IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND FOR
MIAMI-DADE COUNTY, FLORIDA

GENERAL CIVIL DIVISION

CASE NO. 11-33223 CA 25

SILVIO MEMBRENO and
FLORIDA ASSOCIATION OF
VENDORS, INC.,

Plaintiffs,

vs.

THE CITY OF HIALEAH, FLORIDA,

Defendant.
_____/

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and though undersigned counsel, hereby file this Memorandum in Opposition to Defendant's Motion for Summary Judgment:

I. Introduction.

This lawsuit is a constitutional challenge to three of the numerous restrictions on street vendors in Hialeah. The parties have filed cross-motions for summary judgment with memoranda of law, and Defendant has also filed a supplemental memorandum of law. Although the parties obviously dispute some facts,[1] the basic material facts are not in dispute.

Defendant, in its Memorandum of Law in Support of its Motion for Summary Judgment ("Defendant's Memo in Support") and its Supplemental Memorandum of Law in Support of its

[1] For example, Plaintiffs do not concede the assertion made by Defendant that: "Among the primary reasons for enacting the Amended Ordinance are ensuring vehicular and pedestrian safety and maintaining the free flow of traffic on the City's public thoroughfares." Def.'s Memo. 4 ¶ 3.

Motion for Summary Judgment ("Defendant's Supplemental Memo"), states legal conclusions it would like this Court to draw: that 1) the contested sections of the City's vending ordinance are reasonably related to a legitimate government interest; 2) the City's prohibition on vending from one location is not vague; 3) the City's enforcement of an inapplicable state law is proper; and 4) a permanent injunction is improper. However, the City fails to support these conclusions with any evidence from the record. It also misreads both caselaw and statutes.

In this Memorandum, Plaintiffs will first show that, despite the City's many legal conclusions to the contrary, its laws are not reasonably related to any legitimate governmental interest. Next, Plaintiffs will show that that the City's prohibition on vending from one location is, indeed, vague, as not even the City's own representative could explain how the law is enforced. Further, Plaintiffs will show that the City's reading of section 337.406, Florida Statutes, is incorrect in that it eliminates several words from the statute, and thus, the City's prohibition on vending on or near state roads is ultra vires. Lastly, Plaintiffs will show in this Memorandum that, contrary to the City's assertions and misreading of caselaw, a permanent injunction is a proper remedy when, as here, the City has violated Plaintiffs' right to earn an honest living.

II. The City Failed to Show That Its Laws Are Reasonably Related to a Legitimate Governmental Interest.

In Defendant's Memo in Support and Supplemental Memo, the City attempts to show that its laws are reasonably related to a legitimate government interest. The City's attempt to identify a reasonable relationship is contained in a single sentence found on page 7 of Defendant's Memo in Support: "The sections at issue are reasonably related to these interests by preventing peddlers from interfering with the free flow of vehicular and pedestrian traffic on the rights-of-way."

The City thus fails to establish a reasonable relationship between its purported interest and the contested sections because 1) it misrepresents what the contested sections actually prohibit; 2) it fails to take into account that there are already other laws in place that actually *do* address the concerns the City put forth; 3) it merely asserts naked legal conclusions for support; and 4) it does not and cannot put forth any evidence contradicting the fact that enforcement of these laws has the effect of banning Plaintiffs' legitimate and safe occupation of street vending.

1. To Support a Reasonable Relationship, the City Misstates What the Contested Sections Actually Prohibit.

In an effort to support the assertion that the contested sections bear a reasonable relationship with the purported interests in the sections, the City ignores important aspects of what the challenged sections of the code actually prohibit.

In Defendant's Memo in Support, the City suggests that vendors "are prohibited from placing or storing goods, merchandise, or wares on any portion of the public right-of-way." Def.'s Memo. in Support 5. The City goes on to explain that the sections are intended to restrict display and storage of vendors' merchandise "on the public rights-of-way and public property." *Id.* at 9. But this is not what the ordinance says. Instead, it prohibits vendors from displaying their goods at all—whether on public or private property—with the exception of what they can carry on their person. Hialeah Code of Ordinances ("Code") § 18-304.

The City also suggests that the laws bear a reasonable relationship to the purported interests in the law "by prohibiting street vendors from remaining stationary on the public rights-of-way." Def.'s Memo. of Law in Support of M. for Summ. Judg. 9 ("Def.'s Memo in Support"). However, the City restricts much more than just public rights-of-way in this ordinance. It restricts *any* vendor from staying in one location, regardless as to whether they are on public or private property. Code § 18-302. Indeed, vendors like to have a regular location on

private property. Pls.' Memo. Ex. A ¶ 10, Ex. D ¶ 25. And when vendors are not allowed to display their wares on private property because the property owners do not allow it, the vendors simply do not vend from that location because they do not want to obstruct the sidewalks. Pls.' Memo. Ex. D ¶ 24.

