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' OPENING BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Pastor Ray Redlich and his associate, Chris Ohnimus (collectively, "the Appellants"), have for years engaged in the religious and expressive act of sharing food with homeless people wherever they find them on the streets of St. Louis ("the City"). After City officials cited them for feeding the homeless without first obtaining permits ostensibly required by the City's Food Code, the Appellants filed this lawsuit in which they alleged that, as applied to their food sharing ministry, the City's regulations violated their First and Fourteenth Amendment rights. The record in this case shows that complying with the City's regulations would dramatically reshape and restrict their food sharing ministry, including the complete elimination of their ability to immediately provide food to hungry people they encountered while traveling the streets. The District Court held, however, that the City's regulations could constitutionally be applied to the Appellants because, in the court's opinion, they did not amount to a "substantial burden" on either the Appellants' free exercise of religion or their freedom of expression.

This case presents constitutional claims involving the circumstances under which the government may interfere with acts that are both religious and expressive in nature. The regulations involved are extensive and have changed significantly in the course of the litigation; they may require substantial discussion at oral argument. The Appellants therefore request 20 minutes of oral argument per side.

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JURISDICTIONAL STATEMENT

This appeal is from a final judgment through which the District Court disposed of all parties' claims. Counts I, II, and III of the Appellants' Complaint included the claims brought under the First and Fourteenth Amendments to the U.S. Constitution, as authorized by 42 U.S.C. §§ 1983 and 1988. JA 16-25; R.Doc. 1, at 16-25. In Counts IV and V of the Complaint the Appellants asked the District Court to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, to consider related claims brought pursuant to state law. JA 25-28; R.Doc. 1, at 25-28. Accordingly, the District Court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343. The court also had jurisdiction to grant a declaratory judgment pursuant to the Declaratory Judgment Act. 28 U.S.C. §§ 2201 and 2202.

The Clerk of the Eastern District of Missouri filed the Judgment for this case on July 22, 2021, granting the Appellee summary judgment as to the first three counts in the Appellants' Complaint, dismissing those counts with prejudice, and dismissing without prejudice the remaining two counts, the ones which raised matters of state law. JA 943; R.Doc. 58, at 1. The Appellants timely filed the Notice of Appeal on August 23, 2021. JA 944; R.Doc. 59, at 1. This Court, therefore, has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in granting summary judgment in favor of the City based on its holding that "hybrid rights" review under *Employment Division v. Smith* requires a plaintiff to persuade a court that both the Free Exercise element of their claim and the other constitutional element of their claim would each succeed independently?

   U.S. Const. Amend. I

   Employment Division v. Smith, 494 U.S. 872 (1990)

   Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019)

2. Whether the District Court erred by granting summary judgment in favor of the City based on its holding that the City's application of its Food Code to the Appellants' food sharing ministry survives the intermediate scrutiny analysis required under *U.S. v. O'Brien*, even though the City offered no evidence to suggest that the challenged regulations were in any way likely to reduce the incidence of foodborne illness among the homeless persons fed by the Appellants' ministry?

   U.S. Const. Amend. I

   U.S. v. O'Brien, 391 U.S. 367 (1968)

   Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994)

STATEMENT OF THE CASE

A. The Appellants have been sharing food with homeless people in the City for many years.

Pastor Ray Redlich has been ministering to the homeless on the streets of St. Louis for nearly forty years. JA 139; R.Doc. 35-3, at 45; JA 261; R.Doc. 36-1, at 1. As part of this ministry, Pastor Ray seeks out neighbors in need of food, drink, companionship, and prayer so that he may communicate to these neighbors that God loves and values them. JA 150; R.Doc. 35-3, at 56; JA 261-62; R.Doc. 36-1, at 1. As a pastor, Ray is comfortable verbally explaining his reasons for sharing food with those in need and he does so frequently and publicly. JA 128-29, 160-61, 170-71; R.Doc. 35-3, at 34-35, 66-67, 76-77; JA 262-63; R.Doc. 36-1, at 2-3.

Redlich's assistant, Christopher Ohnimus, was once homeless himself and in the position of receiving food, drink, fellowship, and encouragement from Redlich. JA 173; R.Doc. 35-4, at 79; JA 271; R.Doc. 36-2, at 1. His experience in receiving that aid led Chris to begin serving others the way he once had been served himself. JA 173; R.Doc. 35-4, at 79; JA 271; R.Doc. 36-2, at 1. Chris is not as comfortable as Pastor Ray in verbalizing his faith; he prefers to communicate nonverbally, letting his actions speak for themselves. JA 271; R.Doc. 36-2, at 1. He does not wear his faith on his sleeve, although he does always keep a crucifix in his pocket. JA 212; R.Doc. 35-4, at 29.

Redlich and Ohnimus share food with their neighbors on the sidewalks and streets of the City four or five days out of each week (200-250 days per year), using their efforts to share God's love with scores of St. Louisans each week. JA 122, 136; R.Doc. 35-3, at 28, 42; JA 215; R.Doc. 35-4, at 32; JA 634; R.Doc. 44-1, at 4. An important element of Pastor Ray's and Chris's food sharing ministry is that they seek out those in need and serve them where they find them rather than requiring the needy to come to a designated location in order to provide the food they need. JA 194; R.Doc. 35-4, at 11; JA 263; R.Doc. 36-1, at 3. Many of those with whom Pastor Ray and Chris share food have physical or psychological conditions that would prevent them from going to a permitted food establishment. JA 263; R.Doc. 36-1, at 3.

