Br., at ii, 3-4, 11-12. It is crucial for the Court to consider the *actual* questions the City's attorney posed at the deposition, the answers given at the deposition, and the way that Redlich's affidavits expound upon the answers given at the deposition.

As to the first of these representations, that the Appellants' religion does not require them to distribute food to the homeless, nothing in either of the Appellants' depositions supports the City's claim. When the City asked Pastor Ray about the basis for this lawsuit, he responded that the goal was to establish the rights of the people to feed the hungry and the homeless and he specifically affirmed that sharing food with the homeless was part of his religious beliefs. JA 110; R.Doc 35-3, at 16. When the City asked Chris a similar question, he responded that they filed their lawsuit so they could fulfill a "biblical mandate" to help the needy and because the City's ordinance was interfering with his religious beliefs. JA 199; R.Doc. 35-4, at 16. Pastor Ray also later stated that the City's ordinance restricted his religious exercise by preventing him from freely sharing food with the

homeless. JA 156-57; R.Doc. 35-3, at 62-63. Pastor Ray and Chris offered statements in their affidavits that confirmed the importance that their faith puts not only on feeding the hungry, but also on seeking out hungry persons and serving them nutritious food wherever they might be found. JA 261-63, 268; R.Doc. 36-1, at 1-3, 8; JA 271-2, 275; R.Doc. 36-2, at 1-2, 5; JA 631-32, 638; R.Doc. 44-1, at 1-2, 8.

As to the second and third of the City's assertions, the questions relevant to the City's assertions were posed during Pastor Ray's deposition, when the City asked whether he could communicate his intended religious message "by distributing food other than bologna sandwiches". JA 150-51; R.Doc. 35-3, at 56-57. Pastor Ray responded that he could, but he specifically added that he and Chris provide sandwiches because other forms of food might not provide "a balanced diet" and sandwiches are "more typical of the average person's food consumption." JA 151; R.Doc. 35-3, at 57. He also agreed that he could communicate God's love by providing different kinds of sandwiches, whole food, or prepackaged food. JA 151; R.Doc. 35-3, at 57. Posed with similar questions, Chris expressed confusion, but pointed out that they sometimes distribute peanut butter and jelly sandwiches, as well as bananas and oranges. JA 221; R.Doc. 35-4, at 38. Importantly, the City's questions *did not* ask whether Pastor Ray or Chris could fulfill their religious obligation to feed the homeless by *only* providing the

sort of chips, granola, or whole fruit for which (ignoring the Food Code's restrictions regarding Mobile Food Establishments) the City contends no permit is required. Indeed, when the City implied that such limited food options might suffice to fulfill the Appellants' religious obligations, they disputed the City's assertion and explained why it was incorrect. JA 614-615; R.Doc. 44, at 11-12. In sum, the relevant deposition testimony merely confirmed what Pastor Ray and Chris had always openly admitted—that they can use various kinds of foods to engage in their expressive religious act of sharing food with the homeless. But that confirmation does not in any way contradict Pastor Ray's deposition statement indicating the importance of providing a "balanced diet" or "a diet that would be more typical of the average person's food consumption. JA 151, R.Doc. 35-3, at 57. Pastor Ray's affidavit statements *reinforce* and *clarify* what the Appellants said in their depositions about their religious beliefs. Because there is no contradiction between the deposition testimony and the affidavits, there is no basis for rejecting or otherwise discounting the statements made in those affidavits.

D. The Court must disregard the City's other efforts to misconstrue the record.

Beyond the crucial matter of what the Appellants' faith requires when it comes to sharing food with the homeless, many other arguments the City presented in its brief rely heavily on their own version of the facts—even though the Appellants expressly disputed many of these facts and even though the District

Court *sustained* the Appellants' objections related to several of these facts. Specifically, the District Court rejected the claims the City made in paragraphs 47 and 48 of its Statement of Uncontroverted Material Facts because the affidavit relied upon failed to establish a foundation for the claims he was asserting. JA 908-09; R.Doc. 57, at 8-9; AD 8-9. The City did not argue that the District Court had erred in rejecting these claims, it simply *ignored* the fact that the District Court had rejected them. *See* Resp. Br., pp. 1, 27.