Additionally, the contested sections themselves make it clear that the City's intent is not to prevent obstructions of the rights-of-way, but rather its intent is to prevent customers from knowing where vendors are or what they are vending. This is evident because the City's prohibition on vending from one location hinges not on whether vendors are obstructing rights-of-way, but rather *whether the public knows where vendors will be.* Section 18-302 explicitly prohibits vendors from remaining in one location "with such regularity and permanency such [sic] that would lead a reasonable person to believe the location is the vendor's fixed business location." The City's intent of preventing customers from knowing where the vendors are or what they are vending is also evident from the language of section 18-304, which prohibits the display of merchandise. This prohibition also explicitly hinges on whether the public can see a vendor's merchandise, as it requires vendors to keep their merchandise "out of the public's view," even when on private property. Code § 18-304.

These restrictions are broader than the City suggests and cannot be supported by the narrow and wholly unrelated public interest the City claims is being served.

2. Other Existing Laws, Not the Contested Sections, Already Outlaw the Behavior the City Is Trying to Prevent.

The City further fails to prove that the contested sections bear a reasonable relationship to traffic safety because it neglects to take into account that that same interest is already served by other, less restrictive laws. Again, the City's discussion of the purported reasonable relationship is contained within a single sentence of Defendant's Memo in Support, where the City suggests

that "[t]he sections at issue are reasonably related to these interests by preventing peddlers from interfering with the free flow of vehicular and pedestrian traffic on the rights-of-way." Def.'s Memo. in Support 7. And while other, less-restrictive laws actually *do* prevent interference with "free flow of vehicular and pedestrian traffic on the rights-of-way," the prohibitions in the contested sections of the ordinance do not.

By the City's own admission, other already-existing laws address the City's purported interest in the contested sections of the ordinance. Pls.' Memo. Ex. G 48:19-52:1. In its deposition, the City admitted that other, uncontested laws prohibit 1) blocking sidewalks, *id.*; 2) running out into the street in a hazardous manner, *id.* at 49:10-13; and cutting across lanes of traffic, *id.* at 67:24-68:4.

Although some other laws actually do advance an interest in traffic safety, it bears emphasis that the contested sections prohibit activities that are *wholly unrelated to pedestrian or traffic safety*. Instead, as discussed more fully in Part II.3.a, *infra*, the sections *require* vendors to enter rights-of-way to rove around the City, Code § 18-302; Pls.' Memo. Ex. D ¶¶ 16, 21-22, 25, and require vendors to hide their merchandise from public view, even if vendors want to display their wares on private property away from rights-of-way.

3. The City Merely Puts Forth Naked Legal Conclusions That Do Not Link the Contested Sections to the City's Purported Interest in Those Sections.

The City, in Defendant's Memo in Support and Supplemental Memo, states that the contested sections of the Code are reasonably related to the legitimate government interest of traffic safety, but it never explains *how*. Instead, the City 1) repeatedly asserts the unsupported legal conclusion that its ordinance is rationally related to a legitimate governmental interest; and 2) fails to offer any studies, reports, testimony, or evidence whatsoever linking the sections to traffic safety.

That is because there is absolutely no link between the City's prohibitions on vending from one location or on displaying merchandise and the City's purported interest in those laws—traffic safety. The City cannot rest on mere identification of a legitimate government interest. The City must also show the *reasonable relationship* between the laws and that interest. In other words, to be constitutional, these laws must *actually further* the interest asserted. But these laws do not.

a. The City Cannot Rely on Unsupported Legal Conclusions to Support Its Contention that the Contested Sections Are Reasonably Related to the Interest of Traffic Safety.

After several years' worth of discovery that has been conducted in this case, the City is still unable to explain how the contested sections of the ordinance reasonably further the purported interest in traffic safety. Instead, the City merely asserts the unsupported conclusory statement that the interest and the laws are linked.[2] As discussed in Part II, *supra*, only one sentence in the entirety of Defendant's Memo in Support and Supplemental Memo even attempts to link the laws with the City's purported interest in traffic safety: On page 7 of its Memo in Support, the City says, "The sections at issue are reasonably related to these interests by preventing peddlers from interfering with the free flow of vehicular and pedestrian traffic on the rights-of-way."

[2] In Florida, governments cannot rest on unsupported legal conclusions as evidence of a reasonable relationship; the *record* must reflect that relationship. *See, e.g., McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014) (relying on record, not government's unsupported legal conclusions, to strike down Florida's statutory cap on wrongful damages, finding no reasonable relationship); *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000) (relying on record, not government's unsupported legal conclusions, to strike down various statutes and rules prohibiting title insurance agents from negotiating their premiums, finding no reasonable relationship); *Dade Cnty. Consumer Advocate's Office v. Dep't of Ins.*, 457 So. 2d 495, 497 (Fla. 1st DCA 1984); *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963) (relying on record, not government's unsupported legal conclusions, to strike down a ban on advertising motel prices, finding no reasonable relationship); *Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958) (relying on record, not government's unsupported legal conclusions, to strike down a statute prohibiting public adjusters from soliciting business, finding no reasonable relationship).

