

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.

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

Plaintiffs, by and through their undersigned counsel, hereby file this Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment:

**I. Introduction**

This is a constitutional challenge to two provisions of the City of Hialeah's vending ordinance and a challenge to Hialeah's ultra vires enforcement of a state statute. The contested provisions of the vending ordinance violate street vendors' constitutional right to earn an honest living by making it impossible for street vendors to conduct business in an effective manner.

The contested provisions do not bear a reasonable relationship to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare, and they are arbitrary, oppressive, and discriminatory. Additionally, the City of Hialeah has engaged in ultra vires enforcement of a state statute that does not apply inside city limits. Accordingly, Plaintiffs respectfully request

that this Court issue a declaratory judgment invalidating sections 18-302 and 18-304 of Hialeah's street-vending law, and enjoining the City of Hialeah from enforcing § 337.406, Florida Statutes.

## **II. Undisputed Facts**

### **1. Plaintiffs Work Hard to Earn an Honest Living.**

Plaintiff Silvio Membreno ("Membreno") is a City-licensed vendor who has been selling flowers in Hialeah for over 16 years. Aff. of Silvio Membreno ¶ 2, a true and correct copy of which is attached hereto as Exhibit "A"; Bus. Tax Receipt of Silvio Membreno, a true and correct copy of which is attached hereto as Exhibit "B."

Plaintiff Florida Association of Vendors, Inc. ("FAV") is a Florida nonprofit organization made up of mobile vendors, most of whom are vendors in the City of Hialeah (the "City"). Articles of Incorporation of the Fla. Ass'n of Vendors, a true and correct copy of which is attached hereto as Exhibit "C"; *see* Ex. A, at ¶ 6; Aff. of Norma Sequeira at ¶ 6, a true and correct copy of which is attached hereto as Exhibit "D".

Mr. Membreno came to the United States to find his American Dream. Ex. A, at ¶ 2. He found a way to make a living by selling flowers to customers in Hialeah and surrounding areas, though he concentrates his business in Hialeah. *Id.* ¶ 3. Mr. Membreno has also helped other vendors start businesses. *Id.* ¶ 7.

Throughout the last 16 years, he has built up a customer base by vending seven days a week from the same location in Hialeah: the intersection of West 4th Avenue and West 49th Street. *Id.* ¶ 7. From this location, Mr. Membreno sells various types of flowers to his longtime clients and new clients alike. *Id.* ¶¶ 2-3. He cannot hold an entire day's supply of flowers in his hands, so Mr. Membreno stores his merchandise in a van, which he parks with permission in a nearby private lot. *Id.* ¶¶ 10-11. He likes this location because, over the years, he has built up

relationships with his clientele and the surrounding businesses. *Id.* ¶¶ 2, 10-11, 20. Furthermore, his parking space is shaded by trees, which is helpful during the long summer days he spends outdoors selling his wares. *Id.* ¶ 11. To attract new customers and to display the varied arrangements he has for sale each day, Mr. Membreno displays his flowers in buckets that he places in and around his van. *Id.* ¶¶ 10-11.

Customers purchase flowers from Mr. Membreno in one of several ways: They flag him down during a red light and purchase through their car window; they park in the parking lot and buy from him there; or they approach him on foot and buy from him directly. *Id.* ¶ 12. More than anything, Mr. Membreno values his ability to provide convenience to his customers, and his consistent customer service has earned him a loyal clientele over the last 16 years. *Id.* ¶ 2. He wishes to continue providing this level of service to his customers and to continue earning an honest living in the best way he knows how. *See id.*, at ¶ 17.

Like Plaintiff Membreno, FAV member and flower vendor Norma Sequeira typically displays flowers in and around her van, which she parks in a private lot with permission from the owner. Ex. D, at ¶ 7. Ms. Sequeira has been a street vendor for 12 years. *Id.* ¶ 2. And like Mr. Membreno, Ms. Sequeira's hard-earned customers purchase her flowers by flagging her down during red lights at the intersection where she vends (West 68th Street and West 12th Avenue), by parking their vehicles in nearby parking spots, or by approaching on foot. *Id.* ¶ 7.

The other members of FAV sell many different wares, such as fruit, flowers, and water from public and private property. Ex. A, at ¶ 6. Like Mr. Membreno and Ms. Sequeira, many of the vendors in the FAV sell their wares at intersections, entering the intersections during red lights and vending directly to customers in cars. *Id.* ¶ 18. Those vendors often store and display their merchandise nearby, usually in buckets (for flowers) or in or around their vehicles.

Other members sell fruit and vegetables from their vehicles. *Id.* ¶ 19. This is typically done by arranging merchandise on specially constructed racks outfitted on the back of pickup trucks. *Id.* These vendors pick a location to park that is convenient to customers, typically where there is ample parking. *Id.* From these locations, they vend each day, building a customer base by reliably and conveniently selling quality wares. *Id.* ¶ 20. Customers buy from these fruit and vegetable vendors by parking in nearby spots and waiting for the vendor to approach them and make the sale, or by parking, exiting their vehicles, and approaching the vendor’s truck to buy fruit or vegetables. *See id.* at ¶¶ 12, 19.

