Case No.: 16-16808

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FORT LAUDERDALE FOOD NOT BOMBS, NATHAN PIM, JILLIAM PIM, HAYLEE BECKER, AND WILLIAM TOOLE,

Plaintiffs-Appellants,

v.

THE CITY OF FORT LAUDERDALE,

Defendant-Appellee.

On Appeal from the United States District Court,
Southern District of Florida, Fort Lauderdale Division

BRIEF OF AMICI CURIAE MARC-TIZOC GONZÁLEZ, FLORIDA LEGAL SERVICES, INC., LATINA AND LATINO CRITICAL LEGAL THEORY, INC., AND SOCIETY OF AMERICAN LAW TEACHERS, INC. SUPPORTING PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS (CIP)

Per Fed. R. App. P. 26.1 and 11th Cir. R. 26-1, amici believe and certify that the CIP contained in the Appellants' Initial Brief is complete. In the alternative, amici certify themselves as additional interested persons:

1. González, Marc-Tizoc, Amicus Curiae
2. Florida Legal Services, Inc., Counsel for Amicus Curiae
3. Latina and Latino Critical Legal Theory, Inc., Amicus Curiae
4. Mesa Estrada, Victoria, Counsel for Amicus Curiae
5. Society of American Law Teachers, Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly traded corporations that have an interest in the outcome of this case. Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26-1, amici Florida Legal Services, Inc., Latina and Latino Critical Legal Theory, Inc., and Society of American Law Teachers, Inc. state that they are all non-profit corporations, have no parent companies, and have not issued shares of stock.

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STATEMENT OF THE ISSUES

1. Whether Plaintiffs' practice of sharing food in a city-owned park with hungry people, as part of their public demonstration against hunger and war, obtains protection under the First Amendment: (1) under the Free Speech Clause as symbolic speech or expressive conduct; (2) under their right to expressive association; or (3) under the Peaceable Assembly Clause.

2. Whether City of Ft. Lauderdale Zoning Ordinance C-14-42 ("the Ordinance") and Park Rule 2.2, facially and as applied to Plaintiffs, violate the First Amendment.

3. Whether the Ordinance and Park Rule 2.2, facially and as applied to Plaintiffs, violate the Due Process Clause of the Fourteenth Amendment.

4. Whether the District Court improperly: (1) failed to draw all justifiable inferences in the light most favorable to the non-moving Plaintiff parties; (2) disregarded undisputed material facts, including the expert report and opinion of Dr. Richard Wilk; and (3) erroneously concluded that the movant City of Fort Lauderdale met its burden to show that there is no genuine dispute as to any material fact and to be entitled to judgment as a matter of law.

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF AMICI CURIAE

Amici curiae Marc-Tizoc González, Florida Legal Services, Inc., Latina and Latino Critical Legal Theory, Inc., and Society of American Law Teachers, Inc. respectfully submit this brief in support of Plaintiffs-Appellants.[1]

Marc-Tizoc González is an associate professor of law at the St. Thomas University School of Law in Miami Gardens, Florida, where he teaches Property, Wills and Trusts, and seminars on Hispanics, Civil Rights, and the Law; and Poverty Law and Economic Justice. His research into the food-sharing cases has uncovered over sixteen federal and state court challenges to municipal laws that criminalize, or otherwise regulate, people who publicly share food on city-owned properties. Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People who Share Food in Public?*, 7 U.C. Irvine L. Rev. – (forthcoming 2017), at Appendix 1 [hereinafter González, *Criminalizing Charity*]. Earlier, his research identified a split in authority regarding how the United States Courts of Appeal for the Ninth and Eleventh Circuits differently apply First Amendment doctrines to city laws that proscribe or regulate the public sharing of food. Marc-Tizoc González, *Hunger,*

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), amici requested the consent of the parties to submit this brief. Plaintiffs-Appellants' attorney Kirsten Anderson agreed, but Defendant-Appellee attorney Alain E. Boileau objected. Amici therefore move for leave to file this amicus brief.

Poverty, and the Criminalization of Food Sharing in the New Gilded Age, 23 Am. U. J. Gender & Soc. Pol'y & L. 231, 233-34, 260-77 (2015). Professor González urges the Court *not* to extend its holding in *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756 (11th Cir. 2011) (en banc) but instead to reverse the district court's Order and Judgment and to remand this matter for trial. He files this amicus brief with the knowledge and permission of his employer but on his own authority and in his individual capacity.