The problem, as discussed in Part II, *supra*, is that the contested sections of the ordinance do not merely prohibit blocking the rights-of way. Although the first sentences of sections 18-302 and 18-304 prohibit vendors from obstructing the free flow of traffic on rights-of-way, Plaintiffs do not contest those portions of the ordinance, and the contested sections go much further and prohibit conduct that is wholly unrelated to the free flow of traffic. The contested sections of the ordinance go far beyond the City's purported interest in free flow of traffic in rights-of-way by: 1) requiring vendors to be constantly on the move, which means they must spend more time in the rights-of-way; and 2) preventing vendors from displaying their wares *anywhere*, including areas that are *not* rights-of-way.

As shown in the record, the contested sections actually force vendors into the rights-of-way by requiring vendors to constantly walk or drive around. Code § 18-302; Pls.' Memo. Ex. D ¶¶ 16, 21-22, 25. Indeed, the Code actually *expressly requires vendors to* "circulate on the roadways" unless they are making a sale. Code § 18-302. Vendors from vehicles "must continuously drive their vehicle on the roadways in order to solicit, advertise, or display their goods merchandise [sic] or wares." *Id.* Vendors would prefer to safely vend from one location. Pls.' Memo. at 8-9, Ex. D ¶¶ 8-9, 16-21, 23-24.

The sections also prohibit vendors from displaying merchandise except what they can carry on their person. Code § 18-304. This prohibition similarly does nothing to prevent traffic obstructions in rights-of-way. Rather, it requires vendors to hide their merchandise "out of the public's view" and allows vendors to display "only what [they] can carry on [their] person," including private property. Code § 18-304. Indeed, vendors prefer to display their merchandise on *private property*, not in the rights-of-way. Pls.' Memo. Ex. A ¶ 10, Ex. D ¶ 25, Ex. E 51:17-

52:17. However, the City's whole-cloth ban on displays prohibits them from vending in this safe and unobstructive manner.

Indeed, the fact that the City enforces these sections mostly on days when brick-and-mortar stores complain also shows that these laws are not designed to further traffic safety. Pls.' Memo. Ex. A ¶¶ 13-15 (noting that police officers prohibit vendors from selling merchandise in Hialeah on important holidays), Ex. G 142:14-143:24 (discussing the City's increased enforcement against vendors on important vending holidays), Ex. I 42:22-43:11 (recounting the City license inspector's response to a flower-store owner's complaints about a competing vendor on Valentine's Day). True safety issues do not only appear when competitors complain, nor do those safety issues suddenly disappear as soon as the complaints from competitors cease.

b. The City Fails to Offer Any Evidence Whatsoever Linking the Sections to Traffic Safety.

The lack of a reasonable relationship between the contested sections of the ordinance and the purported interest of traffic safety is obvious from the City's failure to offer any evidence whatsoever linking the sections to traffic safety. In support of the purported reasonable relationship, the City offered only a single traffic study, which the City commissioned during the pendency of this litigation. Pls.' Memo. Ex. L. However, as discussed fully in Plaintiffs' Memo, and as admitted by the City, the traffic study does not discuss vendors' display of merchandise or vending from one location. Pls.' Memo. 18-19, Ex. G 196:3-197:13, Ex. L. Nothing in the study even hints at a reasonable relationship between the contested sections of the ordinance and traffic safety. *See generally,* Pls.' Memo. Ex. L. Indeed, the study acknowledges that "[s]treet peddling provides an important service to residents and continues to operate as an economic option for entrepreneurs." Pls. M. Ex L 17 (Bates No. R2-000894).

4. It Is Entirely Uncontested on the Record that the Sections Make It Impossible for Vendors to Earn an Honest Living.

Besides its mere assertion that the contested sections "do not completely foreclose Plaintiffs' ability to engage in their chosen occupation," Def.'s Memo in Support 7, the City offers nothing to contest Plaintiffs' evidence that the City's laws effectively prohibit their occupation. Pls.' Memo. 4-15, Ex. A ¶¶ 9-11, Ex. D ¶¶ 7-10, 15-25, Ex. E 84:8-12. In fact, the record reflects that one flower vendor tried to vend in the way the City demands, but found it impossible to do so because roving around and hiding merchandise make vending unsafe and unpredictable; prevent vendors from serving their customers; make it impossible to offer enough quantity or variety of merchandise; and unfairly discriminate against elderly or feebler vendors. *Id.* Ex. D ¶¶ 15-25. In addition, the City admitted through its representative that the prohibited actions are necessary to the vendors. "The vendors are out there actively trying to sell their merchandise. They want, you know, people to see it." Pls.' Memo. Ex. G 44:23-25. "The key to their sales is accessibility. Location, location, as it applies to anything." *Id.* at 45:9-11.