The City's brief also misconstrued the way that the Food Code's regulations impact the expressive religious practice at issue in this case. In their initial brief Pastor Ray and Chris explained why complying with the City's regulations would make it almost impossible to continue with their food-sharing ministry. App. Br. at 9-16. Pastor Ray's sworn statements explain that his faith requires him to communicate God's love not merely by occasionally giving junk food to people who are hungry, but that he must (1) seek out the hungry wherever they might be found, (2) try to meet their need for food immediately, and (3) try to do so in a way that provides balanced nutrition. The record shows that the Appellants can and do use various kinds of foods to meet the needs of the hungry people they encounter, but that much of the food they provide is prepared in church kitchens that have been certified by local health authorities and kept cold from the time Pastor Ray and Chris receive it until the time it is handed out to hungry people on the City's

streets and sidewalks. JA 123-27, 138, 151-52; R.Doc. 35-3, at 29-33, 44, 57-58; JA 194-96, 203, 221; R.Doc. 35-4, at 11-12, 20, 38; JA 262; R.Doc. 36-1, at 2; JA 272; R.Doc. 36-2, at 2.

The City's brief tried to minimize the impact of its Food Code in several ways. First, the City repeatedly insisted that the ordinance only applies to those who might distribute "potentially hazardous food" and that the Appellants would not need a permit to distribute "pre-packaged food items or whole fruit". *See* Resp. Br., at 2-3, 10-12, 21-24, 26, 28, 30. The Appellants have always disputed this contention. JA 610; R.Doc. 44, at 7. The City contends that Pastor Ray and Chris are subject to its regulations because their act of sharing food with the homeless renders them "food establishments" within the meaning of the Food Code. Although the Appellants believe those who drafted the Food Code only intended for it to be applied to persons engaged in the commercial production and distribution of food, the plain text of the Food Code is indeed broad enough to sweep in even ordinary citizens who share food with each other in noncommercial settings. But if, as the City insists, the Food Code applies to ordinary citizens like Pastor Ray and Chris it is absurd for the City to also argue that they only have to get permits from the City if they are distributing "potentially hazardous food." The record makes clear that the Appellants use a vehicle to carry food to the various locations within the City where they seek out hungry people to share food with. JA

111, 167; R.Doc. 35-3, at 17, 73; JA 205, 215; R.Doc. 35-4, at 22, 32. This means that Pastor Ray and Chris certainly fall within the definition of a "Mobile Food Establishment"—and the Food Code *expressly* requires those acting as a "Mobile Food Establishment" to obtain a permit even if they are sharing "only pre-packaged, ready-to-eat FOOD or drink and/or whole, uncut fruit and/or vegetables from an APPROVED source." JA 610; R.Doc. 44, at 7; JA 804, 818-23, 833. Rather than to try to explain why Pastor Ray and Chris might fall outside the definition of "Mobile Food Establishment" and its attendant requirements, the City simply ignores this part of the ordinance.

As for the other ways in which Pastor Ray and Chris have contended that the Food Code substantially burdens their expressive, religious act of sharing food with the homeless wherever they might be found, Pastor Ray and Chris clearly noted the importance to their faith of meeting the needs of hungry people immediately, specifying that "there is no adequate substitute for being able to act immediately to help relieve the hunger from which a homeless person may be suffering." JA 156; R.Doc. 35-3, at 62; JA 267-68; R.Doc. 36-1, at 7-8; JA 275; R.Doc. 36-2, at 5; JA 638; R.Doc. 44-1, at 8. The record also shows that Pastor Ray's religious practice would be severely burdened by the Food Code's regulations that prohibit him from immediately providing hungry persons with food he had close at hand and knew to be wholesome and nutritious. JA 538-39;