Plaintiffs Membreno and FAV have filed this lawsuit to enforce their right to earn an honest living by harmlessly vending in the way they always have—selling from one location, displaying their wares, and selling on or near state roads. *Id.* ¶¶ 16-17; Membreno Dep. 103:10-104:5, a true and correct copy of which is attached hereto as Exhibit “E”; Ex. D, at ¶ 26.

**2. In Practice, Hialeah’s Vending Ordinance Makes Plaintiffs’ Harmless Businesses Illegal.**

Plaintiffs challenge two provisions of the City’s vending code (“the Code”) that make vending impossible as a practical matter. First, section 18-302 forbids vendors from vending at a regular location. Second, section 18-304 forbids vendors from displaying merchandise other than what they can carry on their person. Hialeah Code of Ord. §§ 18-302, 18-304 (as amended).<sup>1</sup>

Because these laws make a viable vending business practically impossible, vendors generally operate in violation of the contested provisions of the Code. *See* Ex. A, at ¶¶ 7, 10-11;

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<sup>1</sup> At initial filing, this lawsuit challenged three provisions of the City’s vending code: the prohibition on the display of merchandise, the prohibition on ever standing still, and the prohibition on selling within 300 feet of a store selling “same or similar” merchandise. In response to this litigation, the City in 2013 amended its vending ordinance by eliminating the 300-foot proximity restriction and by expanding the prohibitions on the display of merchandise and on standing still.

Ex. D, at ¶ 7. Sometimes, police officers enforce the law by verbally instructing vendors to move or to hide their merchandise or to move along. Ex. A, at ¶ 14; Ex. D, at ¶ 11. Vendors tend to comply with the police officers' requests until the police officers leave, then continue displaying their merchandise or come back to their regular spot after the police have left the area. See Ex. A, at ¶ 14; Ex. D, at ¶ 11. If vendors do not comply with the law, they are issued citations. Ex. G, at 86:16-18. Vendors do not want to operate in fear of police enforcement of these onerous vending laws any longer; instead, they want to operate their harmless, safe, and helpful businesses in a legal manner. Ex. A, at ¶ 17; Ex. D, at ¶ 26.

**a. Complying with Section 18-302 Is Impossible as a Practical Matter Because Doing So Is Unsafe, Unpredictable, and Bad for Business.**

It is impossible as a practical matter to comply with the section 18-302 requirement of constant change of location for three reasons: 1) a regular location is necessary for a loyal customer base; 2) constantly changing locations creates perpetual conflict with unfamiliar property owners; 3) constantly changing locations is less safe than vending from a single location; and 4) constantly changing locations is physically exhausting.

Ms. Sequeira has tried to vend in the way the City demands, and she has found it to be practically impossible. Ex. D, at ¶ 16. Ms. Sequeira walked around the City and tried to vend flowers by entering businesses and attempting to sell flowers, by walking along the sidewalk and asking people if they wanted to buy flowers, and by walking along the sidewalk attempting to make sales to cars. Ex. D, at ¶ 16. She brought a bucket of flowers with her and left the rest of her merchandise at home. Ex. D, at ¶ 17.

In doing so, Ms. Sequeira found that it is impossible, as a practical matter, to comply with sections 18-302 or 18-304 because complying with these sections is unsafe, disorienting, and bad for business.

A regular location is necessary for a loyal customer base. It takes years of consistency and quality to build up a loyal customer base, and when Ms. Sequeira vends away from her regular location, it is impossible to continue to build her customer base in any real way. Ex. D, at ¶ 8. Indeed, she did not see any of her regular customers while she was vending in compliance with the Code. Ex. D, at ¶ 23. She could not leave flowers shut up in her car because they would die from the heat, so she only carried one bucket of flowers, and this did not provide enough variety to serve the potential customers she did come across. Ex. D, at ¶ 17; *see also* Velasquez Dep. 183:4-184:15, a true and correct copy of which is attached hereto as Exhibit “G”. Mr. Membreno has also said that carrying one bucket of flowers does not provide enough variety for customers and that shutting up his flowers in a van would cause them to die. Ex. A, at ¶ 10-11.

Constantly changing locations creates perpetual conflict with unfamiliar property owners. Ms. Sequeira decided to try her hand selling on 49th Street, one of Hialeah’s busiest streets, because it would increase the number of people and businesses she came across as she moved from location to location. Ex. D, at ¶ 18. But many of the businesses she entered told her that solicitation was not allowed. Ex. D, at ¶ 18. Indeed, she eventually was stopped by a security guard who told her that selling to the nearby businesses was not allowed unless express permission was given by the property management company. Ex. D, at ¶¶ 19-20. Because this prohibition covered such a busy part of Hialeah—both sides of 49th street from West 4th Avenue to West 12th Avenue—she asked the property manager for permission to sell, and her request was flatly denied. Ex. D, at ¶ 20.

After that, she was relegated to the sidewalk, from where she was not able to sell even one bouquet of flowers. Ex. D, at ¶ 21. There were no vendors in this area, she noted, because

the private-property owner does not allow vendors to display their merchandise. Ex. D, at ¶ 24. Nor does the City allow displays on sidewalks. Ex. D, at ¶ 24. Based on her experience and knowledge, she knows that vendors have wholly abandoned the area. Ex. D, at ¶ 24.