As supported here and in Plaintiffs' Memo, the City has failed to show any reasonable relationship between the contested sections and its purported interests in those sections because the City 1) misstated what the law actually prohibits; 2) failed to take into account that there are already other laws in place that actually *do* address the concerns the City put forth; 3) merely asserted naked legal conclusions for support; and 4) did not put forth any evidence contradicting the fact that the laws effectively outlaw Plaintiffs' legitimate and safe occupation of street vending.

III. The City's Prohibition on Vending from One Location Is So Vague That the City's Own Representative Could Not Interpret It.

The City's prohibition on vending from "one location," Code § 18-302, is unconstitutionally vague. It is so vague, in fact, that the City's own representative could not articulate what the section means. Additionally, Plaintiffs have plainly shown that they are unable to understand the ordinance.

A large part of the deposition of Chief of Police Sergio Velazquez, the City's designated representative, was spent discussing the application of the contested sections of the ordinance. *See generally* Pls.' Memo. Ex. G. Despite the numerous hours spent discussing section 18-302, the City was unable to explain the meaning of "location." Indeed, the City's own representative *asked counsel to explain the meaning of the word*:

> Q. After the amendments to section 18-302 that happened in January of 2013, are vendors in the City of Hialeah allowed to stay in one location to vend without restriction as to whether they have to move?
> A. When you mean location, okay, are you making a reference to a specific—let's say an intersection that has four corners? Are you making a reference that they can move around the corners or can be in one corner and then have to move to another, or are you making a reference that they can be walking up and down, you know, the sidewalk? That's what I don't understand in that question there.

Pls.' Ex. G 40:15-41:1. The confusion continued for the remainder of the deposition, when the City's representative repeatedly contradicted himself—and the ordinance itself—when attempting to explain what "location" means. The descriptions provided for "location" included:

- "It's whatever place that person is being at." *Id.* at 41:23-24.
- "Location changes with all the other factors affecting it." *Id.* at 41:24-25.
- "There is no prohibition of them being at a location for any extended amount of time as long as they're not interfering with the pedestrian traffic, with the issue of them setting up their goods and all of that." *Id.* at 42:10-14.
- "[W]hen you see that person day in and day out that creates that same expectation that he is in a fixed location." *Id.* at 47: 14-16.

- "So it's not only—to answer your question—it's everything else; the totality of the whole situation surrounding it." *Id.* at 48:16-18.
- "And if we are talking about a location—and when you mean location, a fixed location—I am assuming that he's standing in the exact same location every time between let's say two palm trees that are three feet apart and I see him there day in and day out, then he has set up a permanent business there for himself." *Id.* at 55:22-56:3.
- "If you are in one location selling the same product over and over and you don't move from that little circle that would be three feet or two feet, you have set up that expectation, you know, of being there for any customer." *Id.* at 57:21-58:1.
- "There's different vendors that constantly work the same general area, and there is no issues with that. They are trying to earn the expectation. Of course, like I mentioned before, any vendor is going to walk up and down and be at different locations to go. The problem is when he just sets up in one particular area, does it move, okay. That's the difference." *Id.* at 62:3-11.

Defendant's Memo in Support attempts to show that the reasonable person standard used in the statute necessarily means that the statute is not unconstitutionally vague. Def.'s Memo in Support 9-11. However, given the confusion exhibited by the City's own representative, who is chief of the police force tasked with enforcing this law, the City's argument falls flat.

The City asserts that the language is to be "measured by common understanding and practice," but that is impossible here because everyone—including and especially the vendors—is confused about what the ordinance says. Indeed, in Defendant's Supplemental Memo, the City quotes Plaintiff Membreno for the proposition that Mr. Membreno understands the statute. Def.'s Supplemental Memo 2-3. In fact, in that quote, as in the rest of his testimony, Mr. Membreno exhibited the same confusion about the ordinance as the City's representative did. Mr. Membreno noted the conflicting explanations of the ordinance he received from the City, Pls.' Memo. Ex. E 105:9-106:4, and qualified that his answer applied only to *his interpretation* of the ordinance: "I have to move within that area from where I'm selling . . . . *[I]f it's like that,* then I'm clear." Pls.' Memo. Ex. E 106:6-17 (emphasis added). In the same discussion of the ordinance, Mr. Membreno stated explicitly that the laws "are not clear." *Id.* at 105:9-106:4.

IV. The City's Enforcement of Section 337.406, Florida Statutes, Is Ultra Vires in That the Statute Does Not Apply Within the City so as to Ban Vendors From State Roads.

