UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60185-CIV-ZLOCH

FORT LAUDERDALE FOOD NOT BOMBS, et al.,

Plaintiffs,

vs.

CITY OF FORT LAUDERDALE,

Defendant.
_____/

O R D E R

THIS MATTER is before the Court upon the Mandate of the United States Court of Appeals for the Eleventh Circuit (DE 95), Plaintiffs' Motion For Summary Judgment (DE 41), and Defendant City Of Fort Lauderdale's Motion For Final Summary Judgment (DE 42), specifically as to the whether Defendant City of Fort Lauderdale's Ordinance and Park Rule violate the First Amendment and whether they are unconstitutionally vague.[1] The Court has carefully reviewed said Motions, as to these limited issues, as well as the Parties' Supplemental Briefs (DE Nos. 98, 104, & 105) on said Motions, the entire court file, and is otherwise fully advised in the premises.

Plaintiffs Fort Lauderdale Food Not Bombs, Nathan Pim, Jillian Pim, Haylee Becker, and William Toole (hereinafter "Plaintiffs")

[1] The Court's prior Order (DE 78) concluded that Plaintiffs' food sharing "is not expressive conduct, entitled to protection under the Free Speech Clause of the First Amendment." DE 78, p. 24-25. The Eleventh Circuit reversed this Court's previous grant of summary judgment in favor of Defendant City of Fort Lauderdale, and held that, in context, Plaintiffs' food sharing activity was protected by the First Amendment. See DE 95, p. 22. The Eleventh Circuit remanded for this Court to rule on the limited issues referenced above. Id.

bring suit pursuant to 42 U.S.C. § 1983 alleging that Defendant City of Fort Lauderdale, Florida (hereinafter "Defendant") violated their First and Fourteenth Amendment rights by enacting and enforcing Ordinance C-14-42 (hereinafter "the Ordinance") and Park Rule 2.2 (hereinafter "the Park Rule"). The Ordinance was repealed on November 7, 2017, but the Park Rule remains in place.

Plaintiffs claim that the Ordinance violated their First Amendment rights to freedom of speech and expressive association by barring them from participating in outdoor food sharing events in Stranahan Park without a permit and by banning such food sharing events entirely in other public areas. Plaintiffs also take issue with the Park Rule, which forbids the provision of food as a social service in City Parks without written permission. Plaintiffs assert two claims for relief: Count One alleges violation of both free speech and expressive association rights pursuant to the First Amendment, and Count Two alleges violation of Fourteenth Amendment due process on the grounds that both the Ordinance and the Park Rule are unconstitutionally vague. Plaintiffs request damages as well as declaratory and injunctive relief.

By the Court's prior Order (DE 78), the Court granted Defendant's Motion For Summary Judgement (DE 42) on the grounds that Plaintiffs' food sharing is not expressive conduct and that the Ordinance and the Park Rule are not vague. Plaintiffs appealed, and the Eleventh Circuit reversed this Court's Order, holding that "the nature" of Plaintiffs' food sharing, "combined with the factual context and environment in which it was

undertaken," indicates that it is "a form of protected expression". DE 95, p. 22, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1245 (11th Cir. 2018)(citation omitted). The Eleventh Circuit remanded the above-styled cause, charging this Court with determining if the Ordinance and the Park Rule are unconstitutional in light of the Eleventh Circuit's holding. Id. Pursuant to the Court's Order (DE 97), the Parties submitted supplemental briefs on the instant Motions (DE Nos. 41 & 42). See DE Nos. 98, 104, & 105. The Parties present their arguments in the instant Motions (DE Nos. 41 & 42) and the associated briefs. Defendant challenges Plaintiffs' standing, and also argues that the Ordinance and the Park Rule are lawful, content neutral time, place, or manner restrictions and that they are not unconstitutionally vague. Plaintiff contests these arguments.

I. Background

The Court incorporates by reference the facts presented in its prior Order (DE 78) and provides a short summary here.[2] Fort Lauderdale Food Not Bombs (hereinafter "Plaintiff FFNB") describes itself as an unincorporated association and claims the other named Plaintiffs as members. Plaintiff FFNB engages in political

[2] The facts in this section are taken from: Defendant's Concise Statement Of Undisputed Material Facts In Support Of Its Motion For Final Summary Judgment (DE 38), Plaintiffs' Statement Of Material Facts (DE 39), Defendant's Concise Statement Of Material Facts In Opposition To Plaintiffs' Statement Of Material Facts (DE 49), Plaintiffs' Statement Of Material Facts Submitted In Opposition To Defendant's Motion For Summary Judgment (DE 52), and Defendant's Reply to Plaintiffs' Statement Of Material Facts Submitted In Opposition to Defendant's Motion For Summary Judgment (DE 64), as well as from Exhibits accompanying these submissions and the Exhibit (DE 104-1) attached to Defendant's Supplemental Brief (DE 104).

demonstrations "to communicate its message that our society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide to all." DE 39, ¶ 1. Plaintiffs describe their food sharing as "an act of political solidarity rather than charity meant to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." Id. at ¶ 2.

Ordinance C-14-42 amended Defendant's existing Unified Land Development Regulation (hereinafter "ULDR") § 47-16.31, which regulates social service facilities. The Ordinance defined any outdoor location or site temporarily used to provide meals "without cost or at a very low cost" as an Outdoor Food Distribution Center (abbreviated "OFDC"), which it classified as a social service facility. DE 38-1, p. 4. Under the Ordinance, OFDCs could not be operated in some areas, such as Stranahan Park, without the permission of City officials and without satisfying certain requirements established by the Ordinance, such as sanitation standards. In other areas, including other public parks, OFDCs were barred entirely.

The Ordinance at issue became effective on November 1, 2014; however, pursuant to an order staying enforcement in the state court case, Abbott v. City of Fort Lauderdale, Case No. CACE-99-03583(05), the Ordinance was stayed from December 3, 2014 until January 1, 2015. Defendant voluntarily agreed to an additional stay, and until the Ordinance was repealed, it was not enforced.