Constantly changing locations is actually *less safe* than vending from a single location. When vending in this manner, Ms. Sequeira had to cross many streets and often felt unsafe, as she was required to walk through parking lots every time she wanted to enter a store to solicit sales, whereas her usual vending spot allows for more predictable traffic patterns. Ex. D, at ¶ 22.

Constantly changing locations is also physically exhausting. Vending in this manner requires on-foot vendors to walk many miles more per day, which is difficult for any vendor, but especially older or feebler vendors. Ex. A, at ¶ 9.

In sum, section 18-302's requirement that vendors move from location to location makes a viable vending business impossible.

**b. Complying with Section 18-304 Is Impossible as a Practical Matter Because Doing So Is Difficult, Burdensome, and Bad for Business**

Displaying only the merchandise she could carry in her arms, as required by section 18-304, was also difficult for Ms. Sequeira, and it prevented her from serving her customers. Carrying different types of merchandise is what builds customer confidence and loyalty. Ex. D, at ¶ 4. But Ms. Sequeira could not do that when she attempted to vend as the City requires. Ex. D, at ¶ 9. Some of the people she tried to sell to asked her for different colors or types of flowers that she had at home (and would have had in her van if she had it with her) but she did not have in the single bucket of flowers she is allowed to carry. Ex. D, at ¶ 19. She was not able to bring sunflowers with her, either, because they are too cumbersome and large to hold in a bucket while walking. Ex. D, at ¶ 17. Vendors cannot carry a full day's worth of merchandise

on their person, but that is functionally what the code requires. Ex. D, at ¶ 17. From this experience, Ms. Sequeira determined that she could not vend in this fashion. Ex. D, at ¶ 25.

Mr. Membreno has also noted that he cannot attract customers with merely a bucket on his person. Ex. A, at ¶ 10. Additionally, carrying a full day's worth of merchandise is impossible for him. Ex. A, at ¶ 10. Indeed, both Mr. Membreno and Ms. Sequeira have said is impossible for vendors, especially the elderly and weaker vendors, to carry an entire day's worth of merchandise. Ex. A, at ¶ 10; Ex. D, at ¶ 24.

In sum, section 18-304's requirement that vendors display their merchandise only on their person makes a viable vending business impossible.

**c. The Record Establishes That the Code Hinders, Rather Than Advances, Traffic Safety.**

The only interest that the City has been able to identify is traffic safety, and doing that took two depositions. Before the amendments, the City's agent,<sup>2</sup> Detective Frank Caldara, admitted that he was not aware of any legitimate reasons for these restrictions. Caldara Dep. 24:13-25:5, 31:3-6, 35:18-25, a true and correct copy of which is attached hereto as Exhibit "F". In a more recent deposition, taken after the amendments to the vending ordinance, the City testified through its agent,<sup>3</sup> Chief of Police Sergio Velasquez, that the City's interest in these restrictions is safety. Ex. G, at 62:12-64:17, 185:13-22.

The record contains no evidence that banning the display of merchandise and compelling vendors to move around advances traffic safety in any way. In fact, vending from one location is perfectly safe. In his 16 years as a leader of the vending community, Mr. Membreno has never heard of an injury or car accident related to vending. Ex. A, at ¶ 12. To the contrary, by forcing

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<sup>2</sup> Detective Frank Caldara was designated by the Defendant as the representative with the most knowledge pursuant to Florida Rule of Civil Procedure 1.310(b)(6).

<sup>3</sup> During an entity deposition pursuant to Florida Rule of Civil Procedure 1.310(b)(6).



vendors to hide merchandise, move constantly, and carry oversized amounts of merchandise, the City is making its streets less safe. *See* Ex. D, ¶ 22; *infra* Part IV.1.a.ii.2.

### **3. The City Enforces Laws in Ways That Serve Only to Hurt Business.**

The City's enforcement of the contested sections of the code and § 337.403, Florida Statutes, serve no legitimate purpose, but rather function to hurt vending business. The City enforces these laws when they will hurt vendors most, and it bans vendors from doing activities that are allowed for brick-and-mortar stores.

The City aggressively enforces the Code on important vending holidays like Valentine's Day and Mother's Day. Per City policy, the police department sends an email to officers explaining the Code and City policies regarding vendors, including sections 18-302 and 18-304. Ex. G, at 143:1-24. And police enforce sections 18-302 and 18-304 much more aggressively on these holidays by approaching vendors and telling them to hide their wares or to move locations. Ex. A, at ¶¶ 13-15; Ex. D, at ¶¶ 11, 14-15.

Additionally, the City bans vendors from doing things stores are allowed do. Store owners are allowed to set up displays outdoors. Ex. G, at 143:1-147:6. Vendors are not. Code § 18-304. Stores are obviously not required to move from location to location, but vendors are. Ex. F, at 39:11-19; Code § 18-302.

### **III. Legal Standard**

When there is no genuine issue of material fact, summary judgment is proper. *Tropical Glass & Const. Co. v. Gitlin*, 13 So. 3d 156 (Fla. 3d DCA 2009) (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000)); *see also Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000) (A "party should not

be put to the expense of going through a trial, where the only possible result will be a directed verdict.”).