As discussed in Plaintiffs' Memo, Pls.' Memo. 23-25, the City ultra vires enforces section 337.406, Florida Statutes, by prohibiting vendors from selling on or near state roads within the City, even though the statute does not prohibit such conduct inside incorporated municipalities.

The statutory section at issue is structured in three distinct parts, as follows: First, the statute *prohibits certain uses* of state roads "outside of . . . incorporated municipalit[ies]"; provides explanations and examples of those prohibited uses (including the sale of goods); and establishes exceptions. Second, the statute then *grants permissive authority* to local government entities to issue permits for the prohibited uses and places restrictions on that authority. Third, the statute permits local governments to enforce the provisions in the section within their respective jurisdictions.[3]

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[3] The full text of the section is as follows:

> Except when leased as provided in s. 337.25(5) or otherwise authorized by the rules of the department, it is unlawful to make any use of the right-of-way of any state transportation facility, including appendages thereto, **outside of an incorporated municipality** in any manner that interferes with the safe and efficient movement of people and property from place to place on the transportation facility. Failure to prohibit the use of right-of-way in this manner will endanger the health, safety, and general welfare of the public by causing distractions to motorists, unsafe pedestrian movement within travel lanes, sudden stoppage or slowdown of traffic, rapid lane changing and other dangerous traffic movement, increased vehicular accidents, and motorist injuries and fatalities. Such prohibited uses include, but are not limited to, the free distribution or sale, or display or solicitation for free distribution or sale, of any merchandise, goods, property or services; the solicitation for charitable purposes; the servicing or repairing of any vehicle, except the rendering of emergency service; the storage of vehicles being serviced or repaired on abutting property or elsewhere; and the display of advertising of any sort, except that any portion of a state transportation facility may be used for an art festival, parade, fair, or other special event if permitted by the appropriate local governmental entity. **Local government entities may issue permits of limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses if it is determined that the use will not interfere with the safe and efficient movement of traffic and the use will cause no danger to the public.** The permitting authority granted in this subsection shall be exercised by the municipality within incorporated municipalities and by the county outside an incorporated municipality. Before a road on the State Highway System may be temporarily closed for a special event, the local governmental entity which permits the special event to take place must determine that the temporary closure of the road is necessary and must obtain the prior written approval for

In Defendant's Memo in Support, the City attempts to show that Plaintiffs have misread section 337.406, Florida Statutes, by suggesting that the statute grants cities the authority to issue permits. Def.'s Memo. in Support 11-12. In other words, the City seems to think that, because the statute references the "prohibited uses" in the second part of the statute (which grants authority to issue permits), the words "outside of an incorporated municipality" from the first part of the statute are meaningless.

However, the City has clearly misinterpreted the statute by ignoring that the statute prohibits street vending only *outside an incorporated municipality*. Additionally, the City's interpretation is incorrect because, although the statute *does* grant authority to municipalities to issue permits for special events, that permitting authority does not grant power to Hialeah—or any municipality—to prohibit all sales on state roads *within a municipality*.

1. The City Ignores the Words "Outside of an Incorporated Municipality."

The statute prohibits certain activities only *outside of incorporated municipalities*, but the City insists that, despite the plain language of the statute, the prohibition extends to inside municipalities, as well. The City, in Defendant's Memo in Support, does not address the fact that it is asking this Court to read section 337.406, Florida Statutes, without some of the words that are written in that statute. The statute prohibits certain activities, including street vending, *outside of incorporated municipalities*.[4] What the statute *never* includes is a prohibition on any activity *inside an incorporated*

> the temporary road closure from the department. Nothing in this subsection shall be construed to authorize such activities on any limited access highway. Local governmental entities may, within their respective jurisdictions, initiate enforcement action by the appropriate code enforcement authority or law enforcement authority for a violation of this section.

Fla. Stat. § 337.406 (1) (emphasis added).

[4] Hialeah is an incorporated municipality. Def.'s Answer & Affirmative Defenses to Pls.' Am. Compl. ¶ 9.

municipality. Then, the statute grants permission to local government entities to issue permits for particular uses, especially special events. The reference to "prohibited uses" in the permissive portion of the statute is merely definitional—it defines the types of things for which cities and counties are allowed to issue permits.

In Defendant's Memo in Support, the City asserts that "the complete language of Fla. Stat. § 337.406(1) evidences that the City may grant permits for certain uses of state transportation facilities within the municipality that would be **absolutely prohibited uses of a state transportation facility outside of an incorporated municipality**."[5] Def.'s Memo in Support 12 (emphasis added). But the City simply never explains why it suggests it has the power to enforce the state's ban on vending on state roads *within Hialeah*.