On November 7, 2017, the City adopted Ordinance No. C-17-44, which amended the ULDR so as to eliminate the provisions relating to OFDCs and thereby repealed the Ordinance at issue. While Plaintiffs agree that Defendant has not technically enforced the Ordinance, in that no arrests were made after the stay was imposed, Plaintiffs add that Defendant continued to prosecute violations that took place prior to the stay.

Also at issue is the Park Rule, contained in Parks and Recreation - Rules and Regulations. Rule 2.2 appears in Section 2.0 Park Property and reads:

> Social Services. Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

DE 38-35, p. 2. Unlike the Ordinance, the Park Rule remains in place.

II. Standard of Review

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party seeking summary judgment

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file,

> together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)(quotation omitted). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." Hickson Corp. v. N. Crossarm Co., Inc., 357 F.3d 1256, 1259-60 (11th Cir. 2004)(citing Allen v. Tyson Foods, 121 F.3d 642, 646 (11th Cir. 1997))(further citations omitted). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991). "If the movant succeeds in demonstrating the absence of a material fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact." Burger King Corp. v. E-Z Eating, 41 Corp., 572 F.3d 1306, 1313 (11th Cir. 2009)(citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993)).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case to which the non-moving party has the burden of proof. Celotex Corp., 477 U.S. at 322; Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). All justifiable inferences are to be drawn in the light most favorable to the non-

moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

III. Analysis

The Eleventh Circuit reversed this Court's holding that Plaintiff's food sharing is not expressive conduct protected by the First Amendment and charged this Court with determining "whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague." DE 95, p. 22, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1245 (11th Cir. 2018). The Court now considers these questions. First, the Court will address Plaintiffs' standing. Then the Court will determine if the core restrictions imposed by the Ordinance and the Park Rule violate Plaintiffs' free expression rights and will subsequently consider their associated permitting schemes. Next, the Court will consider Plaintiffs' claim that the Ordinance and the Park Rule violate their rights to expressive association. Finally, the Court will address the issue of vagueness. Although the Ordinance has been repealed and Plaintiffs' demand for injunctive relief is therefore moot as to the Ordinance, the Court will determine if the Ordinance violated Plaintiffs' rights at the time it was in force.

A. Standing

Standing is jurisdictional and "every court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates." Florida Ass'n of Medical Equip. Dealers, Med-Health Care v. Apfel, 194 F.3d 1227, 1230 (11th Cir.

1999)(citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-31 (1999)). Although standing was not addressed on appeal, the Court has a duty to reexamine standing at this time. Defendant argues that Plaintiff FFNB does not have organizational standing to pursue its claims and also that, even if Plaintiff FFNB would otherwise have standing, it cannot bring suit under § 1983 because it is not a "person" for purposes of the statute. As to the individual Plaintiffs, Defendant argues that they do not have standing to challenge the Ordinance because it was never applied to them.

The repeal of the Ordinance affects the Court's analysis of Plaintiffs' standing. Previously, the Court stated that Defendant FFNB likely had organizational standing to challenge the Ordinance and the Park Rule and that even if it did not, the individual Plaintiffs certainly had standing to challenge both. DE 78, p. 11-12. It remains clear that the individual Plaintiffs have standing to pursue declaratory and injunctive relief as to the Park Rule. However, Plaintiffs' standing to challenge the Ordinance requires further analysis, because the claim for injunctive relief as to the repealed Ordinance is now moot.

It is settled law that an unincorporated association may bring suit for its own injuries or on behalf of its members. Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1571 (11th Cir. 1991)(citing Warth v. Seldin, 422 U.S. 490, 511 (1975)). Where an association sues on its own behalf it asserts organizational standing, and where it brings suit on behalf of its members, it asserts associational standing. Plaintiff FFNB only claims

organizational standing. Defendant advances two overlapping but distinct arguments against Plaintiff FFNB's organizational standing. First, Defendant argues that Plaintiff FFNB has not demonstrated that it is an organization in the first place. Second, Defendant argues that Plaintiff FFNB is so informal that it is not equivalent to a traditional member organization and therefore, lacks organizational standing.

If Plaintiff FFNB is not an organization at all, as Defendant claims, then it certainly cannot have organizational standing. Defendant states:

> [FFNB] has no formal membership or hierarchal structure, no formative documents, has no elected leaders, its members hold not [sic] formal offices, positions, or titles, it has no written bylaws, collects no dues, is independent and autonomous, and it provides no written proof of membership to its members.

DE 42, p. 18. Plaintiff FFNB is certainly informal, but that does not mean that it is not an organization for the purposes of organizational standing. The group claims to have members, even if informally, and the individual Plaintiffs and other affiants identify themselves implicitly or explicitly as members of Plaintiff FFNB. See DE Nos. 40-23 through 40-27. These organization members regularly conduct activities under the banner of Food Not Bombs (literally and figuratively) to advance the particular ends of the organization. This is sufficient to show that Plaintiff FFNB is a real, if informal, organization.

In addition, Defendant argues that Plaintiff FFNB cannot claim organizational standing because it is not functionally equivalent

to a traditional membership organization with formal membership and officer positions. As the Court noted in its prior Order (DE 78), while this may be a problem for associational standing under the non-controlling cases cited by Defendant, it does not preclude organizational standing. Plaintiff has cited no controlling law to the contrary. In order to bring suit on its own behalf under the "diversion-of-resources theory" an organization need only show that "defendant's illegal acts impair the organization's ability to engage in its own projects by forcing the organization to divert resources in response." Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1341 (11th Cir. 2014)(citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)). The disruption of Plaintiff FFNB's food sharing and the arrest of its members when the Ordinance was in force caused such a diversion of resources. As for the Park Rule, Plaintiff FFNB would certainly have to divert its resources if it were to comply with the Park Rule and cease its food sharing demonstrations in Stranahan Park. Plaintiff FFNB has organizational standing.

