IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT

Appellate Case No. 3D14-2603

SILVIO MEMBRENO and
FLORIDA ASSOCIATION OF
VENDORS, INC.,

Appellants,

vs.

THE CITY OF HIALEAH, FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit
in and for Miami-Dade County, Florida
Case No. 11-33223 CA 25
The Honorable Jorge E. Cueto

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

In their Initial Brief, Appellants demonstrated that the lower court erred in granting summary judgment to the City of Hialeah (the "City"), and against Appellants. *First*, Appellants showed that they should have prevailed on their Florida constitutional challenge to two provisions in the City's street-vending laws: a prohibition against standing still (the "ambulatory restriction") and a prohibition against displaying more goods than vendors can carry on their person (the "display restriction.").[1] This is because the lower court applied the incorrect legal standard—a "loosey goosey"[2] version of the federal rational basis test that the City urged upon it—rather than the more robust Florida rational basis test. *Second*, Appellants demonstrated that they should have prevailed on their challenge to the City's *ultra vires* enforcement of a statute banning vending on state roads because the text of the statute states that it does not apply in municipalities like the City.

In its Answer Brief, the City defends the lower court's "loosey goosey" version of the federal test, one in which courts speculate about whether a law *could* rationally be related to its stated purpose. The City refuses to acknowledge *Florida's* rational-basis test for claims under the *Florida* constitution. This test has two prongs: (1) demanding that a law—based on facts, not speculation—bear a

[1] Hereinafter, Appellants will refer to the ambulatory and display restrictions collectively as the "Restrictions."

[2] R. 1259:7.

reasonable relationship to a legitimate governmental interest; and (2) forbidding discriminatory, arbitrary, or oppressive laws. Appellants win on their constitutional challenge if they prove that the law fails either prong. One searches the City's brief in vain for any argument that the lower court was correct when it entirely ignored the second prong. Nor does the City point to any legal support for its version of the test. The City also does not respond to Appellants' record proof that the Restrictions are not reasonably related to the City's justifications under the first prong. Finally, rather than respond to Appellants' *ultra vires* argument, the City disregards the part of the statute it does not like—the part denying the City authority to prohibit vending on state roads. Because the lower court committed legal error, this Court should reverse the grant of summary judgment against Appellants and instruct the lower court to grant summary judgment to Appellants.

II. ARGUMENT

Appellants raise four points on reply. *First*, the City, like the lower court, failed to address the second prong of the Florida rational basis test, which provided an independent basis under which Appellants should have prevailed. *Second*, contrary to the City's argument, the first prong of the Florida test gauges whether there is a reasonable relationship between the Restrictions and their purported purpose based on record evidence of their actual effects (or lack thereof) in advancing that purpose—not speculation about those effects. *Third*, the City is

wrong that Appellants failed to meet their burden in negating the reasonable relationship between the Restrictions and the City's justifications of: (1) vehicular and pedestrian safety; and (2) equal rights and enforcement under the City's zoning code. *Fourth*, the City's argument that Section 337.406, Fla. Stat. allows an incorporated municipality like itself to prohibit vending on state roads flies in the face of that statute's plain language, which prohibits vending only outside incorporated municipalities.

Point 1—In Its Answer Brief, the City, Like the Lower Court, Failed to Address the Second Prong of Florida's Rational Basis Test.

Florida' test has two prongs, each of which provides Appellants with a victory on their constitutional claims. Initial Br. 21–23. *First*, unlike the federal test, the Florida test requires that a law "bear a rational and *reasonable* relationship to a legitimate state objective." *Estate of McCall v. United States*, 134 So. 3d 894, 901 (Fla. 2014) (emphasis added). *Second*, even if a law passes the first prong, the second prong, which the lower court failed to consider, asks whether a law is "discriminatory, arbitrary, or oppressive." *Chi. Title Ins. Co. v. Butler*, 770 So. 2d 1210, 1215 (Fla. 2000); Initial Br. 21–22. Under the second prong, a law cannot stand when record facts show that it "make[s] it impossible from a practical standpoint . . . to engage in a business which is otherwise recognized by statute as being lawful." *Larson v. Lesser*, 106 So. 2d 188, 191 (Fla. 1958). The Florida Supreme Court has held laws unconstitutional under this second prong. Initial Br.

43–45. Appellants satisfied this prong with unrebutted evidence that the Restrictions, when enforced, make their lawful vending businesses practically impossible. Initial Br. 45–46.