R.Doc. 37, at 21-22; JA 626-27; R.Doc. 44, at 23-24; JA 638; R.Doc. 44-1, at 8. Although the City contends (erroneously) that the Food Code would allow Pastor Ray to provide something other than "potentially hazardous foods," it cannot point to any part of the record that might contradict his statements about the burden on his religious practice if the Food Code does, in fact, require him to obtain a permit before providing food prepared in locally-certified church kitchens to meet the needs of hungry persons he encounters on the City's streets and sidewalks. The City also offered no serious rebuttal of the Appellants' statement that providing food to the hungry is a uniquely important religious and expressive act and that meeting homeless persons' other physical needs by providing non-food items is not an adequate substitute for providing them food in accordance with Jesus's commands. JA 268; R.Doc. 36-1, at 8; JA 275; R.Doc. 36-2, at 5; JA 520; R.Doc. 37, at 3; JA 575; R.Doc. 43, at 3; JA 612-13; R.Doc. 44, at 9-10; JA 631; R.Doc. 44-1, at 1.

The City attempted to dispute the Appellants' statements as to their inability to pay the fees that would accrue if the City forces them to obtain permits before they can share food with the homeless. Resp. Br. at 14. Although the City characterizes the burden as "a small fee of twenty-five dollars," the record shows that obtaining a Temporary Food Permit for each of the 200 to 250 days each year that Pastor Ray and Chris seek out and feed the homeless would result in a

minimum cost of $5,000 (for 200 days, if only one of them is required to obtain a permit) and a potential maximum cost of $12,500 (for 250 days, if both of them are required to obtain a permit). JA 634-45; R.Doc 44-1, at 4-5. These dollar figures do not include the additional $10 per day cost if the Appellants wish to avoid the two-day delay between submitting an application for a Temporary Food Permit. As the Appellants both testified, these costs do not just pose a minor difficulty for their ministry—the windfall the City is demanding for itself would make it impossible for them to continue their ministry. JA 130, 153-54; R.Doc. 35-3, at 36, 59-60; JA 266-67; R.Doc. 36-1, at 6-7; JA 274-75; R.Doc. 36-2, at 4-5.

The City similarly attempts to handwave away the testimony showing that when Pastor Ray and Chris are seeking out hungry people in the City they are physically unable to bring with them the washtubs, shelter, and handwashing facility that the Food Code would require. JA 167-68; R.Doc. 35-3, at 73-74; JA 274; R.Doc. 36-2, at 4; JA 534-35, 537; R.Doc. 37, at 17-18, 20. The City's brief says that the Appellants' claims in this regard are "unconvincing." Resp. Br. at 14. But the Appellants included their inability to provide these items in conjunction with their food sharing ministry as part of their Statement of Uncontroverted Material Facts, and the City did not present any evidence to the contrary. JA 597-98; R.Doc. 43, at 25-26. Consequently, this Court must accept that Pastor Ray and Chris are unable to comply with these regulatory requirements while they are

engaged in their expressive, religious act of seeking out and providing food to homeless persons on the City's streets and sidewalks.

The plain text of the Food Code shows that compliance with its regulations will not just make it more expensive for Pastor Ray and Chris to engage in this expressive act of worship—it would make it virtually impossible for them to fulfill all three of the crucial aspects set out above. Even if the Food Code allowed them to distribute prepackaged food or whole fruit without a permit, they could only do so from one set location or else they would be operating as a Mobile Food Establishment. Obtaining Temporary Food Permits would not only require them to remain in one set location, it would also require them to pay thousands of dollars in fees as well as to obtain and have on hand the equipment the regulations require. Obtaining a permit to operate as a Mobile Food Establishment would allow Pastor Ray and Chris to move about in search of hungry people to help, but it would also subject them to an entire range of additional costly and burdensome regulations. In sum, the City's application of the Food Code to the Appellants forces them to choose between engaging in this expressive form of religious worship in the manner dictated by their faith or violating the law. Because the Food Code does not allow Pastor Ray and Chris to (1) seek out the hungry wherever they might be found, (2) try to meet their need for food immediately, and (3) try to do so in a way

that provides balanced nutrition, the Food Code substantially burdens their freedom of expression and their free exercise of religion.