Beyond its general standing arguments, Defendant also claims that Plaintiff FFNB lacks standing to bring claims under § 1983 because it is not a "person" under the statute. The relevant portion of the statute reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (emphasis added). Defendant directs the Court's attention to Lippoldt v. Cole, 468 F.3d 1204 (10th Cir. 2006), in which the Tenth Circuit held that an unincorporated association is not a person for the purposes of § 1983. The Lippoldt opinion offers an interesting argument for this conclusion, drawing on the historical context of § 1983. Defendant counters that the Court should instead adopt the reasoning in Gay-Straight Alliance of Okeechobee High School v. School Brd. of Okeechobee Cty., 477 F. Supp. 2d 1246 (S.D. Fla. 2007), in which a court in our District explicitly rejected the holding in Lippoldt.

The Tenth Circuit stands alone with its position that unincorporated associations are not persons under § 1983. No Circuit besides the Tenth has adopted its holding. To the contrary, the Second Circuit has explicitly held that unincorporated associations are persons for the purposes of being sued under § 1983. See Jund v. Town of Hempstead, 941 F.2d 1271, 1281 (2d Cir. 1991). The holding in Jund is reasonably applied to persons bringing suit under § 1983 as well. See Gay-Straight Alliance, 477 F. Supp. 2d at 1251, 1251 n.4 (explaining the "mirroring" of persons suing and subject to suit under § 1983). The court in Gay-Straight Alliance points out the significant fact that the NAACP, an unincorporated association, has been recognized as having the ability to sue and be sued pursuant to § 1983. 477 F. Supp. 2d at 1251 (citing NAACP v. Claiborne Hardware Co., 458

U.S. 886 (1982), NAACP v. Brackett, 130 Fed. Appx. 648 (4th Cir. 2005)(per curiam)(not selected for publication)). Indeed, unincorporated associations routinely bring § 1983 claims, and the courts do not note that the associations are not persons for the purposes of the statute. See eg. Rounds v. Ore. State Brd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999); Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993); Marcavage v. City of New York, 918 F. Supp. 2d 266 (S.D.N.Y. 2013); Occupy Fresno v. Cty. of Fresno, 835 F. Supp. 2d 849 (E.D. Cal. 2011); Good News Employee Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743 (N.D. Cal. Feb. 14, 2005); Cabrini-Green Local Advisory Council v. Chicago Housing Auth., No. 04 C 3792, 2005 WL 61467 (N.D. Ill. Jan. 10, 2005); Playboy Enterprises, Inc. v. Public Service Comm'n of Puerto Rico, 698 F. Supp. 401 (D. P.R. 1988); Nat'l Ass'n of Alzheimer Victims & Friends v. Com. of Pa. Dept. of Public Welfare, CIV. A. No. 88-2426, 1988 WL 29338 (E.D. Pa. Mar. 23, 1988); Republican College Council of Pennsylvania v. Winner, 357 F. Supp. 739 (E.D. Pa. 1973). The only case that the Court can find from outside of the Tenth Circuit that supports Defendant's position is a single district court opinion from the District of Nevada that declared that an unincorporated association was not a person subject to suit under § 1983. Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013), rev'd on other grounds, 617 Fed. Appx. 724 (9th Cir. 2015)(not selected for publication). On appeal, the Ninth Circuit did not address the § 1983 "person" question because

plaintiff had waived the issue. Tate, 617 Fed. Appx. at 725-726. Though often only implicitly, the great weight of authority is opposed to the holdings of Lippoldt and Tate.

The Court agrees with the holding in Gay-Straight Alliance and rejects the Tenth Circuit's holding in Lippoldt. An unincorporated association, such as Plaintiff FFNB, is a person for the purposes of § 1983. Plaintiff FFNB therefore "has the standing to assert its own free speech [and due process] rights in federal court." Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 474 (S.D. Fla. 1980).

Plaintiff FFNB has standing to challenge the Ordinance and the Park Rule, and the individual Plaintiffs have standing to challenge the Park Rule. In addition, the individual Plaintiffs likely have standing to challenge the Ordinance even though it was not directly applied to them, on the theory that they were injured by the threat of arrest. See Bischoff v. Osceola Cty., Fla., 222 F.3d 874, 885 (11th Cir. 2000)(holding that plaintiffs who claimed to have been "specifically threatened with arrest" presented a legal interest on which to base their suit).[3] Having established that all Plaintiffs have standing to challenge the Park Rule and that at least Plaintiff FFNB has standing to challenge the Ordinance, the Court proceeds to address the merits of all claims with respect to both the Ordinance and the Park Rule.

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[3] The Court notes that Bischoff is not entirely on point because there is no evidence in the record that the individual Plaintiffs in the above-styled cause were specifically threatened with arrest. However, there is evidence that the individual Plaintiffs engaged in demonstrations under the general threat of arrest.

B. Time, Place, or Manner Restrictions

In Clark v. Community for Creative Non-Violence, the Supreme Court states, "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions." 468 U.S. 288, 293. The Supreme Court outlined the standard by which such restrictions are to be judged. Id. The restrictions must (1) be "justified without reference to the content of the regulated speech," and (2) be "narrowly tailored to serve a significant governmental interest," and must (3) "[leave] open ample alternative channels for communication of information." Id. (citations omitted).

To determine if the Ordinance and the Park Rule satisfy the criteria enumerated in Clark, the Court must first determine if the restrictions imposed on Plaintiffs' expressive conduct are content neutral. Writing for the Supreme Court in Reed v. Town of Gilbert, Arizona, Justice Thomas states, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. 2218, 2227 (2015). In addition, a law restricting speech that is content neutral on its face "but cannot be 'justified without reference to the content of the regulated speech'" or was enacted "because of disagreement with the message [the speech] conveys" is content based. Id. (alteration in original)(quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

In Reed, the Supreme Court heard a challenge to the Sign Code enacted by the town of Gilbert, Arizona. Id. at 2224. The Sign

Code banned the display of all outdoor signs without a permit, but exempted 23 categories of signs from the restriction. Id. The exempted categories included "Ideological Sign[s]" and "Political Sign[s]" as well as "Temporary Directional Signs Relating to a Qualifying Event." Id. (alterations in original). Each sign category was identified by the sort of message it communicated, and each category was subject to its own particular restrictions. Id. at 2227. Members of a local church placed temporary signs in public areas to advertise its weekly services. Id. at 2225. Gilbert's Sign Code compliance manager cited the church for exceeding the time limits for temporary signs and for failing to include the date of the event on the signs in accordance with the Sign Code. Id. Had the sign communicated a different kind of message, it would have been treated differently. Id. at 2227. The Supreme Court held that the Sign Code was facially content based and failed strict scrutiny. Id. at 2231-32.