#### **IV. Argument and Authorities**

The City violates Plaintiffs’ rights by enforcing Code sections 18-302 and 18-304 and by its ultra vires enforcement of a state statute that does not apply in the City. In Part IV.1, Plaintiffs will show that the City’s Code is not reasonably related to any legitimate governmental interest and that the laws are arbitrary, oppressive, and discriminatory. In Part IV.2, Plaintiffs will show that the City ultra vires enforces a state statute that is not applicable in the City.

##### **1. Sections 18-302 and 18-304 of the Code Violate Plaintiffs’ Right to Earn an Honest Living.**

In order to be constitutional, the two contested sections of the Code: 1) must be reasonably related to a legitimate government interest; and 2) must not be arbitrary, oppressive, or discriminatory. The contested sections violate not just one but both of these requirements. Thus, sections 18-302 and 18-304 should be struck down as unconstitutional.

All Floridians have a right to earn an honest living. The Florida Constitution declares 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. Manufacturers, Inc. v. Jones*, 897 F. Supp. 2d 1241, 1252 (N.D. Fla. 2012) (Order on Mot. to Dismiss).

The Florida Constitution protects this inalienable right and limits the City's police power by guaranteeing that "[n]o person shall be deprived of life, liberty, or property without due process of law." Fla. Const., art. I § 9. As such, the government's police power is to be used only when the law enacted "bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1214-15 (Fla. 2000). This standard requires a law to bear a "reasonable and substantial relationship to the purpose sought to be attained" by the law. *Haire v. Fla. Dep't of Agric. & Consumer Svcs.*, 870 So. 2d 774, 782 (Fla. 2004); *see also Chicago Title*, 770 So. 2d at 1220.

Because they are not reasonably related to a legitimate governmental interest and are arbitrary, oppressive, and discriminatory, sections 18-302 and 18-304 violate Plaintiffs' right to pursue their lawful businesses.

**a. Sections 18-302 and 18-304 Violate Plaintiffs' Rights Because They Are Not Reasonably Related to Any Legitimate Governmental Interest.**

Sections 18-302 and 18-304 are not reasonably related to any legitimate government interest for two reasons. First, the Florida Constitution does not tolerate oppressive laws that effectively ban an otherwise-legitimate business by making it impossible to run the business. Second, there is no real and substantial relationship between the challenged sections and the City's asserted interest in traffic safety.

**i. The Code Violates Plaintiffs' Rights by Effectively Banning the Legitimate Business of Harmless Street Vending.**

The contested provisions of the vending code are not reasonably related to a legitimate government interest because they effectively outlaw an otherwise-legitimate business. To determine whether the right to pursue a lawful business has been violated, Florida courts must

ask whether the “practical effect of a [law] is to prohibit the operation of a lawful business,” and the court must “consider the effect of a statute on the constitutional rights of a citizen from the aspect of its practical impact rather than the strict letter of the law itself.” *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). The practical impact of the law here is that vendors cannot operate their businesses while obeying the Code. For that reason, the contested sections are unconstitutional.

When a legislative body effectively outlaws an otherwise-legitimate business, the legislative body must demonstrate that the public welfare demands the law remain in effect. *Id.* at 191. For example, in *Larson v. Lesser*, the Supreme Court of Florida struck down a law that prohibited public adjusters from soliciting business. *Id.* Sections 18-302 and 18-304 effectively outlaw vending in the same way that the contested statute in *Larson* effectively outlawed public adjusting. The plaintiff in *Larson* was a public adjuster who argued that the regulatory scheme enacted by the state effectively prohibited him from conducting his business, and the Supreme Court of Florida agreed. *Id.* The state prohibited direct solicitation of business by public adjusters, but allowed for other types of solicitation, like advertising. *Id.* at 189-90.

But the Court found that public adjusters primarily garnered business by doing exactly what was prohibited—directly contacting insureds. *Id.* The Court held that “the practical effect” of the law was to “prohibit the operation of a lawful business, under the guise of regulation,” and thus struck down that law as unconstitutional. *Id.* at 191-92.

As in *Larson*, Plaintiffs are technically *allowed* to practice their occupation, provided they do not violate the contested restrictions; but in practice, the restrictions make it impossible to attract and keep customers. The City, like the state in *Larson*, is using onerous regulations to effect a ban on an otherwise-legitimate business that the City appears to dislike. *See* Code § 18-

307 (licensing vendors); Ex. I, at 94:4-13 (discussing the granting of licenses); Memorandum from Rafael E. Granado, a true and correct copy of which is attached hereto as Exhibit “J” (discussing allowed practices for vendors). Plaintiffs want the same thing as the public adjuster in *Larson*: to engage in a useful business that benefits the public and provides gainful employment—namely, displaying merchandise and reliably selling from one location. Ex. A, at ¶¶ 9-10; Ex. E, at 76:7-14, 81:8-22, 91:25-92:18. Prohibiting these venerable, universal, and harmless practices effectively prohibits the operation of the lawful business of street vending.

Mr. Membreno makes this point by explaining that two things are absolutely essential to an effective vending business: First, you must be able to show customers what you are selling. Ex. A, at ¶ 21. Second, you must reliably be available for your customers in a consistent location. Ex. A, at ¶ 9.