Most of the food that Redlich and Ohnimus share with the hungry on the sidewalks and streets of the City is donated by local churches; the food is frequently prepared in facilities subject to inspection by local health authorities. JA 123-24; R.Doc. 35-3, at 29-30; JA 262; R.Doc. 36-1, at 2; JA 272; R.Doc. 36-2, at 2. When these churches donate sandwiches (which are individually wrapped), Pastor Ray and Chris normally freeze them then, as needed, move an appropriate number of the sandwiches to a refrigerator to thaw, then put them into coolers shortly before taking them out to distribute on the streets. JA 175; R.Doc. 35-3, at 81. Sometimes a store such as Whole Foods will donate fresh fruit and vegetables for them to share. JA

217; R.Doc. 35-4, at 34. Ohnimus personally ensures that the coolers he and Pastor Ray use to transport the food and water they share with homeless persons are carefully cleaned. JA 195; R.Doc. 35-4, at 12; JA 272; R.Doc. 36-2, at 2. It is Ohnimus's regular practice to put several frozen water bottles into the cooler that holds the food that will be shared with the homeless to make sure that the food remains cool until it is handed out to those in need. JA 176; R.Doc. 35-3, at 82; JA 195-96, 202-03; R.Doc 35-4, at 12-13, 19-20; JA 272; R.Doc. 36-2, at 2. Both Redlich and Ohnimus sometimes eat the same food that they are sharing with homeless persons. JA 162; R.Doc. 35-3, at 68; JA 227; R.Doc. 35-4, at 44; JA 262; R.Doc. 36-1, at 2; JA 272; R.Doc. 36-2, at 2. They do not give food to homeless persons unless they are confident that the food is safe and healthy. JA 162; R.Doc. 35-3, at 68; JA 262; R.Doc. 36-1, at 2; JA 272; R.Doc. 36-2, at 2.

B. For the Appellants, feeding the homeless is a religious act.

Pastor Ray and Chris are Christians and they believe it is their obligation as followers of Jesus Christ to feed the hungry, give drink to the thirsty, and to provide love, compassion, and company to the suffering. JA 261; R.Doc. 36-1, at 1; JA 271-72; R.Doc. 36-2, at 1-2. Providing food to the hungry is an act of worship that is distinct from other similar acts, such as providing drink to the thirsty or clothing those who are cold or naked, because hunger is a human need that cannot be satisfied by providing water or clothes. JA 631; R.Doc. 44-1, at 1. Jesus specifically instructed

his followers to provide food to the hungry; 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 268; R.Doc. 36-1, at 8; JA 275; R.Doc. 36-2, at 5. Pastor Ray testified that when he encounters a person suffering from hunger, his religious faith and his conscience compels him to try and act immediately to meet their need for food. JA 638; R.Doc. 44-1, at 8.

Further, Pastor Ray and Chris believe their obligation to provide food to the hungry cannot be fulfilled by providing mere snacks or junk food—it requires them to do their best to fully meet the nutritional needs of those they are serving. JA 631; R.Doc. 44-1, at 1. The sandwiches that they frequently provide are more filling than snacks and they provide a balance of fats, carbohydrates, and protein that the hungry person otherwise might not have available to them. JA 631-34; R.Doc. 44-1, at 1-4. For example, a sandwich with two slices of bread, one slice of bologna, and one slice of American cheese would provide the person eating it approximately 380 calories, seventeen grams of fat, thirty grams of carbohydrates, and thirteen grams of protein. JA 633; R.Doc. 44-1, at 3. In contrast, Pastor Ray presented evidence that single servings of fruit provide a large amount of carbohydrates, but relatively few calories and very little fat or protein, and they cost much more per calorie than the ingredients for sandwiches that contain meat and cheese. JA 632-34; R.Doc. 44-1, at 2-4.

C. For the Appellants, feeding the homeless is an expressive act.

For Pastor Ray and Chris, sharing food is a uniquely powerful way to communicate love for and solidarity with the food's recipients, particularly when those recipients may feel unwanted by the community that surrounds them. JA 268; R.Doc. 36-1, at 8. Sharing food with those in need communicates to the recipients that they are loved and valued, regardless of their circumstances. JA 150; R.Doc. 35-3, at 56; JA 262-63; R.Doc. 36-1, at 2-3. Pastor Ray also frequently tells those with whom he is sharing food that he is doing so in Jesus's name, and he very often offers to pray with the person receiving the food. JA 129, 160; R.Doc. 35-3, at 35, 66.

But the Appellants also intend to send a message to the community around them, which is why Redlich regularly makes public statements about his faith and how it informs his interactions with the homeless, including sharing food with them. JA 160-61; R.Doc. 35-3, at 66-67; JA 263; R.Doc. 36-1, at 3. When people ask Pastor Ray why he shares food with homeless persons, he tells them he does so because of his commitment to Jesus Christ. JA 262 R.Doc. 36-1, at 2. By sharing food with those in need, Redlich communicates to the community at large that the Christian faith is relevant to real human needs and that we have an obligation to show love and compassion for those who are hurting. JA 160-61; R.Doc. 35-3, at 66-67. Because of his ministry, Pastor Ray has become well-known in the community as an advocate for the homeless and he regularly makes public

statements about his faith and how that faith informs his interactions with the homeless, including sharing food with them. JA 263; R.Doc. 36-1, at 3. He believes that his food-sharing ministry has, in fact, conveyed the messages he intended; he has seen other private citizens (including Chris) follow his example in providing food to the hungry. JA 172-74; R.Doc. 35-3, at 78-80; JA 263; R.Doc. 36-1, at 3.

D. The City has chosen to enforce the Food Code against the Appellants.

On October 31, 2018, just hours before thousands of other St. Louisans would celebrate Halloween by sharing food at parties and handing out goodies to trick-or-treaters, Pastor Ray and Chris were engaged in their regular practice of providing homeless people with water, sandwiches, prayer and fellowship on the streets of the City. JA 264; R.Doc. 36-1, at 4; JA 273; R.Doc. 36-2, at 3. For some of the people with whom the Appellants interacted on October 31, 2018, the sandwiches Redlich and Ohnimus provided would be the only food they would get to eat that day. JA 264; R.Doc. 36-1, at 4; JA 273; R.Doc 36-2, at 3. As Pastor Ray and Chris were engaging with these homeless persons several police officers intervened. JA 264; R.Doc. 36-1, at 4; JA 273; R.Doc 36-2, at 3. Stephen Ogunjobi, an officer of the St. Louis Metropolitan Police Department, issued the Appellants a City Court Summons to appear in the city court at 9:00 a.m. on December 4, 2018, to answer the complaint information against them, that they had been "operating prepared food w/o proper permits." JA 255; R.Doc. 35-16, at 1; JA 264; R.Doc. 36-1, at 4; JA 273; R.Doc 36-