Here, Plaintiffs argue that the Ordinance and the Park Rule make an unlawful content based distinction by restricting food sharing as a social service. In the instant Motion (DE 41), Plaintiffs contend that "[f]ood sharing is inherently expressive activity," DE 41, p. 8, and in their Supplemental Briefing (DE 98), point to language from the Court's prior Order (DE 78):

> Defendant's Ordinance and Park Rule do not regulate all food sharing in the same fashion, but instead, specifically target only the type of food sharing that is provided as a social service. Thus, these Fort Lauderdale regulations . . . make at least some reference to the content of the alleged regulated speech, or in this case, expressive conduct. If food sharing is

> protected as expressive conduct under the First Amendment, then these regulations at least arguably differentiate between types of food sharing based on their aims, or content.

DE 78, p. 16-17. If food sharing generally is expressive conduct protected by the First Amendment, then restrictions specifically targeting food sharing as a social service might lack content neutrality because they target the "topic" or function of social services. However, this line of reasoning is contingent upon food sharing being inherently expressive. The signs in Reed were certainly expressive: "signs are a form of expression protected by the Free Speech Clause." City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994). If food sharing generally is also expressive, then a restriction on a certain kind of food sharing based on its purpose might be content based. However, although the Eleventh Circuit held that Plaintiffs' food sharing was expressive conduct protected by the First Amendment, it did not hold that food sharing generally is expressive conduct.

The Eleventh Circuit emphasized that food sharing has long standing social significance. See Food Not Bombs, 901 F.3d at 1243 ("[T]he significance of sharing meals with others dates back millennia"). However, the opinion noted that sex is also socially significant: "Like sex, the taking of food has a social component, as well as a biological one." Id. at 1242 (quoting Mary Douglas, Deciphering a Meal, in Implicit Meanings: Selected Essays in Anthropology 231, 231 (1975)). The Eleventh Circuit presumably did not mean to suggest that sex is inherently expressive conduct

protected by the First Amendment. The social significance of an action alone does not make it expressive conduct. Something more is needed.

Thus, the Eleventh Circuit emphasized that the context of an activity can distinguish it as expressive conduct where it otherwise would not be expressive, stating, "the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not." Id. at 1241. In the above-styled cause, the circumstances of Plaintiffs' food sharing, "the presence of banners, a table, and a gathering of people sharing food with all those present in a public park," make Plaintiffs' actions "sufficiently expressive." Id. at 1244.

Food sharing is not necessarily expressive in every instance; context is necessary to make the action of food sharing expressive conduct protected by the First Amendment. "Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade." Id. at 1241 (citation omitted). By itself, food sharing is comparable to the act of walking, in the sense that it is not an inherently expressive act, and it is the full context of Plaintiffs' demonstrations that makes the food sharing component expressive conduct. The Ordinance and the Park Rule are not directed at the contextual factors that make food sharing expressive conduct and merely restrict a general type of conduct that is not inherently expressive. The restrictions at issue are therefore facially content neutral and are justified

without reference to expressive content. In addition, there is no evidence that Defendant enacted the Ordinance and the Park Rule because it disagrees with Plaintiffs' message. The Ordinance and the Park Rule are content neutral.

Next, the Court must determine if the Ordinance and the Park Rule are narrowly tailored to serve a significant government interest. A law or ordinance in this context need not be the least restrictive means of serving a significant government interest. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). But, the restriction must be proportionate relative to the degree to which the restricted expression implicates the government's interest. See Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 151-52 (1939)(holding that a ban on the unlicensed distribution of literature in city streets did not proportionately serve the government's interest in preventing littering). In addition, the government interest served by the restriction must be unrelated to the suppression of speech. Ward, 491 U.S. at 791.

Defendant must demonstrate that its interest is significant and served by the challenged restrictions, but it "is not required to present detailed evidence" and is "entitled to advance its interests by arguments based on appeals to common sense and logic." Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1318 (11th Cir. 2000)(quoting Int. Caucus of Labor Comms.' v. City of Montgomery, 111 F.3d 1548, 1551 (11th Cir. 1997)). In the Coalition case, plaintiffs challenged a festival ordinance imposed by the City of Atlanta that would

require plaintiffs to acquire a permit for a large demonstration that was to include speeches, concerts, and vendors. Id. at 1305. The Eleventh Circuit held that the festival ordinance was narrowly tailored to serve a significant government interest. Id. at 1319. "Taking a common sensical approach, we find it obvious that the City has a significant interest in regulating the use of its parks and streets by large groups." Id. at 1318. A similar common sense determination was made by the Supreme Court in Clark when addressing the Park Service's prohibition on overnight camping in Lafayette Park and on the National Mall:

> It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping — using these areas as living accommodations — would be totally inimical to these purposes.

468 U.S. at 296. Common sense is sufficient, and detailed evidence is not necessary to demonstrate Defendant's significant interest.

Here, Defendant argues that its restrictions on food sharing as a social service serve several significant government interests. Defendant asserts that the Ordinance and the Park Rule are aimed at preventing loitering, unsafe food service, litter, crime, unsanitary conditions, and property damage. In addition, the Ordinance has a separation of uses function; it prohibits social service food sharing near other food sharing sites, preventing a concentration in one area.

Plaintiffs claim that Defendant presents an insufficient

evidentiary basis for its significant interests. The Court disagrees. Drawing on the evidence presented, and most of all, common sense, the Court holds that Defendant has demonstrated a significant interest in regulating the use of City Parks via the Ordinance and the Park Rule.[4] Common sense dictates that Defendant has an interest in regulating the use of City Parks and other public spaces in such a way as to keep them safe, clean, and enjoyable by the public, and that food sharing as a social service attracts people who act in ways inimical to those ends. In addition, Defendant has an obvious interest in protecting those who would participate in food sharing from pathogens that might be present in food that has not been prepared according to sanitation guidelines. It is also clear that the Ordinance and the Park Rule serve these interests while only minimally and incidentally restricting expression. Defendant has met its burden of demonstrating that the Ordinance and the Park Rule serve significant interests, and Plaintiffs have failed to present evidence to the contrary.