First, it is necessary to display merchandise to operate a street vending business. Displaying merchandise is integral to vending because it informs customers—both old and new—what vendors are selling. Mr. Membreno and Ms. Sequeira, for example, sell many different types of flowers, and many different colors of roses. Ex. A, at ¶ 3, Ex. D, at ¶¶ 3-4, 17, 19. Their merchandise varies daily based on what is available to buy and his customers’ needs. Ex. A, at ¶ 3; *see also* Ex. D, at ¶ 17. Customers will not be able to see the full array of merchandise vendors offer if they cannot display their merchandise. Ex. A, at ¶ 10; Ex. D, at ¶ 10. Additionally, new customers are attracted by the selection of flowers the vendors sell. Ex. A, at ¶ 10; Ex. D, at ¶¶ 4, 10. Their displays are much more visible than the buckets they carry on their person; and with a nearby display it is easier for new customers who are driving by or stopped at the red light to recognize that they are selling flowers. Ex. A, at ¶ 10; Ex. D, at ¶ 10; *see* Ex. E, at 92:3-18.

The City's Code unreasonably restricts the operation of vendors' businesses by dictating that a vendor may display "only as much of the goods, merchandise or wares as the [vendor] can carry on [his] person." Code § 18-304; Ex. G, 173:5-8. Mr. Membreno testified that, in his worst year of flower sales, he sold 120 flowers per day on average. *See* Ex. E, at 46:19-47:3, 49:4-13. This means that the City requires a vendor like Mr. Membreno to carry all of his merchandise—at least 120 flowers per day—in his hands while transacting business on a public road during red lights. The City does allow vendors to store merchandise in a nearby vehicle, but requires vendors to keep their merchandise in the vehicle with the doors shut, which renders it invisible to the public and causes perishables like flowers to die. Ex. A, at ¶ 11; Ex. D, at ¶ 17; Ex. G, at 183:4-184:15. The City's Code also requires flower vendors to hold all of their day's merchandise in their hands. But it would be impossible for vendors to display the array of merchandise they have to offer on their person or to hold a day's worth of merchandise on their person. Ex. A, at ¶ 10; Ex. D, at ¶ 10. Thus, much like *Larson's* ban on direct solicitation, the practical effect of the City's restriction on display of merchandise is to prohibit vendors from attracting customers.

Second, it is just as necessary to have a fixed location. Remaining in one location is integral to operating an effective vending business because reliability is the best way to grow and maintain a customer base. Mr. Membreno testified that he has built his clientele by selling from the same corner each day. Ex. E, at 84:8-12. Ms. Sequeira has said the same. Ex. D, at ¶¶ 8-9. Additionally, roving around is disorienting, dangerous, and difficult for vendors, who need to walk many miles a day to comply with the law. Ex. D, at ¶¶ 22, 25; Ex. A, at ¶ 9.

It seems to be the City's goal, however, that vendors *not* build up or maintain a customer base. Section 18-302 of the Code explicitly prohibits vendors from "stop[ping] or remain[ing] at

any one location on private or public property *with such regularity and permanency that would lead a reasonable person to believe the location is the vendor's fixed business location.*" Code § 18-302 (emphasis added). The City testified that one factor in determining whether a vendor is violating section 18-302 is whether a vendor can reliably be found in one location. Ex. G, at 56:20-58:3.

The Code is so onerous that street vendors in the City generally operate in violation of sections 18-302 and 18-304. *See* Ex. E, at 64:4-65:12, 68:7-23; Ex. D, at ¶ 7. The City enforces sections 18-302 and 18-304 sporadically. *See* Ex. E, at 105:7-108:6. When police officers enforce sections 18-302 and 18-304, usually on important vending holidays, the vendors temporarily comply with the law but then continue their practices in violation of the law after police officers leave. Ex. A, at ¶ 11; Ex. D, at ¶ 11. Vendors do this because they have found from practical experience that vending without displaying merchandise and while roving around is impractical and destructive to business. Ex. A, at ¶¶ 10-11; Ex. D, at ¶¶ 15-25. Even when they try to comply with the law, they find it to be impossible to operate a viable vending business in the manner prescribed by the Code. Ex. D, at ¶¶ 16-25. When vendors do not comply with the law, police officers verbally instruct them to do so or else they issue citations to the vendors. Ex. G, at 81:25-82:9, 86:16-18; *see also* Ex. D, at ¶ 11.

Because the City is effectively prohibiting the otherwise-legitimate business of vending, the contested provisions are unconstitutional. As the "public welfare [does not] demand[] the contrary," this Court should strike down the law as violative of Plaintiffs' right to earn an honest living. *Larson*, 106 So. 2d at 191.

**ii. The Contested Provisions of the Code Violate Plaintiffs' Rights Because They Are Otherwise Not Reasonably Related to a Legitimate Legislative Purpose.**

Even if sections 18-302 and 18-304 did not in practical effect outlaw an otherwise-legitimate business, the sections are not reasonably related to any legitimate legislative purpose. The record supports only an illegitimate interest on the part of the City: economic protectionism. The only plausible purpose for banning the display of merchandise and requiring constant motion is to destroy vending businesses that compete with traditional brick-and-mortar stores.