Florida Legal Services ("FLS") is a nonprofit, public-interest law firm established to advocate for poor, vulnerable, and hard to reach people through impact litigation, legislative and administrative advocacy, education, and strategic partnerships. FLS works on the most pressing and current issues faced by low-income and disenfranchised Floridians to effect systemic change for: low-wage earners and disenfranchised job seekers, people in need of health care and prescription drugs, domestic violence survivors, vulnerable seniors, children with special needs and at-risk youth, people seeking safe, fair and affordable housing, institutionalized people, immigrants and migrant workers, and people facing racial, disability, gender identity or sexual orientation discrimination. FLS monitors litigation of concern to these communities and identifies cases that have statewide or national significance such as *Pottinger v. City of Miami,* 810 F.Supp. 1551 (S.D. Fla. 1992); and *Catron v. City of Saint Petersburg*, 658 F.3d 1260 (11th

Cir. 2011)—cases that concern the interplay between constitutionally protected conduct and the criminalization of homelessness. FLS has identified this case as having such significance.

Latina and Latino Critical Legal Theory, Inc. ("LatCrit") is a Florida non-profit corporation whose purposes include developing, promoting, and disseminating critical legal scholarship centering on the Latina/Latino experience and facilitating the work of scholars, public interest lawyers, and non-governmental organizations dedicated to eliminating subordination and to promoting justice. LatCrit thus organizes conferences, workshops, symposia and similar programs; fosters diverse, interdisciplinary, transcultural and international participation and perspectives; promotes original research, field work and data collection; publishes and promotes scholarship; and conducts and collaborates in law reform projects and litigation. LatCrit believes that this case presents important issues of national jurisprudential significance. Accordingly, the LatCrit board of directors voted to join this amicus brief.

The Society of American Law Teachers, Inc. ("SALT"), a non-profit founded in 1973, is the largest independent membership organization of legal academics in the United States. SALT's membership includes law professors, deans, librarians, and administrators from law schools across the country, and virtually all active members hold full-time positions in legal education. SALT

works to promote justice, diversity and academic excellence. SALT's Board of Governors approved joining this amicus brief.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(E), the Amici and its counsel state that no counsel to a party in this matter has authored the brief filed on behalf of Amici in whole or in part. No party or counsel for any party contributed money intended to fund the preparing or submission of this brief. No party other than the Amici has contributed money intended to fund the preparing or submission of this brief.

SUMMARY OF ARGUMENT

The central issue in this case is whether the Plaintiffs' practice of sharing food in a city-owned public park as part of their regular demonstrations against hunger and war obtains First Amendment protection. Amici argue that the district court committed reversible error in two ways, ask this Court to reverse Judge Zloch's Order (Doc. 78.) and Final Judgment (Doc. 80.), and urge this Court to remand the case to proceed toward trial.

First, although the district court Order mentioned the two tests that lower courts have applied following *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam) and its progeny, to evaluate whether "symbolic speech" or "expressive conduct" obtains First Amendment free speech protection, the district court failed to apply those tests to the record evidence in this case. (Doc. 78, at 24.) Instead, the district court merely asserted its conclusory finding, "that outdoor food sharing [at Stranahan Park] does not convey Plaintiffs' alleged particularized message unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations." *Id.* This Court should thus reverse the district court for failing to apply correctly the *Spence* tests, 418 U.S. at 409, as interpreted by the Eleventh Circuit in *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004), to determine whether alleged expressive conduct obtains free speech protection. Also, *Holloman*, 370 F.3d at 1279-82, explained that "[e]ven when

engaging in speech that is not directly constitutionally protected, [the Plaintiffs] still [have] the First Amendment right to be free from viewpoint discrimination." *Id.* at 1281. Finally, by reversing the district dourt, this Court can also clarify the effect of *Rumsfeld v. Forum for Acad. and Inst. Rts., Inc.* ("FAIR"), 547 U.S. 47 (2006) on the *Spence* tests.

Also, applying the *Spence* tests, as interpreted by the Eleventh Circuit, would likely result in a finding that Plaintiffs' public food sharing obtains Free Speech protection as expressive conduct under either the *Spence* "imbued test," which the Eleventh Circuit has yet to apply, but which remains good law, or the *Spence* "message test," even if limited by the "inherently expressive conduct" language of *FAIR*. 547 U.S. at 66. Moreover, even if this Court finds that Plaintiffs' public food sharing is not protected expressive conduct, this Court should reverse the district court for failing to permit the litigation to develop adequately whether the City of Fort Lauderdale's enactment or enforcement of the Ordinance and Park Rule 2.2 were motivated by a desire to suppress the Plaintiffs' viewpoint. *Cf. Holloman*, 370 F.3d, at 1279-82.