In their Supplemental Briefing (DE 98), Plaintiffs argue that an interest in combating the negative behaviors that Defendant mentions cannot be a lawful reason to restrict expressive conduct. Plaintiffs cite Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004) and Forsyth Cty. Ga. v. Nationalist Movement, 505 U.S. 123 (1992) for the proposition that the government may not impose restrictions

[4] The evidence presented by Defendant can be found in the exhibits attached to its Statement Of Undisputed Material Facts (DE 38).

on speech because of the way that some might react to that speech. However, Defendant has not done this. Defendant is not concerned that anyone will commit crimes or otherwise misbehave in direct response to the expressive aspect of Plaintiffs' conduct, but is instead concerned with indirect secondary effects. The secondary effects targeted by the Ordinance and the Park Rule are comparable to those identified in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). In that case, the Supreme Court upheld a zoning ordinance that restricted adult theaters not because of the content of their films but in order to "prevent crime, protect the city's retail trade, maintain property values" and generally maintain "the quality of urban life." Id. at 48.

It is possible that the Ordinance and the Park Rule might be more precisely tailored, but the Court is satisfied that they are sufficiently narrowly tailored to achieve the ends set out by Defendant and that they serve significant government interests in a proportional manner. In addition, the Court notes that the interests to which Defendant refers are entirely incidental to the expressive aspect of Plaintiffs' conduct – Defendant's interests are not related to the suppression of speech. The Ordinance and the Park Rule satisfy the narrow tailoring prong of the test.

Finally, the Court will determine if the Ordinance and the Park Rule allow for ample alternative channels of communication. Expressive conduct, such as Plaintiffs' food sharing, may be treated differently than other forms of expression when considering the availability of ample alternative channels. In the case of

oral or written speech, the medium is coextensive with the message – that is, the words themselves are both the means of communication and the information that is communicated, and some alternative channel for the restricted words must be available. In contrast, the message that is sent by expressive conduct may be easily communicated by some other means, such as oral or written speech. One scholar states:

> The "ample alternative channels" prong has never been officially extended to the test for restrictions on expressive conduct. Such a prong, however, may be implicit but must almost always be met, because there's almost always a good, if imperfect, alternative to expressive conduct – speech that communicates pretty much the same message.

Eugene Volokh, The First Amendment and Related Statutes: Problems, Cases and Policy Arguments 340 (6th ed. 2016)(citations omitted).

In Clark, plaintiffs challenged Park Service regulations that prohibited overnight camping on the National Mall and Lafayette Park, where plaintiffs intended to engage in a camping demonstration "for the purpose of demonstrating the plight of the homeless." 468 U.S. at 291-92. The Supreme Court noted the alternative channels available to the demonstrators absent the ability to camp overnight, stating, "the regulation [was not] faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways." Clark, 468 U.S. at 295 (emphasis added). The opinion continued:

> The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night

> vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

Id. The fact that one particular method of putatively expressive conduct, sleeping overnight in tents, was completely disallowed in public fora at the very center of American political power did not trouble the Supreme Court. The Court tolerated this restriction because the demonstrators' message about homelessness could easily be communicated in other ways. Likewise, in the Coalition case, the Eleventh Circuit held that even though plaintiffs were barred from using temporary structures, electric power, and other items and resources, thus limiting the activities in plaintiffs' demonstration, plaintiffs had ample alternative channels with which to convey their support for marijuana legalization. Coalition, 219 F.3d at 1319-20.

Here, Plaintiffs assert that their activities "demonstrate that society can end hunger and poverty if we redirect our resources towards providing food for all instead of on weapons of war," and that their food sharing conveys the message "that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." DE 39, ¶¶ 1-2. These messages can certainly be communicated orally or in writing or by some alternative form of expressive conduct. Plaintiffs can spread their messages in Stranahan Park, among other venues, without food sharing and without violating the Ordinance or the Park Rule. Ample alternative channels of communication exist,

and the essential restrictions imposed by the Ordinance and the Park Rule therefore satisfy all criteria necessary to make them lawful time, place, or manner restrictions.

C. Permitting Schemes

Although the core restrictions established by the Ordinance and the Park Rule are lawful in themselves, the regulations could nevertheless be unlawful if they include or are paired with unconstitutional permitting schemes. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992)(quoting Hefron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981)). Where permission to engage in expressive conduct is subject to the unlimited discretion of a government official, such a permitting scheme acts as an unlawful prior restraint. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 757 (1988). In addition, a permitting scheme is unlawful where it does not impose clear time limits on the decision maker responsible for granting a permit. See U.S. v. Frandsen, 212 F.3d 1231, 1240 (11th Cir. 2000)(holding that a provision requiring that a permit be issued "without unreasonable delay" was insufficient because no guidance was provided as to what a reasonable delay would be). In the above-styled cause, Plaintiffs argue that the Ordinance and the Park Rule are unlawful prior restraints on expression because of the excessive fee charged

to permit applicants, the broad discretion granted to decision makers, and the lack of a clear time limit for the decision to grant or deny a permit.

Plaintiffs attempt to bring both an as-applied challenge and a facial challenge to the Ordinance and the Park Rule. Plaintiffs did not actually apply for permission to engage in their food sharing demonstrations, so the permitting schemes are not susceptible to an as-applied challenge, but may potentially be subject to a facial challenge for their chilling effect on expression. See Lakewood, 486 U.S. at 757-58 (stating that a facial challenge is the appropriate vehicle for challenging a licensing scheme for the chilling effect of a licensor's broad discretion).