2, at 3; JA 283; R.Doc. 36-4, at 5. The penalty for operating a food establishment without a permit is a $500 fine. JA 852. The Narrative portion of the Incident Report that Ogunjobi filed stated that "the City of St. Louis Health Department has created rules and regulations governing sidewalk vendors along with individuals that donate prepared food to homeless individuals. …Representatives from the health department stated they would like officers from this department to identify individuals who are breaking these rules, so they can follow up and bring them into compliance." JA 283; R.Doc. 36-4, at 5. In addition to the citation, Ogunjobi gave Pastor Ray a flyer entitled "Requirements for Operating a Temporary Food Establishment" and a two-page document entitled "Feeding the Homeless." JA 265; R.Doc. 36-1, at 5; JA 285-86; R.Doc. 36-6, at 1-2; JA 287-88; R.Doc. 36-7, at 1-2. When Pastor Ray and Chris arrived at the municipal court on December 4, 2018, as required by their citations, the City Counselor's Office chose not to pursue charges against them. JA 255; R.Doc. 35-16, at 1. In a news release issued later that day, the City's Public Safety Director, Jimmie Edwards, stated that issuing citations for feeding the homeless was "not a priority for the City." JA 80; R.Doc. 34-1, at 1.

E. Complying with the City's Food Code would impose significant financial and regulatory burdens on the Appellants' religious and expressive acts.

The first step in complying with the Food Code is applying for a Vendor's License. JA 83; R.Doc. 35, at 3; JA 285; R.Doc. 36-6, at 1; JA 287; R.Doc. 36-7, at 1; JA 512; R.Doc. 36-13, at 4; JA 704; R.Doc. 50-4, at 5. At one point would-be

applicants for Food Establishment Permits could get a waiver for the Vendor's License requirement, that is no longer an option. JA 83; R.Doc. 35, at 3; JA 704-05; R.Doc. 50-4, at 5-6. There are different kinds of Vendor's Licenses and although the Appellants assume one can apply for a Sidewalk Vendor's License without first obtaining a generic Vendor's License, that is not clear. JA 511-16; R.Doc. 36-13, at 3-8; JA 696; R.Doc. 50-2, at 1. An applicant for either a generic Vendor's License or a Sidewalk Vendor's License must pay a non-refundable application processing fee of $25.00; if the license is granted the application fee is credited toward the $200.00 annual license fee. JA 513; R.Doc. 36-13, at 5; JA 517; R.Doc. 36-14, at 1. The application processes for either a generic Vendor's License or a Sidewalk Vendor's license each involve gaining certificates or approvals from various other government offices. JA 513; R.Doc. 36-13, at 5.

On November 19, 2020, after the parties had filed their cross-motions for summary judgment, the City submitted an affidavit from an Administrative Officer at the License Collector's office who asserted that "The License Collector's Office does not issue vendor's licenses to individuals wishing to distribute food to the homeless." JA 697; R.Doc. 50-2, at 2; JA 704; R.Doc. 50-4, at 5; JA 713; R.Doc. 50-5, at 1; JA 729; R.Doc. 50-6, at 15. The City also revised its position to state that vendors licenses are not required for persons distributing food to the homeless. JA 733-34, 743; R.Doc. 50-6, at 19-20, 29. The City did not identify any change in the

Food Code to account for its revised position, nor did it offer any basis in the text of the City's ordinances to explain its assertion that "City generally, but not always, requires an applicant for a temporary food service permit to obtain a vendor's license… [but] a vendor's license is not required for persons distributing food to the homeless." JA 704; R.Doc. 50-4, at 5; JA 729; R.Doc. 50-6, at 15. The Appellants contend that the City cannot unilaterally (and selectively) decide that requirements written into law no longer exist. JA 787-88; R.Doc. 53, at 8-9.

Once a person who would like to share food with the homeless has obtained their Vendor's License, they may apply for a Food Establishment Permit. JA 83; R.Doc. 35, at 3; JA 92; R.Doc. 35-2, at 2. To apply for that permit one must submit their application in person at the Health Department between 8:00 a.m. and 4:00 p.m. *at least two days* before the date one wishes to start sharing food with the homeless, although if the applicant pays an additional $10 the regulatory authority may choose to waive that deadline. JA 83; R.Doc. 35, at 3; JA 92; R.Doc. 35-2, at 2; JA 285; R.Doc. 36-6, at 1; JA 287; R.Doc. 36-7, at 1; JA 289; R.Doc. 36-8, at 1; JA 591; R.Doc. 43, at 19; JA 834, 839. After the Appellants initiated this lawsuit the City adopted Ordinance 71106, which created a "Charitable Feeding Temporary Food Permit" to replace the permit requirement to which they would have been subject when they filed the Complaint; the new ordinance waived the fourteen-day-per-year limit on sharing food with the needy and reduced the usual $50 per day permit fee

to "twenty-five dollars ($25) per day for a vendor, if there is no sponsor." JA 84; R.Doc. 35, at 4; JA 92; R.Doc. 35-2, at 2; JA 631-32; R.Doc. 44-1, at 1-2. Given that Pastor Ray and Chris try to feed the hungry "between 200 and 250 days out of each year," the cost of "Charitable Feeding Temporary Food Permits" alone would end up between $5,000 (for 200 days, if only one of them is required to pay the daily fee) and $12,500 (for 250 days, if both of them are required to pay the daily fee). JA 634-35; R.Doc. 44-1, at 4-5.

Even beyond the expense of Vendor License fees and Charitable Feeding Temporary Food Permit fees, complying with the Food Code's requirements would *either* prevent the Appellants from seeking out those in need and serving them where they are found *or* it would require them to comply with all the regulations applicable to a Mobile Food Establishment. JA 167-68; R.Doc. 35-3, at 73-74; JA 266-67; R.Doc. 36-1, at 6-7; JA 804, 818-823. If the Appellants agree to obtain Temporary Food Permits, the Food Code would require them to obtain and have with them certain mandatory equipment, such as three food-grade washtubs, a five-gallon or larger container of potable water, a hand-washing facility with warm running water, soap, and individual paper towels, and an "overhead cover" or shelter to be placed over the food preparation area. JA 286; R.Doc. 36-6, at 2; JA 594-95; R.Doc. 43, at 22-23. Even if the Appellants were able to obtain all that equipment and carry it with them, the Food Code requires Temporary Food Establishments to remain at only one

single, fixed location. JA 287-88; R.Doc. 36-7, at 1-2; JA 89; R.Doc. 36-8, at 1; JA 836. If they chose not to set up at a fixed location, the Food Code would requires them to obtain a Mobile Food Establishment Permit and to comply with all relevant regulations *even if* they were only serving "pre-packaged, ready-to-eat FOOD or drink and/or whole, uncut fruit and/or vegetables from an APPROVED source."[1] JA 804, 818-823. Consequently, the Food Code's requirements are thoroughly incompatible with the way the Appellants seek out homeless persons wherever they are in order to pursue their food sharing ministry.