Second, this Court should reverse the district court because its Order failed to consider whether the City of Fort Lauderdale violated Plaintiffs' First Amendment rights to peaceably assemble in a city-owned public park. Although the Plaintiffs styled their two claims for relief under free speech and association

under the First Amendment and due process under the Fourteenth Amendment, (Doc. 1, at 21-28.), their Complaint referred expressly to their assembly and weekly demonstrations. *Id.* at 19 ¶77, 22 ¶92, 24 ¶96. In deciding the instant appeal, therefore, this Court should not forget that several relevant sources of First Amendment protection exist, namely, rights to free speech, expressive association, and peaceable assembly. If this Court cannot recognize Plaintiffs' public food sharing as obtaining protection under doctrines of expressive conduct or expressive association, then it should still reverse the District Court because the Plaintiffs claimed not only a violation of their First Amendment rights to free speech and expressive association but also to peaceably assemble. Indeed, the right to peaceably assemble may be a better way to cognize the modern food-sharing cases than free speech. Though overshadowed in recent decades by the doctrines of expressive conduct and expressive association, peaceable assembly precedents remain good law, and they are relevant to this case in part because Plaintiffs' practice of sharing food in city-owned public parks resembles numerous other public uses of food in the late nineteenth and early to mid-twentieth centuries. For example, African Americans, industrial unionists, and suffragists organized public barbecues, picnics, and teas as they peaceably assembled to advocate against Jim Crow, in favor of workers' rights, and to establish women's rights to vote and hold elected office. While in recent decades the Supreme Court has eclipsed its

peaceable assembly precedents with doctrines regarding expressive conduct and expressive association, the First Amendment right to peaceably assemble remains an independent constitutional basis to reverse the district court Order and Judgment.

ARGUMENT

I. The District Court Failed to Apply the *Spence* Tests as Interpreted by the Eleventh Circuit to Evaluate Whether "Symbolic Speech" or "Expressive Conduct" Obtains Free Speech Protection

Opining that *FAIR*, 547 U.S. 47 (2006) changed the relevant test to discern whether an activity obtains free speech protection as expressive conduct, the district court concluded:

> that outdoor food sharing does not convey Plaintiffs' alleged particularized message unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations. . . . Therefore, the Court finds that Plaintiff's [sic] conduct is not expressive conduct, entitled to protection under the Free Speech Clause of the First Amendment.

(Doc. 78, at 24-25.)

While this reading of *FAIR* has some support, the district court failed to distinguish between the two tests that the Supreme Court and the lower courts have recognized following *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam). This is surprising because earlier in its Order the district court approvingly quoted a law review article by Professor James McGoldrick for the proposition that the lower courts have interpreted *Spence* to create two tests—the imbued test and the

message test—to determine whether an activity obtains First Amendment protection as expressive conduct. (Doc. 78, at 17-18, quoting James M. McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 Okla. L. Rev. 1, 36 (2008).) Elsewhere in his article, Professor McGoldrick notes:

> Though *FAIR* does not mention the *Spence* case, it potentially imposes a restrictive definition of the *Spence* message test. . . . In *FAIR*, the Court seemed to go out of its way to use the term "inherently expressive." Unlike some of the other cases, *FAIR*'s use of the phrase seems less like something similar to the imbued test, and more like a limitation on the message test.

Id. at 45.

The Plaintiffs' appeal of the district court Order therefore provides this Court with the opportunity to determine whether the Eleventh Circuit discerns two tests out of *Spence* and to instruct the lower courts in how to apply the correct test or tests. As Professor McGoldrick explains, "Although *Spence* likely intended a single test, it makes sense to treat the imbued test and message test separately, and later courts tend to emphasize one over the other." *Id.* at 36. He notes, "[a]lthough a few lower courts apply only the imbued test, the most common approach is to just mention the imbued language and then to apply the message test." *Id.* (citations omitted). For example, the Sixth Circuit has applied the imbued test.

Pinette v. Capitol Square Review & Adv. Bd., 30 F.3d 675, 678 (6th Cir. 1994), *aff'd*, 515 U.S. 753 (1995).

In *Holloman*, this Court explained *Spence* to mean that "the Supreme Court held that, to determine whether a particular act counts as expressive conduct, a court must determine whether '[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" 370 F.3d at 1270 (citing *Spence*, 418 U.S. at 410-11). Commenting on *Holloman*, Professor McGoldrick explained that "the Eleventh Circuit also applied a modified version of the message test." McGoldrick, *supra*, at 74. The modification followed from *Hurley v. Irish Am., Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), which *Holloman* interpreted to liberalize the *Spence* message test. 370 F.3d at 1270, (citing *Hurley*, 515 U.S. at 569). As the *Holloman* court explained, "in determining whether conduct is expressive we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." 370 F.3d at 1270.