The Ordinance's permitting scheme, even as described by Defendant, is somewhat suspect. The standard fee for a Site Plan Level III permit application is $6,000, and Defendant can only offer the assertion from the Zoning Administrator that this fee is reduced if City officials "feel" that such an amount would be "out of line with the amount of staff time that it takes to review the application." DE 65, p. 6. The actual cost to Plaintiffs may well have been significantly lower than $6,000 had they applied for a permit, but there is no clear indication of what that cost would be, nor are there clear standards to guide City staff in setting the fee. In his deposition, the Zoning Administrator also stated that the amount of time that the approval process takes is variable. See DE 40-3, 39:7-16. He could not point to any

standards establishing time limits, with the exception of the 30 day limit for the City Commission to review an application after approval by the Planning and Zoning Board. See id. at 39:7-40:13. Even more problematic is the Park Rule, which provides that social services may be conducted in City Parks with written permission, but does not provide any guidelines or time limits for granting permission. The Park Rule must be read together with the Ordinance for the Ordinance's permitting standards to apply, and following the repeal of the Ordinance, the Park Rule's provision requiring written permission stands alone and offers no guidance to applicants or City officials.

Defendants' permitting schemes may be problematic, but even laws or regulations with bad permitting schemes may survive an attempted facial challenge if they are laws or regulations of general application. "[L]aws of general application that are not aimed at conduct commonly associated with expression and do not permit licensing determinations to be made on the basis of ongoing expression or the words about to be spoken, carry with them little danger of censorship." Lakewood, 486 U.S. at 760-61. In Lakewood, the Supreme Court used a law requiring building permits as an example of a law of general application, stating that such a law "is rarely effective as a means of censorship." Id. at 761. The opinion continued:

> To be sure, on rare occasion an opportunity for censorship will exist, such as when an unpopular newspaper seeks to build a new plant. But such laws provide too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual

misuse.

Id. This principle has been applied by lower courts.

In United States v. Masel, a court in the Western District of Wisconsin addressed a constitutional challenge to a requirement that a special use permit be obtained for non-commercial group use of national forest land. 54 F. Supp. 2d 903 (W.D. Wis. 1999). The permitting scheme in that case applied to a wide variety of activities subject to "special use authorization" and was not targeted at expressive activity specifically. Id. at 912-13. The Forest Service had some discretion to attach terms and conditions to the permits, but the court held that "the nexus between the terms and conditions provision and protected expression is simply too attenuated to justify a facial challenge" and upheld the permitting scheme. Id. at 914. In accord with Lakewood, the court in Masel held that the Park Service permitting scheme "provide[s] too blunt a censorship instrument to warrant judicial intervention prior to an allegation of actual misuse." Id. (alteration in original)(quoting Lakewood 486 U.S. at 761). In United States v. Kalb, a case with the same issue, the Third Circuit adopted the reasoning in Masel and similarly concluded that a facial challenge to the Forest Service's permitting scheme was unwarranted. 234 F.3d 827, 833-35 (3rd Cir. 2000).

In ATM Express, Inc. v. Montgomery, Ala., a district court in this Circuit addressed a First Amendment challenge to a business licensing ordinance. 376 F. Supp. 2d 1310 (M.D. Ala. 2005). In that case, an adult store applied for a business license but opened

before the license was granted and was cited for operating without a license. Id. at 1313-14. The City Council was made aware of the citation and subsequently refused to grant the adult store a business license. Id. at 1314. The adult store sued, claiming that the licencing ordinance violated the First Amendment on its face and as-applied. Id. Addressing plaintiff's facial challenge, the court in ATM held that the licencing ordinance was a law of truly general application that was not directed at speech or associated activity: "Although it applies to businesses whose commercial aim is to sell speech, it applies as well to those whose commercial aim is to sell steel, sand, snake oil and soccer balls." Id. at 1326. The court continued, "[the ordinance's] application is patently general, and there is a strong likelihood that most of the businesses licensed under its scheme are not identified by their distribution of spoken or written expression." Id. For this reason, the court held that the ordinance was not subject to a facial challenge on First Amendment grounds. Id. at 1327. The ordinance was not subject to a facial challenge despite the fact that the ordinance established no standard governing the discretion of the licensor and imposed no time limit on the licensor, defects that led the court to hold that the ordinance was unlawful as applied. Id. at 1334-36.

A case before this Court, Set Enterprises v. City of Hallandale Beach, concerned an issue similar to that in ATM. No. 09-61405-CIV-ZLOCH/ROSENBAUM, 2010 WL 11549687 (S.D. Fla. June 22, 2010) (affirmed adopted and ratified, No. 09-61405-CIV-ZLOCH, 2010

WL 11549672 (S.D. Fla. Aug. 11, 2010)). In that case, an adult entertainment business and its representative challenged the revocation of its occupational licenses on First Amendment and other grounds. Id. at *6. The business' licenses had been revoked under the City Manager's authority to revoke occupational licenses for "threats to the health, safety, and welfare of the City's residents." Id. at *4. The particular threats in that case consisted of prostitution, drug use, and drug sales taking place at the business. Id.

In Set Enterprises, Magistrate Judge Rosenbaum issued a Report and Recommendation (adopted by this Court) on defendant's motion to dismiss. In her Report, Magistrate Judge Rosenbaum drew on ATM and Lakewood in addressing plaintiffs' facial challenge to the licencing scheme and produced an instructive analysis of the relevant legal principles. See id. at *20-23. The Report outlined the distinctions between different kinds of laws or regulations of general application, recognizing that some laws "appearing on their faces to constitute laws applicable to all" may in fact "disproportionately impact conduct commonly associated with expression and permit licensing determinations to be made on the basis of communicated content." Id. at *20. However, "a law does not automatically fall into the category of laws of general application that are susceptible to a facial challenge simply because it is a licensing scheme, or even just because it is a licensing scheme that bestows discretion upon the licensing official." Id. at *22 (citing Lakewood, 486 U.S. at 759). The key

consideration is whether or not "the law involved 'bears a close enough nexus to expression or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.'" Id. (quoting Lakewood, 486 U.S. at 759).