2. The City's Authority to Grant Permits Does Not Allow the City to Enforce Prohibitions That Do Not Exist.

Although the statute restricts certain practices outside of incorporated municipalities, within municipalities, the statute merely grants *permissive authority* to issue permits. Indeed, the second portion of the statutory section *does not prohibit anything*. The statute instead allows cities and counties to grant "permits of limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses."

This permission is clearly granted to permit local governments to authorize special events. While incorrectly suggesting that Plaintiffs "selective[ly] quot[ed]" from the statute, Def.'s Memo. in Support 12, the City itself neglects to include that the sentences immediately before and after the portion the City quotes discuss these special event permits:

[5] Alternatively, Defendant may be somehow implying with this language that the prohibited uses are absolutely prohibited *outside* an incorporated municipality but permissible *inside* an incorporated municipality with a proper permit. However, that argument would also fall flat because it would require this Court to ignore *two* distinct parts of the statute: 1) the "outside of an incorporated municipality" language discussed above, and 2) the grant of authority to counties to issue permits *outside* of incorporated municipalities, which Defendant itself quotes on page 12 of Defendant's Memo in Support.

> Such prohibited uses include, but are not limited to, the free distribution or sale, or display or solicitation for free distribution or sale, of any merchandise, goods, property or services; the solicitation for charitable purposes; the servicing or repairing of any vehicle, except the rendering of emergency service; the storage of vehicles being serviced or repaired on abutting property or elsewhere; and the display of advertising of any sort, **except that any portion of a state transportation facility may be used for an art festival, parade, fair, or other special event if permitted by the appropriate local governmental entity.** Local government entities may issue permits of limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses if it is determined that the use will not interfere with the safe and efficient movement of traffic and the use will cause no danger to the public. The permitting authority granted in this subsection shall be exercised by the municipality within incorporated municipalities and by the county outside an incorporated municipality. **Before a road on the State Highway System may be temporarily closed for a special event, the local governmental entity which permits the special event to take place must determine that the temporary closure of the road is necessary and must obtain the prior written approval for the temporary road closure from the department.**

Fla. Stat. § 337.406 (1) (emphasis added). Indeed, the only mentions of the permitting authority granted relate to special events. This grant of authority, which is plainly intended to apply to special event permits, does not change the fact that the "prohibited uses" mentioned are prohibited only, as plainly stated in the statute, "outside an incorporated municipality."

Defendant's Memo in Support does not explain the City's erasure of words from the statute in the City's reading of it. And contrary to Defendant's Memo in Support, the City is merely permitted by the statute to issue temporary special-event permits. Because the City is not authorized by any statute to prohibit vendors from selling on or near state roads, as no statute prohibits this activity *inside* an incorporated municipality, the City has been enforcing this statute in an ultra vires manner and must be enjoined from further doing so.

V. A Permanent Injunction Is a Proper Remedy When, As Here, the City Has Violated Plaintiffs' Right to Earn an Honest Living.

The City, in Defendant's Memo in Support, argues that Plaintiffs are not entitled to a permanent injunction because Plaintiffs supposedly could obtain an adequate remedy at law by suing for damages. Def.'s Memo. in Support 13. However, as discussed below, Florida law on this point is clear, and Florida courts have repeatedly held that a permanent injunction is proper relief when a law is held to be invalid or when the plaintiff seeks to prevent illegitimate enforcement of an otherwise-legitimate statute. And although the City, in Defendant's Memo in Support, misstates the appropriate factors necessary for this Court to grant a permanent injunction, the record supports issuance of a permanent injunction under the correct factors.

1. Permanent Injunctions Are the Customary and Accepted Remedy to Prevent Enforcement of Invalid Laws.

Contrary to the City's arguments, Florida courts have repeatedly held that an injunction is the proper—and, indeed, customary—relief to prevent enforcement of invalid laws. *N. Fla. Women's Health & Counseling Servs., Inc., v. State*, 866 So. 2d 612, 615-16, 639-40 (Fla. 2003) (affirming trial court's entry of permanent injunction to bar enforcement of unconstitutional statute); *Watson v. Centro Espanol De Tampa*, 30 So. 2d 288, 290 (Fla. 1947) (en banc) ("[E]quitable jurisdiction may be invoked to restrain criminal prosecutions under unconstitutional acts when essential to safeguard [p]ersonal or property rights. *The right to earn a livelihood and to continue in one's employment unmolested by efforts to impose void enactments* should likewise be entitled to protection.") (emphasis added); *Daniel v. Williams*, 189 So. 2d 640, 641 (Fla. 2d DCA 1966) ("The traditional procedure by which to test the validity of and secure relief against the immediate or prospective adverse effect of an allegedly invalid

statute is by a suit in equity to enjoin its enforcement."); *Bd. of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69 (Fla. 1st DCA 1958) (same).