This test, the *Spence* message test, is what the district court opines *FAIR* changed. (Doc. 78, at 22.) Citing a vacated portion of the panel opinion in *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010) *vacated by* 616 F.3d 1230 (11th Cir. 2010), *reinstated in part*, 638 F.3d 756 (11th

Cir. 2011) (en banc), the district court opined that *FAIR* has superseded Holloman. (Doc. 78, at 21-22.) Amici believe that this interpretation of *FAIR* is wrong.

In *FAIR*, the Supreme Court first referenced *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968), for the proposition that "we [have] recognized that some forms of symbolic speech were deserving of First Amendment protection. *FAIR*, 547 U.S. at 65 (internal quotations omitted).) The Court then noted, "we have extended First Amendment protection only to conduct that is inherently expressive." *FAIR*, 547 U.S. at 66. It then cited *Texas v. Johnson*, 491 U.S. 397, 406 (1989), as an example where it had "applied *O'Brien* and held that burning the American flag was sufficiently expressive to warrant first amendment protection." *FAIR*, 547 U.S. at 66. How should this Court interpret *FAIR*? Professor McGoldrick explains, "the Court may have been signaling its dissatisfaction with the array of symbolic speech cases filed in the lower courts and suggesting a much stricter message test as a way of weeding out the more specious claims." McGoldrick, *supra*, at 51. McGoldrick, however, disapproved of this interpretation. (Not only is the *FAIR* Court's use of the *Johnson* [overwhelmingly apparent] language unsupported by *Johnson*, it reflects a harshness toward symbolic speech that is not justified." McGoldrick, *supra*, at 51-52. As he explains, "This seems a serious misreading of *Johnson*, in that the Court there seemed to be just describing the dramatic nature of *Johnson*'s flag burning message, not imposing a new message test." (McGoldrick, *supra*, at

50-51 (citation omitted).) McGoldrick ends his discussion of *FAIR* by noting that "Professor [Harry] Kalven would say that if there is one overwhelming principle to free speech, it is that tests for free speech must be expansive in order to make sure that all speech is protected. Here, a narrow definition of symbolic speech is inconsistent with that vision." McGoldrick, *supra*, n.279 at 52 (citation omitted).

Amici agree with McGoldrick's critique of *FAIR* and Professor Kalven's vision of an expansive First Amendment. In the instant case, amici urge this Court to discern that *FAIR*'s assertion that the Court has "extended First Amendment protection only to conduct that is inherently expressive" subsumes and incorporates earlier iterations of the two *Spence* tests. Both the imbued test and the message test remain good law. Moreover, the array of activities that the Court has protected under these tests, and earlier applications of free speech jurisprudence, remain protected by the First Amendment. In other words, the Court's twentieth century free speech precedents provide a guide for this Court to interpret *FAIR*'s phrase, "conduct that is inherently expressive."

Consider the following activities that the Court has found to obtain First Amendment protection: flying a red flag in *Stromberg v. California*, 283 U.S. 359, 370 (1931); protesting and picketing in *Schneider v. State*, 308 U.S. 147, 162 (1939); leafletting in *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940); passing handbills in *Jamison v. Texas*, 318 U.S. 413, 416 (1943); refusing to recite the

Pledge of Allegiance in *W. Va. State Bd. of Edu. v. Barnette*, 319 U.S. 624 (1943); labor organizing and collecting funds in *Thomas v. Collins*, 323 U.S. 516, 540 (1945); peacefully marching to the South Carolina statehouse grounds in *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963); picketing in front of a courthouse in *Cox v. Louisiana*, 379 U.S. 536, 552 (1965); conducting a peaceful sit-in to protest racial segregation in a public library in *Brown v. Louisiana*, 383 U.S. 131, 142 (1966); flying a United States flag upside down with a peace symbol made of removable black tape from an apartment window in *Spence*, 418 U.S. at 405-06; demonstrating against public school desegregation by marching and singing in a peaceful and orderly manner from city hall to the mayor's residence in *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969); wearing black armbands at school to protest the Vietnam War in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969); marching out of church in an orderly fashion and onto the sidewalk in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148-49 (1969); charitable appeals for funds on the street or door-to-door in *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); picketing the U.S. Supreme Court building in *U.S. v. Grace*, 461 U.S. 171 (1983); pitching tents at the Mall and Lafayette Park in Washington, D.C. in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 303 (1984); burning an American flag to protest at the Republican National Convention in *Johnson*, 491 U.S. at 399; parading in the

streets (not merely holding up banners of singing songs) in *Hurley*, 515 U.S. at 568-69; and even nude erotic dancing in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 284 (2000).