The 2020 amendment to the Food Code also introduced (and the 2021 amendment retained) a new requirement related to Charitable Feeding Temporary Food Permits—that a permit holder must participate in a "Temporary Food Safety Training Program." JA 635; R.Doc. 44-1, at 5; JA 806-07, 890-91, 895, 899. The amended ordinance does not explain when or where such a "Temporary Food Safety Training Program" would be provided, what such a program would entail, how long it would take to complete such a program, whether completion of the program would require graded evaluation, what participation in such a program would cost, or how frequently a permit holder would be required to participate in such a program. JA 635; R.Doc. 44-1, at 5; JA 806-07, 890-91, 895, 899.

[1] These express requirements for Mobile Food Establishment Permits *directly contradict* the City's longstanding claim that the Food Code only applies if people wish to share "potentially hazardous foods."

All told, the City's regulations would significantly limit the Appellants' ability to pursue their food sharing ministry. Pastor Ray and Chris do not have the financial resources required to obtain the permits and equipment the City says are required before they can share food with the homeless. JA 266-68; R.Doc. 36-1, at 6-8; JA 274-75; R.Doc. 36-2, at 4-5. Even if they had the financial resources to pay for these things, when they go out looking for people to help they could not carry with them the equipment the City's regulations require, such as three separate food-grade washtubs, each with a different liquid in it, a shelter to place over a food preparation area, and a handwashing facility. JA 167-68; R.Doc. 35-3, at 73-74; JA 266-67; R.Doc. 36-1, at 6-7; JA 274; R.Doc. 36-2, at 4. And even if the money, the equipment, and the ability to transport it with them were all no object, the City's regulations would nonetheless prevent Pastor Ray and Chris from spontaneously sharing food with people they encounter in a moment of need. JA 169 178-79; R.Doc. 35-3, at 75, 84-85; JA 267-68; R.Doc. 36-1, at 7-8; JA 274-75; R.Doc. 36-2, at 4-5. As Pastor Ray testified, a law such as the Food Code that would punish him for immediately providing a hungry person with food he had close at hand and knew to be wholesome and nutritious would dramatically burden his exercise of religion and his right to live in a manner consistent with his conscience. JA 638; R.Doc. 44-1, at 8.

To be clear, the Appellants do not challenge the validity of the Food Code as a whole; they contend that the City has violated their First Amendment rights to free exercise of religion and the freedom of expression by prohibiting them from engaging in the religious and expressive act of sharing meals with the homeless unless they first comply with the following requirements:

- The requirement to obtain a vendor's license and to pay $200 for that purpose, JA 83; R.Doc. 35, at 3; JA 285; R.Doc. 36-6, at 1; JA 287; R.Doc. 36-7, at 1; JA 509; R.Doc. 36-13, at 1; JA 704; R.Doc. 50-4, at 5;
- The requirement either to obtain a Permanent Food Establishment permit or to pay $25 per person, per day (potentially $12,500 per year) for Temporary Food Permit, JA 83; R.Doc. 35, at 3; JA 92; R.Doc. 35-2, at 2; JA 806-07, 833, 841;
- The requirement either to obtain a Temporary Food Permit at least two days in advance of sharing food with homeless persons or to pay $10 to expedite the application, JA 839;
- The requirement either to provide food at a single, fixed location rather than seeking out the hungry wherever they might be, or to comply with all the regulations applicable to a Mobile Food Establishment (including a prohibition on sharing even non-potentially hazardous foods without a

permit), JA 167-68; R.Doc. 35-3, at 73-74; JA 266-67; R.Doc. 36-1, at 6-7; JA 804, 818-823, 833;

- The requirement to obtain and have on hand at any time they share food with homeless persons three separate food-grade washtubs (each with a different liquid in it), a shelter to place over a food preparation area, and a handwashing facility. JA 167-68; R.Doc. 35-3, at 73-74; JA 266-67; R.Doc. 36-1, at 6-7; JA 274; R.Doc. 36-2, at 4;
- The requirement to participate in the "Temporary Food Safety Training Program," the details of which the City never brought into the record, JA 635; R.Doc. 44-1, at 5; JA 806-07, 890-91, 895, 899.

F. The City broadly allows citizens to share food—except with the homeless.

The City does not require non-homeless persons sharing home-prepared meals with other non-homeless persons to comply with the Food Code; it expressly stated 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. Redlich also asserted that the City does not interfere with those not engaged in the commercial preparation or distribution of food if they wish to share food with non-homeless persons in public places. JA 269; R.Doc. 36-1, at 9. But Redlich offered evidence that the City does apply the Food Code against people who attempt to share food with homeless

persons—even if the food is being provided in private spaces. JA 269; R.Doc. 36-1, at 9; JA 657; R.Doc. 44-4, at 1; JA 658-61; R.Doc. 44-5, at 1-4; JA 62-64; R.Doc. 44-6, at 1-3.

G. The record does not show that imposing these financial and regulatory burdens on the Appellants' religious and expressive acts will promote the City's alleged interest in reducing foodborne illnesses.

The City presented very little competent evidence regarding the extent to which the food shared by the Appellants might cause those who received it to become ill. The City asserted that in 2018, 5,893 people were hospitalized from foodborne illness and 120 people died from foodborne illness. JA 237; R.Doc. 35-9, at 2. It also asserted that one in six people get sick from contaminated food each year. JA 237; R.Doc. 35-9, at 2. The City had also claimed (without identifying any report or study as the basis for the claim) that donated food had caused outbreaks of foodborne illness in several states between 2012 and 2018, and that a majority of the affected jurisdictions did not require temporary food permits for charitable events; the District Court correctly sustained the Appellants' objections to these allegations. JA 237-38; R.Doc. 35-9, at 2-3; JA 909; R.Doc. 57, at 9. The City presented an affidavit in which a police officer claimed to have assisted homeless persons whom the officer suspected were suffering from food-related illness, but the Appellants objected to these statements and the District Court expressly stated that its opinion did not rely upon either the testimony in question or the City's statement of fact

based upon that testimony. JA 89-90; R.Doc. 35-1, at 1-2; JA 906-07; R.Doc. 57, at 6-7. That was the sum total of the evidence the City offered regarding its interest in preventing foodborne illness.