**1. There Is No Record Evidence of a Reasonable Relationship Between the Contested Code Sections and the City's Supposed Governmental Interests.**

There is no evidence in this record of any reasonable relationship between the contested provisions of the ordinance and any legitimate governmental interest. This is evident from the admissions of City employees, the patterns of enforcement by the City, and the inability of the City to produce any studies, reports, or information that would show a reasonable relationship between the provisions of the Code and any legitimate government interest. This Court must find evidence of a reasonable relationship in the record, or else the contested sections must be held unconstitutional. *See Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1216 (Fla. 2000) (“From our review of the record, we find no identifiable relationship between the [contested laws] and a legitimate state purpose.” (quoting *Dade Cnty. Consumer Advocate's Office v. Dep't of Ins.*, 457 So. 2d 495, 497 (Fla. 1st DCA 1984))); *Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958) (holding law unconstitutional because court failed to find any reasonable relationship in the record). Moreover, the challenged law must have a “reasonable relationship” to actually accomplishing a legitimate state interest. *See Chicago Title*, 770 So. 2d at 1220.



The Florida Supreme Court has a long history of striking down laws lacking a reasonable relationship to a legitimate government interest. *See, e.g., McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014) (striking down Florida’s statutory cap on wrongful damages as unconstitutional for not bearing a reasonable relationship to the stated purpose the cap was purported to address); *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000) (various statutes and rules prohibiting title insurance agents from negotiating their premiums); *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) (ban on advertising motel prices); *Larson v. Lesser*, 106 So. 2d 188, 192 (Fla. 1958) (statute prohibiting public adjusters from soliciting business); *Miami Springs v. Scoville*, 81 So. 2d 188 (Fla. 1955) (ordinance regulating the size and placement of signs advertising gasoline prices); *Lee v. Delmar*, 66 So. 2d 252 (Fla. 1953) (requiring real estate salesmen to operate as full-time agents); *Miami v. Shell’s Super Store*, 50 So. 2d 883 (Fla. 1951) (regulating barber shop business hours).

In *Chicago Title Insurance Co. v. Butler*, for example, the Court held that, although the state had a legitimate government interest in protecting title agents and insurers from insolvency, the statutes at issue—which prohibited title insurance agents from rebating a portion of their commission—were not reasonably related to that interest. 770 So. 2d at 1220. The Court noted that the statutes did “not achieve the Legislature’s avowed purpose and instead simply deprive[d] the consuming public of a choice in the price of products or services, the choice of which is the cornerstone of a competitive, free-market economy.” *Id.* Thus, the Court held that summary judgment in favor of the Plaintiff was proper. *Id.* at 1221.

As in *Chicago Title*, nothing in this record shows that the contested provisions of the Code actually advance any legitimate governmental interests. Indeed, the City’s own designated

representative could not articulate any legitimate government interest in these laws. Ex. F, at 54:1-5.

The City ultimately asserts one interest in these laws: traffic safety. Def.'s Resp. Pls.' 2d Interrog. No. 1, a true and correct copy of which is attached hereto as Exhibit "K". However, there is no reasonable relationship between the interest of traffic safety and the contested provisions of the Code. During the deposition of the City's designated representative, Chief Velasquez could not identify any reasonable relationship between the purported interest and the law. Instead, he merely identified instances of vendors violating the law and pointed to the traffic study commissioned by the City to support its January 2013 amendments to the Code. Ex. G, at 189:6-190:11; City of Hialeah Peddlers & Itinerant Vendors Traffic Assessment, Richard Garcia & Assoc., Inc., Jan. 7, 2013 (the "Traffic Study"), a true and correct copy of which is attached hereto as Exhibit "L". But ultimately, Chief Velasquez was not even able to articulate what the City expects vendors to do, much less how the Code advances any legitimate governmental interest.<sup>4</sup>

The City's Traffic Study does nothing to link sections 18-302 or 18-304 to the City's purported governmental interests. Rather, the Traffic Study merely concludes that, due to the City's traffic congestion, "Peddlers and Itinerant Vendors should be regulated at certain locations." Ex. L, at 7 (Bates No. R2-000875). The study goes on to specify that those "locations" are limited access facilities, under freeway underpasses, state intersections, school

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<sup>4</sup> Instead, Chief Velasquez repeatedly explained the application of the Code by vaguely referring to the "totality of the circumstances" an officer is supposed to assess when enforcing the Code. Ex. G, 46:17-48:21, 55:10-59:20, 94:10-96:7, 101:10-23. When shown a photograph of a vendor's display, the Chief could not even determine whether the display violated section 18-304, reasoning that he could not determine the "totality of the circumstances." Ex. G, at 154:14-157:21. Additionally, when given numerous detailed examples of vending set-ups, the City's representative could not articulate what is and what is not a violation of the contested Code sections. 42:2-48:15, 52:2-62:11, 164:5-167:17.

zones, and medians. Ex. L, at 18. When asked to cite a particular portion of the study that supports the Code, the City, through its designated representative, merely directed Plaintiffs to “the complete study.” Ex. G, 191:21-192:1. The study does not discuss display of merchandise, ambulatory requirements, or the purported benefits thereof. Ex. G, at 196:3-197:2. Instead the study merely gives guidance on “whether [the City] should have regulations” at all. Ex. L, at 196:3-13.

Conversely, Mr. Membreno has noted that he has never heard of a traffic accident involving a vendor in Hialeah. Ex. A, at ¶ 12. He has been a leader in the vending community for 16 years, and is a founder of Plaintiff FAV. Ex. A, at ¶ 6. There have undoubtedly been millions of vendor transactions over the years without even a rumor of a problem, much less any undocumented incident.