These precedents can aid this Court to discern whether Plaintiffs' public sharing of food in city-owned Stranahan Park, as part of their regular demonstration against hunger and war, qualifies as sufficiently expressive (*O'Brien*), overwhelmingly apparent (*Johnson*), or inherently expressive (*FAIR*) under a modified version of the *Spence* message test.

In the alternative, if this Court determines that *FAIR* limited the *Spence* message test in some way, tempering how the *Hurley* Court had earlier liberalized it, and thus decides to modify its holding in *Holloman* in a way that finds Plaintiffs' public food sharing to fail the modified *Spence* message test, this Court retains recourse to the imbued test, and amici urge this Court to apply both the *Spence* tests to the case at bar.

A. The District Court Asserted a Conclusory Finding that Plaintiffs' Outdoor Food Sharing Does Not Convey their Alleged Particularized Message Unless it is Combined with the Other Speech Involved in their Demonstrations

Instead of applying the modified *Spence* message test, the district court asserted its conclusory finding, "that outdoor food sharing [at Stranahan Park] does not convey Plaintiffs' alleged particularized message unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations." (Doc. 78, at 24.)

The district court's conclusion relied on *FAIR*'s assertion that "[t]he expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." *FAIR*, 547 U.S. at 66, cited in Doc. 78, at 21. However, the district court then failed to apply the *Spence* message test as modified by *FAIR*. Instead, it concluded, amici believe erroneously, "that outdoor food sharing does not convey Plaintiffs' alleged particularized message unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations." (Doc. 78, at 24.) This Court should thus reverse the district court for failing to apply correctly the *Spence* message test, 418 U.S. at 409, as interpreted by the Eleventh Circuit in *Holloman*, 370 F.3d at 1270, and as modified by *FAIR*, 547 U.S. at 66.

B. Applying the *Spence* Message Tests as Interpreted by the Eleventh Circuit Would Likely Result in a Finding that Plaintiffs' Public Food Sharing Obtains First Amendment Free Speech Protection as "Inherently Expressive Conduct"

Correctly applying the *Spence* tests, as interpreted by the Eleventh Circuit, would likely result in a finding that Plaintiffs' public food sharing obtains Free Speech protection either as inherently expressive conduct under the modified *Spence* message test or under the *Spence* "imbued test." Moreover, even if this Court finds that Plaintiffs' public food sharing does not constitute protected

expressive conduct, this Court should reverse the district court for failing to permit the litigation to develop adequately whether the City of Fort Lauderdale's enactment or enforcement of the Ordinance and Park Rule 2.2 were motivated by a desire to suppress the Plaintiffs' viewpoint. *Cf. Holloman*, 370 F.3d, at 1279-82.

In the Eleventh Circuit, "to determine whether a particular act counts as expressive conduct, a court must determine whether '[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.'" *Holloman*, 370 F.3d, at 1270 (citing *Spence*, 418 U.S. at 410-11). Further, interpreting *Hurley*, *Holloman* noted, "we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d, at 1270.

Here, Plaintiffs have alleged numerous facts demonstrating their intent to convey a particularized message. Plaintiffs demonstrate weekly in Stranahan Park to protest hunger and war and to promote the idea that food is a human right. (Docs. 1, at 10-13 ¶¶39-50; 40-23, at 1-2 ¶5; 40-24, at 2-3 ¶¶7-8; 40-25, at 3 ¶7; 40-26, at 2-3; ¶¶6-7.) Moreover, the Plaintiffs' demonstrations assert that if people work together in solidarity across the various social divides, they can cook, transport, serve, and share nutritious vegan or vegetarian food with homeless, poor, or otherwise hungry people and without expectation of remuneration. (Doc. 1, at

11-12 ¶¶41-46.) In contrast, the City of Fort Lauderdale interprets Plaintiffs' conduct to express an entirely different message (i.e., that people can only use public parks to provide food to hungry people as a kind of social service, and after complying with various bureaucratic processes like obtaining written permission and applying for a conditional use permit from the City's Development Review Committee. (Doc. 1-3, at 1, 3-10). The Ordinance defines Plaintiffs' activity as an "Outdoor Food Distribution Center," which is only permitted as a matter of right in a "Heavy Commercial/Light Industrial (B-3) District. (Doc. 1-3, at 11.)