A permanent injunction is also the correct relief when governments engage in improper enforcement of otherwise-legitimate laws. *Louisville & N.R. Co. v. Railroad Comm'rs*, 58 So. 543, 547 (Fla. 1912) ("Where action taken by state officials is unauthorized and substantially impairs private rights, in violation of the Constitution, such action will not be enforced."); *Kimball v. Fla. Dep't of Health and Rehabilitative Svcs.*, 682 So. 2d 637, 638 (Fla. 2d DCA 1996) ("Persons who are the subject of harassment by the overzealous, improper or bad faith use of valid statutes may be afforded the protection of injunctive relief.").

2. Plaintiffs Meet All Four of the Factors Necessary for the Granting of a Permanent Injunction.

Plaintiffs meet all four of the factors necessary for this Court to enjoin the City from enforcing sections 18-302 and 18-304 and section 377.406, Florida Statutes. The City misstates the factors this Court must consider before granting a permanent injunction. This is likely because all but one of the cases the City cites discuss temporary—not permanent—injunctions. *See* Def.'s Memo in Support 13. The sole exception is *Florida Fern Growers Association v. Concerned Citizens of Putnam County*, which in fact supports Plaintiffs' claim for a permanent injunction and sets out the correct set of factors this Court must consider before granting summary judgment: "A party seeking injunctive relief in Florida must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; and 4) consideration of the public interest." 616 So. 2d 562, 564 (Fla. 5th DCA 1993).

Under the factors set forth in *Florida Fern Growers*, and as evidenced by the reasoning in that case, Plaintiffs are entitled to injunctive relief. In *Florida Fern Growers*, a trade group of ferngrowers sued a citizens' environmental-advocacy group for the citizens' group's persistent

petitions opposing the ferngrowers' consumptive water use permits. *Id.* at 563. The ferngrowers sought injunctive relief as well as damages for tortious interference with an advantageous business relationship and civil conspiracy. *Id.* at 563. The Fifth District Court of Appeal addressed whether Plaintiffs had sufficiently pled facts that supported their claims. Reversing the lower court's decision, the District Court of Appeal held that plaintiffs had pled sufficient facts to support their claim of injunctive relief[6] because the ferngrowers pled facts that supported each of the factors for permanent injunctions. *Id.* at 564.

a. The Facts in the Record Show that the City Has Caused Plaintiffs Irreparable Harm.

Plaintiffs have demonstrated facts on the record sufficient to constitute irreparable harm in that, when enforced, the laws make Plaintiffs' businesses functionally impossible to operate. Using affidavits from vendors and deposition testimony of Plaintiff Membreno and the City's representative, Plaintiffs have shown that the contested sections of the ordinance effectively outlaw Plaintiffs' common business practices. Pls.' Memo. 4-8, 10-15. The City's own representative said that vendors receive citations for conducting business in the customary way. Pls.' Memo. Ex. G 86:16-18. Indeed, vendors live in fear of police enforcement of the laws. *See* Pls.' Memo. Ex. A ¶ 11, Ex. D ¶ 13. The record shows that vendors feel unsafe if they comply with the law and cross many different streets and parking lots to vend. Pls.' Memo. Ex. D ¶ 22. The City has also admitted that if vendors comply with the laws, their merchandise will spoil. Pls.' Memo. Ex. G, 183:4-184:15; *see also id.* Ex. D ¶ 17, Ex. A ¶¶ 10-11. And vendors cannot carry the amount or variety of merchandise they need to serve their customers if they are allowed to carry only what they can hold in their arms. Pls.' Memo. Ex A ¶¶ 10-11, Ex. D ¶ 17.

[6] The court also held that plaintiffs pled sufficient facts to support their other claims for reasons that are not relevant here.

All of these things make it impossible for vendors to build and maintain businesses if they comply with the contested sections of the ordinance. For that reason, Plaintiffs have sustained or will sustain irreparable harm from the enforcement of the contested sections of the Code.

b. The Plaintiffs Have a Clear Legal Right to Earn an Honest Living by Street Vending.

The record in this case shows that Plaintiffs have a clear legal right to earn an honest living by street vending. That right is guaranteed in the Florida Constitution, and it is undisputed that Plaintiffs engage in the lawful business of street vending.

The Florida Constitution guarantees that "[a]ll natural persons, female and male alike, are equal before the law and have inalienable rights, among which [is] the right . . . to be rewarded for industry, and to acquire, possess and protect property." Fla. Const., art. I § 9. And the right to pursue a lawful business has been repeatedly recognized by the Supreme Court of Florida. Indeed, "[t]he right to work, earn a living and acquire and possess property from the fruits of one's labor is an inalienable right." *Lee v. Delmar*, 66 So. 2d 252, 255 (Fla. 1953); *see also Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963) (noting that Florida has recognized the right to "pursue a lawful business"); *Alliance Auto. Mfrs., Inc. v. Jones*, 897 F. Supp. 2d 1241, 1252 (N.D. Fla. 2012) (Order on Mot. to Dismiss). As Plaintiffs argue in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Amended Motion for Summary Judgment, the City has violated this important right by enacting laws that are not reasonably related to any legitimate governmental interest and by ultra vires enforcing an inapplicable state statute. Pls.' Memo. 10-25.