The Magistrate Judge's Report concluded that the challenged portions of the licensing scheme at issue in Set Enterprises were materially the same as those in ATM and were likewise immune to a facial challenge. Id. at *23. The Report emphasized the general applicability of the challenged ordinance and noted that any business, regardless of its relation to protected expression, would be subject to the City Manager's revocation authority, such as a dry cleaning business that failed to safely dispose of hazardous material. Id. In addition, the ordinance "[did] not expressly authorize the City Manager to consider the content of a licensee's speech in determining whether to revoke a license." Id. at *26. The Report suggested however, and this Court agreed, that a plausible claim of unlawful prior-restraint could be made as-applied, and that said claim was not subject to dismissal. Id. Even where a First Amendment violation may have occurred in the application of a permitting or licensing scheme, such a scheme might nevertheless be immune to a facial challenge if it is part of a law or regulation of general application.

Applying these principles to the above-styled cause, the Court holds that Defendant's permitting schemes, under both the now-repealed Ordinance and the extant Park Rule, are not subject to a First Amendment facial challenge. The Eleventh Circuit has held

that Plaintiff's conduct, is, in context, an act of protected expression. However, neither the Eleventh Circuit nor any other authority has held that food sharing is conduct "commonly associated with expression." Food sharing, without context, is not inherently expressive, nor is it so often an expressive activity that it is commonly associated with expression. The Ordinance and the Park Rule, with their permitting schemes, are regulations of truly general application. They are not aimed at expression or at conduct commonly associated with expression, and they do not authorize Defendant to discriminate against expression. It is true that Defendant might potentially discriminate against Plaintiffs for their expression if they were to apply for a permit, giving rise to an as-applied challenge, but they have not applied. Although Defendant's permitting schemes are suspect, the Court holds that they are not susceptible to an as-applied challenge or a facial challenge.[5] Therefore, the permitting schemes do not make the Ordinance or the Park Rule unlawful prior restraints on expression.

D. Freedom of Association

In addition to their free expression claim, Plaintiffs bring another First Amendment claim, charging Defendant with infringing on their rights to engage in expressive association. The right to engage in expression under the First Amendment implies "a

[5] The Court notes potential problems with Defendant's permitting schemes but the Court need not and does not determine if said schemes would be unlawful if the Ordinance and the Park Rule were not regulations of general application unrelated to expression.

corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984). Plaintiffs argue that by restricting their ability to promulgate their message via food sharing, and by enforcing the Ordinance and the Park Rule based on "who is associating with whom," Defendant violates Plaintiffs' expressive association rights. DE 41, p. 19.

Plaintiffs' argument that the restrictions imposed by the Ordinance and the Park Rule by themselves violate their expressive association rights is a non-starter. Simply preventing Plaintiffs from sharing food as a social service in certain venues is not an attack on their rights of expressive association. Under the Ordinance and the Park Rule, the members of Plaintiff FFNB remain free to associate with each other and with anyone whom they invite to take part in their demonstrations. The fact that a restriction is placed on a particular method of expression at said demonstrations does not impair this freedom of association.

Plaintiffs also claim that Defendants must violate Plaintiffs' association rights in order to enforce the Ordinance and the Park Rule. The Ordinance and the Park Rule are directed at food sharing as a social service, and their enforcement arguably implicates association to the extent that an act of food sharing might be allowed or disallowed depending on the kind of people being fed. Where food is shared with those in particular need of food, the food sharing may be determined to be a social service on account of those people partaking of food at the food sharing demonstration.

However, those in need of food are free to associate with Plaintiffs; Plaintiffs are simply forbidden from feeding them as a social service where doing so would violate the Ordinance or the Park Rule. The Ordinance and the Park Rule do not prohibit anyone from associating with Plaintiffs, but instead impose a content-neutral restriction on a kind of expressive conduct that is only incidentally associative. The Court notes that Plaintiffs have failed to cite any authority that is relevant to their circumstances. This is not due to any lack of diligence on the part of Plaintiffs' counsel but is explained by the fact that no authority is to be found that supports Plaintiffs' position. Plaintiffs' expressive association claim fails.

E. Vagueness

Lastly, the Court addresses Plaintiffs' claim that the Ordinance and the Park Rule are void for vagueness in violation of the Fourteenth Amendment's Due Process Clause. In its prior Order (DE 78), the Court held that the Ordinance and the Park Rule are not void for vagueness, but the Eleventh Circuit's Mandate (DE 95) requires the Court to revisit this conclusion in light of its holding that Plaintiffs' food sharing is expressive conduct. In their Complaint (DE 1), Plaintiffs argue that the Ordinance and the Park Rule are unconstitutionally vague because they "fail to provide adequate notice of prohibited conduct and authorize and encourage arbitrary enforcement." DE 1, ¶ 116.

A law is unconstitutionally vague for one of two reasons: (1) "it fails to provide people of ordinary intelligence a reasonable

opportunity to understand what conduct it prohibits" or (2) "it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732 (2000)(citing Chicago v. Morales, 527 U.S. 41, 56-57 (1999)). Either defect is sufficient by itself to render a law void for vagueness, and Plaintiffs contend that the Ordinance and the Park Rule suffer from both. Following the repeal of the Ordinance, the Court must not only consider Plaintiffs' vagueness claim as to the Ordinance and the Park Rule together, but also in relation to the Park Rule standing alone without the contextual support of the Ordinance.

In the Court's prior Order (DE 78), the Court held that the Ordinance and the Park Rule, when read together, provide an objective definition of outdoor food sharing as a social service, do not authorize discriminatory enforcement, and are not vague as applied to Plaintiffs' conduct. See DE 78, p. 27-28. Upon review, the fact that Plaintiff's conduct is now understood to be protected expression does not change this analysis, which applies to the period of time in which the Ordinance and the Park Rule were both in existence. Rather than revisit the reasoning in its prior Order (DE 78), the Court directs the Parties' attention to said Order and to the analysis below regarding the Park Rule, which substantially applies to the Ordinance as well. Because it is less detailed, the Park Rule is more susceptible to a vagueness challenge than the Ordinance, and if the Park Rule is not void for vagueness then neither is the Ordinance.