In contrast, the Appellants provided important context about the relative risks of foodborne illness by putting into the record a recent report published by the Center for Disease Control and Prevention showing that in 2017 the vast majority of outbreaks of foodborne illness were linked either to food prepared in a restaurant or food prepared at a catering or banquet facility, while only a tiny percentage of the recorded foodborne illnesses that year were linked to food prepared in a private home or a house of worship. JA 635-36; R.Doc. 44-1, at 5-6; JA 652; R.Doc. 44-2, at 13. That same 2017 report showed that of the foodborne illnesses attributed to a specific type of food, more illnesses were attributed to *fruits* (521) than were attributed to any other single type of food other than turkey (609); chicken (487), pork (376), and "vegetable row crops" (351) were the next most common single-food causes of foodborne illness. JA 645, 650; R.Doc. 44-2, at 6, 11. In light of this data, Pastor Ray contended that there was no legitimate basis for believing that "potentially-hazardous foods" prepared at church kitchen facilities that are certified by local health authorities are any more likely to cause foodborne illness than the "potentially hazardous food" prepared at restaurants or grocery stores certified by local health authorities. JA 637-38; R.Doc. 41-1, at 7-8.

The City offered no competent evidence at all to suggest that requiring the Appellants to pay for daily permits and to comply with the Food Code's regulations is in any way likely to reduce incidences of foodborne illness among those receiving the food the Appellants share with them. The Appellants pointed out that there was no evidence that the so-called "potentially hazardous" food they share with homeless persons is any more likely to cause foodborne illness than the "potentially hazardous" food that *the City allows people to share* among friends, family, and acquaintances at potlucks, barbeques, house dinner parties, and/or tailgating parties. JA 637; R.Doc. 41-1, at 7. Pastor Ray testified that when homeless people do not have access to the healthy, nutritious food of the sort that his ministry provides, they may resort to obtaining food from trash cans or dumpsters, which is much less healthy than food lovingly prepared specifically for the purpose of feeding the homeless. JA 141; R.Doc. 35-3, at 47; JA 636-37; R.Doc. 41-1, at 6-7. He asserted that even if the City had a legitimate interest in ensuring that food offered to the homeless had been prepared at a facility certified by a local health authority, the Appellants' food sharing ministry already *was* providing food prepared at a facility that is certified by local health authorities. JA 637; R.Doc. 41-1, at 7. He added that to the extent that the purpose of the permit requirements is to know when and where "potentially hazardous foods" are being distributed, a less-restrictive means of accomplishing that goal would be to ask those who provide food to the homeless to

self-report the times and locations of their activities. JA 637; R.Doc. 41-1, at 7. In sum, the record suggests that reducing the amount of food that Pastor Ray and Chris share with homeless persons by making it much more difficult and expensive for them to continue their food sharing ministry will simply *decrease* the homeless persons' overall access to safe, healthy food, not *increase* it. JA 162; R.Doc. 35-3, at 68.

H. The procedural history of this case.

The Plaintiffs-Appellants filed this case in the Eastern District of Missouri on January 7, 2019, alleging that, as applied to their food sharing ministry, the City's Food Code violated the First and Fourteenth Amendments' protections for free exercise of religion, freedom of expression, equal protection of the laws, and freedom of association. JA 9-10, 16-25; R.Doc. 1, at 1-2, 8-17. They also asked the District Court to exercise supplemental jurisdiction over claims regarding Missouri's Religious Freedom Restoration Act and Article I, section 5 of the Missouri Constitution. JA 10, 25-28; R.Doc. 1, at 2, 17-20. After the parties conducted discovery they filed cross-motions for summary judgment; the City sought summary judgment on all five of the counts in the Complaint, while the Appellants only sought summary judgment as to their hybrid rights claim under the U.S. Constitution, their stand-alone free expression claim, and their claim regarding Missouri's Religious Freedom Restoration Act. JA 44-45; R.Doc. 32, at 1-2; JA 256-60, R.Doc. 36, at 1-

5. On July 22, 2021, Magistrate Judge Baker entered judgment denying the Appellants' motion, granting the City summary judgment as the three counts comprising the Complaint's federal constitutional claims, declining to exercise jurisdiction over the two counts based on state law, and dismissing those state law claims without prejudice. JA 943; R.Doc. 58, at 1; AD 43.

Although the Appellants had from the outset acknowledged that under *Employment Division v. Smith*, 494 U.S. 872 (1990), they could not succeed in a stand-alone claim based on the Free Exercise Clause and never contended otherwise (they did ask to preserve the question of whether *Employment Division* should be overturned), the District Court devoted eight pages of its opinion to addressing arguments the Appellants had not made. JA 918-26; R.Doc. 57, at 18-26; AD 18-26. In particular, the District Court held that, despite their explanation that the application of the Food Code to their food sharing ministry would severely curtail the Appellants' ability to continue that ministry, the regulations did not "substantially burden" their free exercise of religion. JA 923; R.Doc. 57, at 23; AD 23. Turning to the Appellants' freedom of expression claim, the District Court assumed (without holding) that their food sharing ministry was expressive conduct protected by the First Amendment, but held that the City's application of its regulations to that ministry satisfied the intermediate scrutiny. JA 931-34; R.Doc. 57, at 31-34; AD 31-34. First, the District Court held that the City has a substantial

interest in preventing foodborne illness, then it held (without referring to any evidence that might support its holding) that requiring permits to distribute potentially hazardous food "plainly serves" that interest. JA 933; R.Doc. 57, at 33; AD 33. The District Court then addressed the Appellants' claim that the City's selective application of the Food Code to those attempting to feed homeless people violated the equal protection clause and the freedom of association. JA 934-38; R.Doc. 57, at 34-38; AD 34-38. The District Court held that because the City's application of the challenged regulations did not actually prevent Pastor Ray and Chris from associating with homeless people, rational basis scrutiny applied and the regulations survived that standard of review. JA 938; R.Doc. 57, at 38; AD 38. And, finally, the District Court disposed of the Appellants' hybrid rights claim by concluding that they had "not established a standalone free exercise claim, nor have they established a violation of another constitutional right." JA 941; R.Doc. 57, at 41; AD 41.