These are substantially, perhaps even radically, different messages. While the City of Fort Lauderdale is entitled to express its own messages regarding food sharing in public, this case highlights what is essentially at issue here: can local government, and the federal courts, hear and understand Plaintiffs' own messages about their public food sharing, or shall Plaintiffs' messages be deemed incomprehensible and thus deemed unprotected by the Free Speech Clause. *Cf.* González, *Criminalizing Charity*, *supra*, at Manuscript 9 n.37, 11, 22-23 (discussing the contested meanings of sharing food in public between people who understand their activity in terms of: (1) religious charity and ministry; (2) political solidarity and mutual aid; and (3) municipal food distribution, homeless or large group feeding, social service facility, or outdoor food distribution center, under the anthropological theories of "emic" and "etic," where the emic concept describes

people's "native" usage of language and other cultural practices and the etic concept describes an outsider specialist's interpretation of such practices). Amici thus urge this Court to rule that Plaintiffs established their intent to convey a particularized message by publicly sharing food in a city-owned park, or at least to rule that the City of Fort Lauderdale failed to show that no genuine dispute of material fact exists regarding Plaintiffs' intent.

The second part of the *Spence* message test is to determine "in the surrounding circumstances [that] the likelihood was great that the message would be understood by those who viewed it.'" *Holloman*, 370 F.3d, at 1270, citing *Spence*, 418 U.S. at 410-11. Further, interpreting *Hurley*, *Holloman* noted, "we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d, at 1270. One way to interpret *FAIR* is to mean that when a court finds a message to meet this standard, it constitutes "conduct that is inherently expressive." 547 U.S. at 64. This seems a reasonable reading because FAIR's standard expressly cites to earlier cases for support of its assertion. *Id.* (citing *O'Brien*, 391 U.S. at 376; *Johnson*, 491 U.S. at 406). Of course, *FAIR* also instructs that the "fact that such explanatory speech is *necessary* is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*." *FAIR*, 547 U.S. at 66 (emphasis added).

Here, the surrounding circumstances make the likelihood great that Plaintiffs' message would be understood by those who viewed it, or rather, that a reasonable person would interpret Plaintiffs' public food sharing, held weekly every Friday at Stranahan Park in the late afternoon to early evening, as *some* sort of message. Stranahan Park is in downtown Fort Lauderdale. (Docs. 1, at 13-14 ¶¶51-55; 40-23, at 3-5 ¶¶ 8-11, 7-8 ¶¶ 17-18; 40-34.) The park adjoins the Fort Lauderdale Woman's Club and the Broward County Main Library, is one block away from the Broward County Governmental Center, and is two blocks away from the west end of East Las Olas Boulevard, a popular tourist destination that is one block away from the Tarpon River. In other words, every Friday afternoon to evening passing city residents, county workers, tourists, and others may witness Plaintiffs as they assemble at Stranahan Park, set up their folding table beneath the park gazebo, place their vegan and vegetarian food atop the table, along with literature or flyers, and unfurl their Food Not Bombs banner, which features not only the group's name and slogan but also its emblem (a human fist closed around a carrot). (Docs. 40-23, at 2-3 ¶¶ 6-7,5-6 ¶ 12; 40-24, at 2 ¶ 6; 40-25, at 4-5 ¶¶ 10-11; 40-26, at 2-3 ¶ 7; 40-31; 40-32, at 1.)

If the *Spence* message test required an observer necessarily to infer a *specific* message, then it might be debatable whether Plaintiffs met it. However, even after *FAIR*, that is not the correct test. Rather, this Court must determine whether the

reasonable person would interpret Plaintiffs' public food sharing as *some* sort of message, *Holloman*, 370 F.3d, at 1270, and after *FAIR*, if explanatory speech is *necessary*, it would be "strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection under *O'Brien*." *FAIR*, 547 U.S. at 66 (emphasis added). The district court opines that Plaintiffs' banner, literature, and flyers meet this showing, but this conclusion is wrong. Rather, Plaintiffs' public food sharing is analogous to the marching, parading, and patrolling that the Court began to protect during the civil rights movement of the twentieth century. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. City of Birmingham*, 394 US. 147 (1969). Fifty years ago state and local governments prosecuted such activity. The Court however, interpreted such activity to obtain First Amendment protection. *See, e.g.*, Harry Kalven, Jr., *The Negro and the First Amendment* (Ohio State U. Press 1965). Professor McGoldrick, whom the district court cited approvingly, explains, "Conduct like marching seems to be protected not because the march itself is communicative, but because marching is an effective way of getting the message noticed and is inseparable from the message." McGoldrick, *supra*, at 15. Three decades after Kalven published his germinal book regarding how the civil rights movement affected First Amendment jurisprudence, the Supreme Court explained, "The protected expression that inheres in a parade is not limited to its banners and

songs, however, for the Constitution looks beyond written or spoken words as mediums of expression." *Hurley*, 515 U.S. at 569.