Plaintiffs bring a facial and an as-applied vagueness

challenge. The law of the Supreme Court on the requirements for a facial vagueness challenge is not entirely clear. See Set Enterprises, 2010 WL 11549687, at *37 (discussing the competing theories presented by Justice Stevens and Justice Scalia in City of Chicago v. Morales, 527 U.S. 41 (1999)). However, it is clear that to succeed on a facial vagueness challenge in the Eleventh Circuit, "the complainant must demonstrate that the law is impermissibly vague in all of its applications." Stardust, 3007 LLC v. City of Brookhaven, 899 F.3d 1164, 1176 (11th Cir. 2018)(quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982)). If the law is not vague as applied to Plaintiffs' conduct or not vague in any other application, it is not vague on its face. This means that if Plaintiffs' as-applied vagueness challenge fails, their facial challenge must necessarily fail as well.

In both facial and as-applied challenges, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Id. (alteration in original)(quoting Hoffman Estates, 455 U.S. at 495). This principle applies not only to the first prong of the vagueness analysis, notice, but also, to an extent, to the second prong regarding enforcement. "[E]ven where [enforcement] standards may be lacking, a party cannot make a successful case where 'the conduct at issue falls within the core of the statute's prohibition.'" Set Enterprises, 2010 WL 11549687, at *40 (quoting Farrell v. Burke, 499 F.3d 470, 493-94 (2d Cir. 2006)). See also

United States v. Coscia, 866 F.3d 782, 794 (7th Cir. 2017)(also applying the rule from Farrell v. Burke). Even if discriminatory enforcement is possible because of a lack of enforcement guidance, a plaintiff cannot on that basis raise a successful vagueness challenge to a law or ordinance that clearly prohibits the plaintiff's conduct.

The Park Rule forbids the use of City Parks for "social service purposes" without permission. DE 38-35, p. 2. "Social service" is defined by Black's Law Dictionary to mean: "A service that helps society work better; esp., organized philanthropic assistance for those most in need. — Also termed social welfare." Social-Service, Black's Law Dictionary (11th ed. 2019). The Park Rule is consistent with this definition of the term, with an emphasis on philanthropic assistance to those most in need. The Park Rule states: "As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs." DE 38-35, p. 2. The term "social service" as used by the Park Rule is not as precise as it could be, but "[t]he Constitution does not require perfect clarity in the language of statutes and ordinances." Stardust, 899 F.3d at 1176. Statutes and ordinances (and park rules) may lawfully include language of "flexibility and reasonable breadth, rather than meticulous specificity," provided that "it is clear what the ordinance as a whole prohibits." Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)(citation omitted). And even if the Park Rule's prohibitions are not clear

as to some conceivable conduct, they are clear as to Plaintiffs' conduct.

The Court holds that as applied to Plaintiffs' conduct, the Park Rule provides a sufficiently objective standard that gives notice of what it prohibits, and that Plaintiffs' food sharing clearly falls under that prohibition. As noted in the Court's prior Order (DE 78), the provision of free food to the homeless is clearly a social service for the purposes of the Park Rule when the Park Rule is read together with the repealed Ordinance. It is nearly as obvious that such food sharing is a banned social service under the Park Rule alone. The Park Rule explicitly forbids "the provision of food . . . to persons in order to meet their physical needs." DE 38-35, p. 2. Plaintiffs' food sharing demonstrations objectively involve the provision of food to meet the physical needs of the homeless. This is true even if the provision of food to prevent hunger in the homeless is not the primary purpose of Plaintiffs' food sharing demonstrations. Whether or not the Park Rule would give sufficient notice of what conduct it prohibits in more borderline cases of food sharing, it gives enough notice to Plaintiffs. In addition, the Park Rule does not explicitly authorize selective enforcement, nor does its language necessarily lead to such. To the contrary, Park Rule 11.1 states: "It is the intent of the Parks and Recreation Department that these regulations be enforced in a fair and equitable manner." DE 38-35, p. 7. It is true that the Park Rules do not provide strict and specific enforcement standards to ensure equitable application, but

that cannot make Park Rule 2.2 susceptible to a vagueness challenge from Plaintiffs because their conduct clearly falls within the core prohibitions of the Park Rule. Plaintiffs' as-applied vagueness challenge therefore fails, and their facial challenge necessarily fails as well, because if the Park Rule is not vague as applied to Plaintiffs it is not vague in all of its applications.

IV. Conclusion

The Eleventh Circuit held that, in context, Plaintiffs' food sharing is expressive conduct protected by the First Amendment. However, the Eleventh Circuit did not hold that the Ordinance and the Park Rule violate the First Amendment, nor did it hold that the Ordinance and the Park Rule are void for vagueness. The Eleventh Circuit's Mandate (DE 95) tasked this Court with considering these issues. In doing so, this Court recognizes that Plaintiffs' food sharing is expressive conduct and that the restrictions imposed on said conduct therefore implicate Plaintiffs' First Amendment freedoms. However, after careful review, the Court holds that the Ordinance and the Park Rule did not and do not violate Plaintiffs' rights.

The Court holds that the core restrictions imposed by the Ordinance and the Park Rule are lawful as content neutral time, place, or manner restrictions. In addition, the undisputed facts do not allow for an as-applied challenge to the permitting schemes included in the Ordinance and the Park Rule, and because the Ordinance and the Park Rule are regulations of truly general application, their permitting schemes are not susceptible to a

facial challenge. The Court also holds that the Ordinance and the Park Rule do not infringe on Plaintiffs' rights to engage in expressive association. Finally, the Court holds that the Ordinance and the Park Rule clearly apply to Plaintiffs' conduct and that they are not void for vagueness, whether considered together or separately. There are no material facts in dispute, and summary judgment for Defendant will be entered on all Counts.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion For Summary Judgment (DE 41) be and the same is hereby **DENIED;**

2. Defendant City Of Fort Lauderdale's Motion For Final Summary Judgement (DE 42) be and the same is hereby **GRANTED;** and

3. Pursuant to Rules 56 and 58, Final Judgment shall be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 15th day of August, 2019.

WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

All Counsel of Record