The Appellants filed a timely notice of appeal. JA 944; R.Doc. 59, at 1.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *See, e.g.*, *Acton v. City of Columbia*, 436 F.3d 969, 975 (8th Cir. 2006). The primary question is whether, viewing the facts in the light most favorable to the nonmoving party and affording them all reasonable inferences, the available evidence could not

lead a rational trier of fact to find for the nonmoving party. *Estate of Barnwell by and through Barnwell v. Watson*, 880 F.3d 998, 1004 (8th Cir. January 28, 2018); *see also Rogers v. City of Little Rock*, 152 F.3d 790, 799 (8th Cir. 1998); Fed. R. Civ. P. 56(c).

SUMMARY OF THE ARGUMENT

The basic question this case presents is straightforward. Does the U.S. Constitution permit the City of St. Louis to require Appellants to assume numerous expenses and regulatory burdens on before they may engage in the religious and expressive acts of sharing food with homeless people, particularly when the City imposes no such requirements on those sharing similar food with non-homeless people?

The Appellants' primary argument is that because their food sharing ministry is both a religious exercise and an expressive act, this is a case in which the hybrid rights doctrine should apply. The District Court misapplied this Court's precedents in upholding the City's application of its Food Code to the Appellants' food sharing ministry. Viewing the evidence and inferences in the light most favorable to the Appellants—as both the District Court and this Court must in the face of the City's motion for summary judgment—it is clear that requiring Pastor Ray and Chris to take on these financial and regulatory burdens would dramatically inhibit their religious and expressive activities, if not prevent them altogether. Consequently,

pursuant to this Court's rulings in *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), and *Telescope Media Group v. Lucero*, 936 F.3d 740 (8th Cir. 2019), the District Court erred by failing to apply a hybrid rights analysis and, thus, strict scrutiny to the City's application of the Food Code against the Appellants.

Further, even if the District Court was correct that hybrid rights analysis was improper, it still erred by misapplying the *O'Brien* test to the Appellants' stand-alone Freedom of Expression claim. Where a content-neutral regulation burdens expressive conduct protected by the First Amendment, intermediate scrutiny requires the government to justify the burden it imposes on constitutionally-protected speech not only by identifying a substantial government interest to be served, but also by showing that less-restrictive measures simply would not accomplish the government's interests. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). Although the Appellants do not dispute that government generally has a compelling interest in protecting the public health and welfare, they do not concede that *foodborne* illness, in particular, is sufficiently widespread or dangerous to warrant drastic restrictions on their constitutionally-protected expression. And even if the government had presented evidence that it had a substantial interest in preventing foodborne illness, the record (interpreted in the light most favorable to the Appellants) shows that requiring them to assume the burden and expense of the City's regulations will probably not lower the likelihood of foodborne illness in the

community. Even worse, because the City's restrictions *will* dramatically reduce both the quantity of the food they can share and the frequency with which they can share it, requiring the Appellants to comply with the challenged restrictions is more likely to *reduce* the quality and quantity of food available to the City's homeless population.

The Appellants have decided to waive Count III of their Complaint, in which they had argued that the City's selective enforcement of its Food Code violated the Equal Protection Clause and the Freedom of Association; this appeal does not involve part D of the District Court's opinion.

ARGUMENT

I. The District Court erred in granting the City summary judgment as to the Appellants' hybrid rights claim.

In *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the U.S. Supreme Court held that although the Free Exercise Clause does not require courts to carefully scrutinize religiously-neutral, generally-applicable laws that incidentally burden a person's religious practice, courts should nevertheless apply strict scrutiny where a plaintiff asserts a claim that "involve[s] not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." *Id*. at 881. Justice Scalia addressed the idea of a separate hybrid rights analysis to explain why, historically, the Supreme Court has been more likely to rule in favor of parties

whose constitutional claims involved religious liberty in conjunction with another fundamental right than it has been to rule in favor of parties with stand-alone free exercise claims.

The Supreme Court has not elaborated on how, precisely, courts should approach hybrid rights cases. The prevailing view among the circuits, however, is that a litigant need not show that they would independently prevail in the non-religious aspect of their hybrid rights claim before courts must engage the hybrid analysis. To the contrary, the Fifth, Ninth, and Tenth Circuits have all taken the position that an individual raising a hybrid rights argument only needs to present a "colorable claim" that the government's action infringes on a companion right. *See, e.g.*, *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 n.8 (5th Cir. 2009) (asking whether the party had "a colorable claim" on its companion right); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (explaining that a hybrid-rights claim requires the party to "make out a 'colorable claim' that a companion right has been violated"); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (similar). This Court as well has not only recently affirmed the vitality of this hybrid rights theory, it held that where a plaintiff had argued that a law negatively impacted both their religious exercise and their "communicative activity," the district court was obligated follow *Employment Division*'s guidance

and to apply strict scrutiny. *Telescope Media Group v. Lucero*, 936 F.3d 740, 759-60 (8th Cir. 2019).

This case fits that mold; the Court should follow *Employment Division*'s guidance and apply strict scrutiny.

A. The Appellants' food sharing ministry is a thoroughgoing blend of religious practice and "communicative activity."

In the Gospel of Matthew, Chapter 25:31-46, Jesus describes to his followers the judgment of the nations, saying that the Son of Man will divide people from one another as the shepherd separates sheep from goats. When he invites the righteous to come into the eternal kingdom, the first thing the Son of Man says to them is, "For I was hungry and you gave me food." When the righteous respond by asking when they ever saw Jesus and gave him food, he answers, "Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it unto me."

As explained above, for the Appellants sharing food with the hungry is not just a nice thing to do—it is an act of worship that Jesus commanded of his followers. It is an act of compassion and obedience. And it is also a communicative act, intended to convey to the recipient and to the community around them what it means and what it looks like for God to care for and provide for his children. Jesus taught his followers to "do to others what you would have them do to you[.]" Gospel of Matthew 7:12. But Jesus said that while wrapping up a larger point about the abundance of God's love in meeting his children's needs. He asked, "Which of you,

if your son asks for bread, will give him a stone? Or if he asks for a fish, will give him a snake?" Gospel of Matthew 7:9-10. Jesus was teaching his followers to trust that God loves all of his children and intends to meet their needs. For Pastor Ray and Chris, the meals they are providing to their homeless friends and neighbors really are the message. Because complying with the City's Food Code would necessarily and dramatically reduce their ability to convey this religious message to those in need and the community around them, the Court must recognize this as a situation in which hybrid rights analysis is required.