Common sense and logic dictate that the City’s regulations do not help advance, but in fact hinder the City’s purported interest in safety. The City’s contention is that the expectation of a vendor being in one location makes drivers and pedestrians violate laws and obstruct traffic to get to the vendors. *See* Ex. G, at 63:11-68:8. In fact, the expectation that a vendor will be at a set location helps *alleviate* the problem of drivers scrambling to reach the vendor. Indeed, Ms. Sequeira found that roving around the City was unsafe, and remaining at one location was safer because it was less disorienting and easier to predict traffic patterns. Ex. D, at ¶¶ 22, 25.

In other words, the City’s laws thwart—not advance—the purported goals of pedestrian and traffic safety.

The City’s regulation of fruit and vegetable vendors does even less to advance any interest in traffic safety. Fruit and vegetable vendors who vend from vehicles are required to drive around until potential customers wave them down. Then, the vendors must park

somewhere safely before making a sale, and they *must have the property owner's permission for any place they park to make a sale*. Code § 18-304. In other words, in the City's ideal situation, *two* parties in vehicles (the vendor and the customer) instead of *one* (just the customer) must communicate with each other while moving and then find a safe place to park before engaging in a transaction. Then the vendor must continue to circulate on the roadways. *Id.*; see also Code § 18-302 (requiring vendors to circulate on roadways). This scheme is not only untenable, but it is also far from advancing a legitimate governmental purpose.

The contested provisions of the Code do absolutely nothing to advance any interest in traffic safety. To the extent that the City has legitimate concerns, like preventing the obstruction of sidewalks and preventing people from unsafely entering the roadway, those activities are already outlawed based on laws *other than* the Code. Ex. G, 49:10-52:1. Unlike those laws, the contested provisions of the Code bear no relationship whatsoever to protecting anyone's safety.

## **2. The City's Real Interest Is Protectionism.**

Given the lack of any demonstrable connection between the City's asserted traffic concerns and the challenged provisions, the only plausible purpose for the challenged provisions is to discourage street vendors from competing with brick-and-mortar businesses.

The City proves its real interest of protectionism by increasing enforcement of the contested sections on the most important holidays for vendors: Valentine's Day and Mother's Day. Ex. A, at ¶¶ 13-15 (noting that police officers prohibit vendors from selling merchandise in Hialeah on important holidays); *see also* Ex. I, at 42:22-43:11 (recounting Mr. Suarez's response to a flower-store owner's complaints about a competing vendor on Valentine's Day). Every Valentine's Day, the police department sends out an email to officers reminding them of the Code and explaining enforcement of the Code, including sections 18-302 and 18-304. Ex. G, at

143:1-24. Every Valentine's Day, City police more aggressively enforce the contested provisions of the ordinance by riding around the City ordering vendors to move along. *See* Ex. G, 142: 14-145:11. The City's policy of increasing enforcement of the contested sections during important vending holidays demonstrates that the City's real purpose is to protect other businesses from competition.

Protectionism is not a legitimate government purpose. *See Chicago Title*, 770 So. 2d at 1220 (striking down statutes for being concerned with the solvency of one industry, as opposed to the public, and noting the importance of economic liberty and free markets); *Dade Cnty. Consumer Advocate's Office v. Dep't of Ins.*, 457 So. 2d 495, 497 (Fla. 1st DCA 1984); *Eskind*, 159 So. 2d at 212 (striking down an ordinance because "the subject ordinance is nothing less than an attempted exercise of the police power to restrict competition between favored and unfavored segments of the same business activity"). *See also St. Joseph Abbey v. Castille*, 700 F. 3d 154, 161 (5th Cir. 2012) ("As we see it, neither precedent nor broader principles suggest that mere economic protection of a pet industry is a legitimate governmental purpose[.]"); *Craigsmiles v. Giles*, 312 F. 3d 220, 224 (6th Cir. 2002) ("Courts have repeatedly recognized that protecting a discrete interest group from economic competition is not a legitimate governmental purpose.").

The true purpose of the contested provisions of the ordinance is apparent: They are intended to prevent vendors from competing with brick-and-mortar businesses. As discussed above, this is not a legitimate government interest. *See Chicago Title*, 770 So. 2d at 1220; *Eskind*, 159 So. 2d at 212. Accordingly, the law must be held unconstitutional.

**b. The Contested Provisions of the Code Violate the Reasonable Relationship Test Because They Are Arbitrary, Oppressive, and Discriminatory.**

Not only are the contested provisions of the Code unrelated to a legitimate government interest, but they are also arbitrary, discriminatory, and oppressive. Florida courts have held that “[n]either a state nor a city can arbitrarily interfere in private business or impose unreasonable and unnecessary restrictions upon them, under the guise of protecting the public.” *Alliance of Auto. Manufacturers, Inc. v. Jones*, 897 F. Supp. 2d at 1252 (citing *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963)).