II. The record in this case calls into question the seriousness of the City's alleged interest in preventing the spread of foodborne illness.

In order to survive intermediate scrutiny, the City bears the burden of showing that the challenged regulations are supported by a substantial government interests and that they are no greater than is essential to the furtherance of the government's asserted interest. The City has asserted that the Food Code's regulations are generally intended to prevent the spread of foodborne illness; the Appellants have not disputed this claim. But the City offered no evidence regarding how foodborne illness affect the City and although it claimed that the Food Code "requires those who are distributing potentially hazardous foods, whether or not for cost, to obtain a temporary food permit," the record actually shows that the City does not usually enforce the Food Code against those not engaged in the commercial preparation and distribution of food. This lax approach to enforcement calls into question the seriousness of the City's alleged interest in applying the challenged regulations against the Appellants.

That the government has a compelling interest in limiting threats to the public health and safety does not lead inexorably to a conclusion that the government may justify *any* restriction on citizens' constitutional rights simply by claiming that the restriction is intended to protect some aspect of the public health

and safety. As this Court held in *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1099 (8th Cir. 2013), it is not enough for the government "to recite an interest that is significant in the abstract; there must be a genuine nexus between the regulation and the interest it seeks to serve." Furthermore, when the government alleges that certain restrictions are motivated by a particular interest but it declines to apply those restrictions in a number of circumstances where the asserted interest would seem to be implicated, courts may develop serious doubts about the seriousness of the government's asserted interest. *See Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011); *see also Johnson* at 1100.

The record in this case shows that, despite the City's stated concern about the risks of foodborne illness, it made only the most cursory effort to provide a factual basis explain how foodborne illness affects the City. Neither did the City offer any evidence to explain why, given its alleged concerns about foodborne illness, it does not require compliance with the Food Code where non-homeless persons are sharing meals with other non-homeless persons; the record shows that non-homeless persons may freely share food with "family, friends, and acquaintances" at potluck dinners, barbeques, house dinner parties, and/or tailgating parties. JA 83; R.Doc. 35, at 3; JA 93; R.Doc. 35-2, at 3. The record also reveals that the City's Director of Public Safety, Jimmie Edwards, stated that

"Issuing citations for this type of offense is not a priority for the City of St. Louis." JA 80; R.Doc. 34-1, at 1. Taken as a whole, the paucity of evidence concerning the impact of foodborne illness on the City, combined with the City's demonstrably lax approach to enforcing the Food Code against those who are *not* engaged in the commercial preparation or distribution of food,[2] strongly suggests that the City *is not* seriously concerned about the risk that foodborne illness might present if Good Samaritans like the Appellants are able to share food with the homeless without first obtaining permits from the City.

CONCLUSION

For the foregoing reasons, the District Court ought to be reversed.

Respectfully submitted,

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[2] The Appellants have made clear throughout this litigation that they do not question the City's interest in or commitment to applying the Food Code to those who *are* engaged in the commercial preparation or distribution of food. JA 14-15, 259, 536, 627, 679.

CERTIFICATE OF COMPLIANCE

The foregoing complies with the word limit established by Fed. R. App. P. 32 (a)(7)(B)(i) as it contains, exclusive of those provisions exempted by Fed. R. App. P. 32(f), 4,272 words. It also complies with the typeface and style requirements of Fed R. App. P. 32(a)(5) and 32(a)(6), because this document has been prepared using a proportionally spaced typeface in Microsoft Word 365 in Times New Roman, 14 point font.

Pursuant to 8th Cir. R. 28A(h)(3), Appellant states that electronic copies of this brief and addendum were "generated by printing to PDF from the original word processing file."

Pursuant to 8th Cir. R. 28A(h)(2), Appellants also state that the brief has been scanned for viruses the document is virus-free.

CERTIFICATE OF SERVICE

I, David E. Roland, do hereby certify that on April 4, 2022, I filed a copy of the foregoing electronically via this Court's CM/ECF, which has served electronic notice all counsel of record.

/s/ David E. Roland