B. As applied to the Appellants, the challenged restrictions cannot survive strict scrutiny.

Strict scrutiny is "the most demanding test known to constitutional law." *See Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017). Under this standard, courts only uphold a challenged restriction on a fundamental liberty if the restriction is 'necessary to promote a compelling state interest.' The strict scrutiny test requires the government to prove not only that it has a compelling interest that it needs to address, but also that the regulations the government wishes to implement in pursuit of its interest restrict as little constitutional liberty as possible while still serving their intended purpose. The Appellants explain below why the challenged restrictions could not even survive intermediate scrutiny as applied to the Appellants' religiously-motivated expressive acts. Where it is clear that a challenged law cannot

survive a lower level of scrutiny it is unnecessary to elaborate as to the higher levels. *See, e.g.*, *D.C. v. Heller*, 554 U.S. 570, 628-29 (2008).

Because the City did not carry its burden of proving that the Appellants' religious and expressive conduct poses any serious danger to the City's alleged interest in preventing the spread of foodborne illness, this Court should reverse the District Court's judgment as to the Appellants' hybrid rights claim and should remand this matter to the District Court with instructions to enter summary judgment in favor of the Appellants.

II. The District Court erred in granting the City summary judgment as to the Appellants' freedom of expression claim.

A. The Appellants' food sharing ministry constitutes expressive conduct protected by the First Amendment.

Where a party claims that a government regulation infringes upon their freedom of expression, a court's consideration of that claim necessarily must begin with determining whether the challenged regulation actually burdens speech protected by the First Amendment. In order to answer this question the court must ask first whether the conduct demonstrates "an intent to convey a particularized message," and second whether those who view the conduct are likely to understand the message. *Adam and Eve Jonesboro, LLC. v. Perrin*, 933 F.3d 951, 957 (8th Cir. 2019). Applying this standard, courts have held that the First Amendment's protections extend to such actions as nude dancing, burning the American flag,

wearing a military uniform, conducting a silent sit-in, refusing to salute the American flag, or even selling video games. *Id.* The record before the Court shows that Appellants' food sharing ministry is expressive conduct protected by the First Amendment because it is intended to convey a particularized message and others who have observed their food sharing have understood that message.

Food—and the circumstances under which one shares it—has always been a powerful mechanism through which people convey ideas to others. "[T]he significance of sharing meals with others dates back millennia." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale* ("*Food Not Bombs I*"), 901 F.3d 1235, 1243 (11th Cir. 2018) (citing historical examples). Every society on earth uses food to communicate messages of various kinds, including messages about status, gender, lifestyle, ethnicity, religion, and more. See E.N. Anderson, Everyone Eats: Understanding Food and Culture 6, 124-139 (2005). "Preeminent among these are messages of group solidarity; food sharing is literally sacred in almost all religions[.]" *Id*. at 6. Indeed, one of the most distinctive marks of Jesus's ministry was his willingness to share meals with "tax collectors and sinners"[2]—people whom the elites of the day deemed unworthy of association—as well as his teaching that sharing food with those in need was a fundamental characteristic of the Kingdom of

[2] Gospel of Matthew 9:10-13.

God.[3] This is the context within which the Court must understand the Appellants' commitment to sharing food with homeless persons on the City's streets and sidewalks.

Food Not Bombs I is almost directly on point and, although the Eleventh Circuit's decisions are not binding on this Court, this one should be persuasive. A non-profit group that wished to share its opinion that food is a human right which society has a responsibility to provide, so it began hosting weekly food sharing events in a public park. *Id*. at 1238. But these gatherings ran afoul of city ordinances about the use of public parks and the public distribution of food. *Id*. The organization sued, alleging that the city's restrictions violated their rights to free speech and free association, but the federal district court granted summary judgment to the city on the basis that the food sharing events were not "expressive conduct" because food sharing was not "inherently communicative." *Id*. at 1239. The Eleventh Circuit reversed, holding that the correct analysis was whether a reasonable person would be able to discern "*some* sort of message" in light of the overall context of the gatherings, not whether an observer would necessarily infer a *specific* message. *Id*. at 1240-43.

The record in this matter shows that the Appellants intend for their act of sharing food with those in need to communicate to the recipients that they are loved

[3] See, e.g., Gospel of Matthew 25: 35-36, 40; Gospel of Luke 14:12-15.

and valued, regardless of their circumstances. JA 150; R.Doc. 35-3, at 56; JA 259-60; R.Doc. 36, at 4-5. The type and quality of the food they share with the hungry is part of that message—providing unfilling, unhealthy snacks suggests that the giver is not especially concerned with the recipient's long-term well-being, whereas wholesome, filling sandwiches convey that God intends to meet his children's needs abundantly. JA 614-15; R.Doc. 44, at 11-12; JA 684; R.Doc. 45, at 14. They also intend for their act of sharing food with those in need to communicate to the community at large that the Christian faith is relevant to real human needs and that we have an obligation to show love and compassion for those who are hurting. JA 161; R.Doc. 35-3, at 67. The record shows that their food-sharing ministry has, in fact, conveyed the intended messages in that other citizens have chosen to follow their example in providing food to the hungry. JA 172-74; R.Doc. 35-3, at 78-80; JA 263; R.Doc. 36-1, at 3.

As to the overall context for their food sharing ministry, Pastor Ray has been doing this work for decades. He has long since established himself as a passionate advocate for the homeless, particularly when it comes to treating them with dignity and compassion and seeking to meet their needs by providing them with nourishing food. Consequently, the Appellants have demonstrated that their expressive act of sharing food with homeless persons qualifies as speech protected by the First Amendment.

B. The City's application of the challenged restrictions to the Appellants' food sharing ministry cannot survive intermediate scrutiny.