In *Eskind v. City of Vero Beach*, the Supreme Court of Florida struck down as arbitrary—and thus unconstitutional—an ordinance that prevented motels from advertising prices. 159 So. 2d at 212. Indeed, the Court noted that if the ordinance were constitutional, “then any legitimate business practice which provides a competitive advantage over others in the same business could conceivably be condemned by an exercise of police power.” *Id.* The court ultimately held that, although the City articulated some legitimate governmental interests, the ordinance did not actually advance those interests in any meaningful way, and therefore, the ordinance was arbitrary.

As in *Eskind*, the contested provisions of the Code are arbitrary in that they serve only to protect businesses from competition and impose bizarre business practices on City vendors, who cannot function effectively in the manner prescribed. *See, infra*, Part IV.1.a.ii.1. Additionally, the contested provisions are oppressive in that they effectively ban Plaintiffs’ business. *See, infra*, Part IV.1.a. Lastly, the contested provisions are discriminatory because the City does not prohibit brick-and-mortar stores from displaying their merchandise or from serving their customers. *See Code*; Ex. G, at 146:4-147:6 (noting that hardware stores in Hialeah display

merchandise outside their buildings). Because the most plausible conclusion to be drawn from the evidence in the record is that the contested provisions of the Code are arbitrary, oppressive, and discriminatory, they must be struck down as unconstitutional. Indeed, if any one of these were true, the contested sections would be unconstitutional. But here, the City's law is arbitrary, oppressive, *and* discriminatory.

## **2. The City Ultra Vires Enforces a State Statute That Does Not Apply in Hialeah, Impeding Vending in the Most Popular Vending Areas.**

In addition to enforcing unconstitutional ordinances, the City has engaged in ultra vires enforcement of a state statute that is inapplicable within incorporated municipalities. Before 2013, the City told street vendors they could not sell on state roads pursuant to § 337.406, Florida Statutes. Ex. G, 135: 6-11; Def.'s Resp. to Pls.' First Req. for Produc., City of Hialeah Rules & Regulations for Peddlers & Itinerant Vendors, a true and correct copy of which is attached hereto as Exhibit "M". However, § 337.406 explicitly applies *outside incorporated municipalities* and says, in relevant part:

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.

(emphasis added).

If a local government has "no delegated authority" to act, then the government's action is *ultra vires*, and thus null. *Santa Rosa County v. Gulf Power Co.*, 635 So. 2d 96, 101, 102 (Fla. 1st DCA 1994). The City's prohibition of vending on or abutting state roads is not based on any law, and thus, the City should be enjoined from enforcing § 337.406 in this incorrect manner. When a statute has a "clear and definite meaning, there is no occasion for resorting to the rules of

statutory interpretation and construction; the statute must be given its plain and obvious meaning.” *Westphal v. City of St. Petersburg Risk Mgmt.*, 122 So. 3d 440, 444 (Fla. 1st DCA 2013) (quoting *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007)). Here, the City takes the preceding excerpt to read:

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.

The words “outside of an incorporated municipality” clearly and definitely except this portion of the statute from applying inside an incorporated municipality. The City is an incorporated municipality. Def.’s Answer ¶ 9. As such, applying that portion of the statute inside the City is ultra vires enforcement.

The City claims that it has recently ceased enforcement of this statute for the time being, apparently due to the enactment of the amended vending ordinance. Ex. G, 136:2-137:9.

Although the City claims it has stopped enforcing § 337.406 for now, this Court should still enjoin the City from enforcing this statute as it has done in the past because the City’s ultra vires enforcement is capable of repetition while evading review. *See Grapski v. City of Alachua*, 31 So. 3d 193 (1st DCA 2010). Indeed, in the City’s January 13, 2014 motion for summary judgment, the City argued that “the use is prohibited both within and without a municipality” unless the City issues a permit. Def.’s Mem. in Supp. Mot. for Summ. Judg. 12. The City’s designated representative refused to answer whether the City believes it has the power to ban vendors from state roads pursuant to § 337.406 and instead generally pointed to the text of the statute and vaguely referred to the City’s authority to regulate vendors. Ex. G, 128:13-134:1.



Because the City's enforcement of § 337.406, Florida Statutes, is both ultra vires and capable of repetition while evading review, this Court should enjoin the City from banning vendors from state roads without the appropriate legislative authority.

**V. Conclusion**

The two contested provisions of the Code are unconstitutional because they violate Plaintiffs' rights to earn an honest living by going outside the bounds of due process. First, the provisions violate Plaintiffs' due process rights because they effectively prohibit an otherwise-legitimate business without any benefit for the public welfare. Second, the provisions violate Plaintiffs' economic liberty because they lack a reasonable relationship to the only interest identified by the City: traffic safety. Instead, the challenged ordinances are simply a means of protecting politically favored brick-and-mortar businesses from honest competition from disfavored street vendors. Finally, the provisions are unconstitutional because they are arbitrary, oppressive, and discriminatory in interfering with a harmless pursuit.

Additionally, the City ultra vires enforces a state statute that is inapplicable inside Hialeah city limits. The contested provisions advance only the interest of established business owners and are not reasonably related to the public interest.

For all these reasons, this Court should strike down sections 18-302 and 18-304 of the Code as unconstitutional and enjoin the City's ultra vires enforcement of §337.406, Florida Statutes.

RESPECTFULLY SUBMITTED this 23rd day of May, 2014.

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 23rd day of May, 2014, a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment was filed and served electronically on the following counsel of record:

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