Under the district court's erroneous interpretation of Plaintiffs' weekly public food sharing in Stranahan Park, their activity fails to obtain First Amendment protection "unless it is combined with other speech, such as that involved in Plaintiffs' demonstrations." (Doc. 78, at 24.) This is wrong because it misapplies the modified *Spence* message test and because it would result in Plaintiffs' only being able to set up a table with flyers, literature, and to unfurl their Food Not Bombs banner but without the public sharing of food that most eloquently expresses their protest of hunger and war.

C. In the Alternative, this Court May Reverse the District Court under the *Spence* Imbued Test, or under the *Holloman* Standard regarding Viewpoint Discrimination

Because of word limits, amici are unable to develop substantively two alternative arguments. Recall, however, that lower courts have interpreted *Spence* to create two tests, the Sixth Circuit has applied the *Spence* imbued test, and the Supreme Court has endorsed the application. *Pinette v. Capitol Square Review & Adv. Bd.*, 30 F.3d 675, 678 (6th Cir. 1994), *aff'd*, 515 U.S. 753 (1995). Also, by its terms *FAIR* arguably did not modify the imbued test. McGoldrick, *supra*, at 45 ("Unlike some of the other cases, *FAIR*'s use of the phrase [inherently expressive] seems less like something similar to the imbued test, and more like a limitation on

the message test.") (citation omitted). Therefore, this Court, which applied the *Spence* message test in *Holloman* could apply the *Spence* imbued test here.

Under the *Spence* imbued test, the Court said it was "necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," and the Court concluded that "the nature of appellant's activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he was engaged in a form of protected expression." *Spence*, 418 U.S. at 409-10; *see also* McGoldrick, supra, at 34-36 (discussing the *Spence* imbued test).

Finally, even if this Court agrees with the district court that Plaintiffs' weekly public food sharing to protest hunger and war in Stranahan Park is not expressive conduct, this Court should recall the *Holloman* standard regarding viewpoint discrimination. *Holloman*, 370 F.3d at 1279-82, explained that "even if Holloman did not have the right to express himself in the manner he did, his rights were still violated if he was punished because Allred disagreed or was offended by what he said." *Id.* at 1280. The *Holloman* court continued, "[e]ven when engaging in speech that is not directly constitutionally protected, [the Plaintiffs] still [have] the First Amendment right to be free from viewpoint discrimination." *Id.* at 1281. Thus, if this Court agrees with the district court that Plaintiffs' public food sharing is not expressive conduct and hence not "directly constitutionally protected," these

Plaintiffs, like the Plaintiff-Appellant in *Holloman*, have the right to be free from viewpoint discrimination, which even the district court Order acknowledges seems to exist here. The district court noted, "If food sharing is protected expressive conduct, then Plaintiffs' food sharing, specifically, is being targeted. . . . Even if the Court applied the *O'Brien* steps, cited above, it is not obvious that the Ordinance and the Park Rule do not target expression because both are concerned with the purpose for which food is being provided. (Doc. 78, at 23-24.) The district court was rightly troubled that the Ordinance facially targets people who "furnish meals to members of the public without cost or at a very low cost as a social service as defined herein[.]" (Docs. 1-1, at 3; 78, at 4.) The Ordinance subjects such people to an array of requirements that it does not require of people who publicly provide food at a cost that is not "very low." In contrast, Plaintiffs and others who publicly provide or share food without cost or at very low cost must apply for a conditional use permit in the handful of zoning districts where "Outdoor Food Distribution Centers" are a conditional use. (Doc. 1-1, at 8-14.) While the phrase "without cost" seems clear, the term "at very low cost" seems fatally vague, especially considering the extreme income and wealth inequality in the United States. Moreover, these terms seem analogous to the viewpoint discrimination that the *Holloman* court found, where the school teacher demanded that all students recite the Pledge of Allegiance, and where the teacher and

principal punished students for silently protesting the compelled speech. *Holloman*, 370 F.3d at 1281-82.

Hence, even if this Court affirms the district court conclusion that Plaintiffs' public food sharing is not directly protected symbolic speech or expressive conduct, it should nevertheless reverse the district court Order and Judgment because the Ordinance facially discriminates regarding the expressive content and/or viewpoint of providing or sharing food in public. One may do so unregulated by the Ordinance so long as food is not provided for free or at very low cost. Especially after *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (establishing a new standard regarding content discrimination), this Court should scrutinize such content and/or viewpoint discrimination carefully. *See also Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 (M.D. Fla. 2016) (applying the new standard to rule unconstitutional an ordinance that banned the solicitation of donations in certain parts of a city).