Pastor Ray and Chris have always conceded that insofar as their Free Expression claim was going to be considered separately from their Free Exercise claim, the restrictions the City's Food Code would impose on their expressive act of sharing food would require application of intermediate scrutiny. JA 21; R.Doc. 1, at 13. Under this standard, where content-neutral government regulations interfere with expressive conduct, the government bears the burden of demonstrating that the challenged regulations are narrowly tailored to serve a significant governmental interest and also that they leave open ample alternative channels for communication. *Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1099 (8th Cir. 2013). The government must show not only that there is a real need to protect the interest it has identified, but also that there is a "genuine nexus" between the challenged regulation and the interest it is supposed to serve, and that absent the challenged regulation the government would be substantially less effective in achieving its interest. *Id*.

1. The City failed to present evidence sufficient to show that the City's alleged interest in preventing the spread of foodborne illness is "important" or "substantial."

As this Court has recently held in the context of a case involving intermediate scrutiny, when it comes to satisfying the government's burden of demonstrating a

real need to protect an asserted governmental interest, it is not enough for the government to recite an interest that is significant in the abstract. *Id.* In this case the City made no effort whatsoever to show whether foodborne illness is a regular or severe health issue for the City and its residents. It presented an affidavit in which a City employee claimed—without citing any specific study or otherwise demonstrating the reliability of the information—that in 2018 a CDC surveillance system identified 25,606 cases of "enteric disease." The affiant did not define "enteric disease" or explain the circumstances under which such a malady might develop. Although he inferred that all of these cases were caused by ingesting food or beverages, the affiant did not identify what types of food or beverage might have led to these cases or whether the substances responsible might have been obtained from a restaurant, home-cooked meal, or a backyard barbeque. Haslam did indicate that fewer than 6,000 people were hospitalized as a result of the "enteric disease" out of the 48 million Americans that he claimed were being monitored by the system—or, in other words, about 0.01% of that population over the course of an entire year. Nothing in Haslam's affidavit indicated what relevance, if any, these statistics might have on the City or the people who live there. Thus, the City has not provided any explanation as to how foodborne illness affects the City or those who live there and there is no basis at all upon which this Court can conclude that preventing foodborne illness rises to the level of an "important" or "substantial"

interest. "[R]estrictions on speech are not permitted when either the harms or the remedial effects of the government's restrictions are supported only by speculation or conjecture, or when the regulation burdens substantially more speech than is necessary to further the government's legitimate interests." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1071 (10th Cir. 2020).

Three additional data points undercut the City's claims that it has an important or substantial interest in enforcing the Food Code's requirements. First, although on December 4, 2018, the Appellants to show up to municipal court just as they had been commanded to do by the citation issued to them on October 31, 2018, the City's attorneys did not consider the matter important enough to pursue the charges. Second, later that same evening the City's Director of Public Safety, Jimmie Edwards, stated "Issuing citations for this type of offense is not a priority for the City of St. Louis." And third, if the City really did consider the risk of foodborne illness to be a substantial or important interest, it would require compliance with the Food Code whenever "potentially hazardous food" is shared at potlucks, barbeques, house dinner parties, and/or tailgating parties instead of selectively applying it to those trying to feed the homeless. The City presented no basis for believing that the

food the Appellants share with the homeless is any more prone to contagion than the food shared in any of those other settings.

Because the City did not carry its burden of proving that its alleged interest in preventing the spread of foodborne disease is actually important or substantial, this Court should reverse the District Court's judgment as to Count II of the Complaint and should remand this matter to the District Court with instructions to enter summary judgment in favor of the Appellants.

2. The City failed to present evidence sufficient to show that the Appellants' food sharing ministry poses any danger to the City's alleged interest in preventing the spread of foodborne illness.

The U.S. Supreme Court observed in *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622 (1994), that even if a government defendant manages to show that, at least in the abstract, its asserted interests are "important" within the meaning of the intermediate scrutiny analysis, that does not mean that the challenged restrictions on speech will advance the asserted interest. *Id*. at 664. "When the Government defends a regulation on speech as a means to… prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, *and that the*

regulation will in fact alleviate those harms in a direct and material way." *Id*. (emphasis added).

It is important to note at this point the difference made by the fact that the Appellants' are presenting only an as-applied challenge to the requirements listed above. As-applied challenges are intensely fact-based, focusing only on the specific circumstances presented by the plaintiff in that case. *In this case* the record makes clear that the food the Appellants are providing to those in need is mostly prepared at churches whose kitchens have been certified by local health authorities. To the extent that the City might be concerned about food of unknown provenance, *that concern is not presented by this case*. Similarly, the record shows that Pastor Ray and Chris are diligent about keeping the donated food frozen and/or chilled until it is ready to be eaten. With these two basic facts established, the City must bear the burden of explaining why forcing the Appellants to comply with the challenged restrictions might be expected to move the needle in any way when it comes to reducing the likelihood of foodborne illness in the City. The Appellants respectfully suggest that there is no evidence at all that making it harder and more expensive for them to provide nourishing food to the City's homeless community will actually advance the City's asserted interest in preventing foodborne illness.

Because the City did not carry its burden of proving that the Appellants' religious and expressive conduct poses any danger to the City's alleged interest in

preventing the spread of foodborne illness, this Court should reverse the District Court's judgment as to Count II of the Complaint and should remand this matter to the District Court with instructions to enter summary judgment in favor of the Appellants.

3. **The City failed to demonstrate that less significant restrictions on the Appellants' religious and expressive conduct would prevent the City from securing its alleged interest.**

Where a regulation restricts an expressive medium in the name of a particular interest but declines to restrict similar acts that implicate the same interest, the regulation's underinclusiveness may raise serious doubts about the legitimacy of the government's alleged interest. *See Johnson v. Minneapolis Park and Recreation Bd.*, 729 F.3d 1094, 1100 (8th Cir. 2013). Put another way, the more important a given regulation really is, the fewer exceptions the government will make as to who has to comply with it. If a "very important" regulation only actually applies to a small handful of people, it likely isn't that important.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's opinion and remand the case with instructions to enter summary judgment in favor of the Appellants as to Counts I and II of their Complaint.

Respectfully submitted,

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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), 10,410 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 and addendum have been scanned for viruses using Microsoft Defender, and both documents are virus-free.

CERTIFICATE OF SERVICE

I, David E. Roland, do hereby certify that on December 10, 2021, 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