Plaintiffs are engaged in the lawful business of street vending. Pls.' Memo. Ex. A ¶¶ 2-5, 7, 18-20, Ex. D ¶¶ 2-5, 7. It is not in dispute that street vending is a lawful business. *See* Pls.'

Memo. Ex. A ¶¶ 4-5, Ex. D ¶ 5, Ex. E 13:6-9, Ex. L. Indeed, the City noted as much in the preamble to its amendments to the vending code. Pls.' Memo. Ex. M. Vendors are licensed by the City itself. Code § 18-307; Pls.' Memo. Ex. B. And the City's own traffic study also acknowledges the legitimacy and benefit of street vending where it says, "Street peddling provides an important service to residents and continues to operate as an economic option for entrepreneurs." Pls. M. Ex. L. at 17 (Bates No. R2-000894).

Because Plaintiffs are engaging in the practice of a lawful business and because the Florida Constitution guarantees the right to do so, Plaintiffs have a clear legal right to earn an honest living by street vending.

c. There Is No Adequate Remedy at Law for Plaintiffs' Injury.

Damages are not an adequate remedy at law in this case because the loss of benefit to the community, the loss of economic opportunity for as-yet-unknown vendors, the loss of economic opportunity for current vendors, and the violation of a constitutionally-protected right are all incalculable.

The City's assertion that irreparable injury does not occur if the alleged injury is compensable by money damages is incorrect in that it leaves out the most important word of that standard: adequate. If money damages do not *adequately* compensate Plaintiffs' injuries, then damages cannot be considered an adequate remedy at law.

When a grant of damages would be speculative and unascertainable, damages are *not* an adequate remedy. *City of Oviedo v. Alafaya Utilities, Inc.*, 704 So. 2d 206, 207 (Fla. 5th DCA 1998) (holding that, despite city's contention that damages could be "easily and simply calculated," damages were an inadequate remedy for city's withholding of approval for utility franchise agreement because of the "incalculable amount of loss to developers and home buyers"

if withholding continued); *Zimmerman v. D.C.A. at Welleby, Inc.*, 505 So. 2d 1371, 1373 (Fla. 4th DCA 1987) (holding that damages were not an adequate remedy at law for a condominium's loss of potential sales as a result of picketers' demonstrations in front of condominium building).

Here, the loss to vendors and the community is incalculable. The City's own evidence reflects that vendors provide "an important service to [City] residents" and that the occupation provides "an economic option for entrepreneurs." Pls.' Memo. Ex. L 17 (Bates No. R2-000894). But the exact value of loss of that service to the community is speculative, as are the loss of economic opportunity for as-yet-unknown vendors and the loss of prospective sales for current vendors. Lastly, Plaintiffs are looking to vindicate the rights of vendors, not for monetary damages. Pls.' Memo. Ex. E 103:15-21. Thus, monetary damages would not alleviate the violation of vendors' constitutionally-protected right.

Because the loss to vendors and the community is speculative and incalculable, damages are not an adequate remedy in this case.

d. Enjoining the Enforcement of These Laws Is in the Public Interest.

The public interest is served by the elimination of the contested provisions of the ordinance. First, vendors and the public are *safer* when vendors remain in one location because it creates predictability and allows for planning. Pls.' Memo. Ex. D ¶¶ 22, 25. Allowing vendors to continue selling as they customarily do, generally in violation of the contested provisions, will allow vendors to continue serving their customers in a reliable and convenient fashion and will allow them to continue to provide quality products to their customers. Pls.' Memo. Ex. A ¶¶ 17, 19-20, Ex. D ¶ 8.

Because Plaintiffs have shown that 1) a permanent injunction is the proper and customary relief ; and 2) Plaintiffs meet all four of the factors necessary to grant a permanent injunction,

this Court should grant a permanent injunction enjoining the City from enforcing the compliance of laws.

VI. Conclusion.

In Defendant's Memo in Support and Supplemental Memo, the City attempts to show that its laws are reasonably related to its interest in traffic safety, that section 18-302 is not unconstitutionally vague, that the plain language of the Statute is not valid, and that a permanent injunction is improper. However, the City failed to prove any of these assertions. For that reason and for the reasons set forth in Plaintiffs' Memo, this Court should deny Defendant's Motion for Summary Judgment and enter summary judgment in favor of Plaintiffs.

RESPECTFULLY SUBMITTED this 11th day of June, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of June, 2014, a true and correct copy of the foregoing Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment was filed and served electronically on the following counsel of record:

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