II. If This Court Does Not Recognize Plaintiffs' Public Food Sharing as Obtaining Protection under Expressive Conduct or Expressive Association, It Should Still Reverse the District Court Under the First Amendment Right to Peaceably Assemble

Although Plaintiffs styled their claims for relief under free speech and expressive association under the First Amendment, and due process under the Fourteenth Amendment, (Doc. 1, at 21-28.), their Complaint referred expressly to their efforts to "assemble," demonstrate, protest, and share food. *Id.* at 19 ¶77, 22

¶92, 24 ¶96. In deciding the instant appeal, therefore, this Court should not forget that several relevant sources of First Amendment protection exist, namely, rights to free speech, expressive association, and peaceable assembly. If this Court cannot recognize Plaintiffs' public food sharing as obtaining protection under doctrines of expressive conduct or expressive association, it should still reverse the District Court because the Plaintiffs claimed not only a violation of their First Amendment rights to free speech and expressive association but also their right to peaceably assemble. Indeed, the right to peaceably assemble may be a better way to cognize the modern food-sharing cases than free speech.

A. Though Overshadowed in Recent Decades by Other Doctrines, Peaceable Assembly Precedents Remain Good Law and Relevant to this Case

Professor John Inazu explains that "in the past thirty years the freedom of assembly has become little more than a historical footnote in American law and political theory." John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (Yale U. Press 2012), at 1-2. According to his research, "[t]he Supreme Court, in fact, has not addressed an assembly claim in thirty years." *Id.* at 7 (citations omitted). Nevertheless, peaceable assembly precedents remain good law and are relevant to this case. Briefly, the Court incorporated the Peaceable Assembly Clause against the states in 1937. *De Jonge v. Oregon*, 299 U.S. 353 (1937). In that case and other early peaceable assembly cases, the Court struck

down convictions under criminal syndicalism statutes, attempting to incite an insurrection, and arrests related to the Committee for Industrial Organization's efforts to meet publicly and advocate for unionization after having been repeatedly denied permits to do so. *De Jonge*, 299 U.S. at 353, 356-58; *Herndon v. Lowry*, 301 U.S. 242, 243-44 (1937); *Hague v. Comm. for Indus. Org.*, 307 U.S. 406 (1939). *See also* Inazu, supra, at 52-55. Also, the right to free assembly featured in *Barnette*, 319 U.S. at 638-39, *Thomas*, 323 U.S. at 518, and several of the civil rights symbolic speech / expressive association cases. *E.g.*, *Edwards*, 372 U.S. at 235; *Cox*, 379 U.S. at 545-47, 552; *Brown*, 383 U.S. at 141-42, 146; *Shuttlesworth*, 394 U.S. at 159.

Not only does the First Amendment protect the right of the people peaceably to assemble, United States history, law, and society includes past political and legal controversies that featured food. As Professor Inazu explains, "practices of assembly have themselves been forms of expression—parades, strikes, and meetings, but also more creative means of engagement like pageants, religious worship, and the sharing of meals." Inazu, *supra*, at 21. For example, "[d]uring the women's movement in the early twentieth century, women organized around women-only banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes." *Id.* at 175; *see also* Linda J. Lumsden, *Rampant Women: Suffragists and the Right of Assembly* (U. Tenn. Press 1997), at

18-19, 43 (discussing how suffragists created community in the traditionally feminine venue of preparing and sharing food). Also, civil rights protestors famously protested segregated lunch counters through sit-ins that spotlighted racial discrimination in places of public accommodation. *See, e.g.*, Eduardo M. Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. Penn. L. Rev. 1095, 1114-22 (2007). Finally, even in the nineteenth century period before the Supreme Court interpreted the Free Assembly Clause to apply to the states, state appellate courts had ruled against municipal efforts to prohibit picnics and open air dances. *Poyer v. Village of Des Plaines*, 18 Ill.App. 225, *1, *5 (1885). *See also* Inazu, *supra*, at 42, 44, n.50 at 203-04. Thus, in part because Plaintiffs' practice of publicly sharing food in city-owned Stranahan Park resembles other public uses of food, this Court should consider reversing the District Court based on the Free Assembly Clause.

IV. Conclusion

For the foregoing reasons, this Court should reverse the district court and remand the matter for trial.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because the brief contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Mac in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and six copies of the foregoing brief were sent to the Clerk of Court, 56 Forsyth Street, N.W., Atlanta, GA 30303, and that the brief was electronically filed with the Court and served on all counsel on the attached Service List via the CM/ECF system, on this 25th day of January, 2017. I further certify that on this day I also served true and correct copies upon counsel of record by depositing same in the United States Mail, postage prepaid, addressed to all counsel on the attached Service List.

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