Citing *Chicago Title*, the City appears to acknowledge in its Answer Brief that the second prong exists. Answer Br. 15. But the City did not analyze this prong, and it completely ignored Appellants' binding authority applying it, namely *City of Miami v. Shell's Super Store, Inc.*, 50 So. 2d 883 (Fla. 1951). In *Shell's Super Store*, the Florida Supreme Court struck down a Miami hours-of-operation ordinance, which, like the Restrictions, was shown, by record evidence, "to be an unreasonable deterrent to appellee in the conduct of its business." *Id*. at 884; Initial Br. 44. The City did not mention, much less distinguish, obvious parallels between that case and the instant matter: the business in *Shell's Super Store*, like the vending businesses here, would not have been sustainable if the law were to continue to be enforced. *See* Initial Br. 44. The City's surrender on the second prong, coupled with the lower court's failure to address it, requires reversal.

Point 2—Florida's Rational Basis Test Scrutinizes the Record to Assess Whether a Law Is Reasonably Related to an Asserted Governmental Interest.

Appellants also should have prevailed on the first prong. The dispute on this prong is whether, as the City urges, this Court should equate Florida's rational basis test with a wholly deferential version of the federal test in which courts rely on conjecture that a law is rationally related to its purported purpose. Answer Br.

15, 23–25. This will not do. The Florida Constitution—and Florida cases applying Florida's rational basis test—require courts to rely on *facts* to make this determination. Initial Br. 24–26 (citing *McCall*, 134 So. 3d at 905; *Chicago Titl*e, 770 So. 2d at 1214, 1216–18; *Eskind v. City of Vero Beach*, 159 So. 2d 209, 212 (Fla. 1963); and *Larson*, 106 So. 2d at 192). This precedent stands in the City's way, so the City attempts to distinguish some of that precedent (it does not distinguish *Chicago Title*) and then marshal its own cases to mischaracterize Florida's test as a carbon copy of the weaker federal test. Answer Br. 15, 23–24. Below, Appellants will show: (1) why the City's attempt to distinguish Appellants' cited authority fails; and (2) why the City's cited cases either respond to a strawman or are inapposite.

a. The City's Attempt to Distinguish Appellants' Authority Is Unavailing.

The City argues that Appellants' reliance on the Florida Supreme Court's recent decision in *McCall* is misguided. Answer Br. 13–15. *McCall* used the first, "reasonable," prong of Florida's test to strike down Florida's cap on wrongful death noneconomic damages *after* the Eleventh Circuit upheld it. 134 So. 3d at 899. *McCall* proves that Florida's test, because it relies on facts, is stronger than the deferential version of the federal test the City advances. Initial Br. 24–26.

Because its argument cannot overcome *McCall*, the City attempts to marginalize *McCall*, contending it is not binding because it had both a plurality

and concurring opinion. Answer Br. 14–15. That *McCall* was a fractured opinion is of no moment. According to the only comprehensive work on how the Florida Supreme Court operates, a concurrence "can constitute the fourth vote needed to establish both a decision and a Court opinion, subject only to any reservations expressly stated in the concurring opinion." Harry Lee Anstead, et. al, *The Operation & Jurisdiction of the Sup. Ct. of Fla.*, 29 Nova L. Rev. 431, 459 (2005), www.floridasupremecourt.org/pub_info/documents/juris.pdf (footnotes omitted).[3] In other words, an opinion with multiple opinions is controlling as to the points that a majority of the justices agree upon.

In *McCall*, the plurality and concurrence agreed, even on the narrowest reading of their opinions, that Florida courts must look at reality to determine whether there is a reasonable relationship between a law and its purported purpose. Initial Br. 25–26. Five justices scrutinized the state's asserted interest—curbing doctors' malpractice premiums—and compared it with the statute's real-world effects. *McCall*, 134 So. 3d at 911–12 (plurality opinion); *id.* at 919–20 (Pariente,

[3] The City contends *McCall* does not stand as precedent for *any* of its opinions. Answer Br. 14–15 (citing *Schaap v. Publix Supermarkets, Inc*., 579 So. 2d 831 (Fla. 1st DCA 1991) & *Nehme v. Smithkline Beecham Clinical Labs., Inc*., 822 So. 2d 519 (Fla. 5th DCA 2002)). Neither case that the City relies on supports this argument. Neither discussed the precedential value of Florida Supreme Court concurring opinions. They are, at best, examples of three-judge district court opinions that also have a concurrence in result only (with no opinion), and a dissent. *See Schaap*, 579 So. 2d at 835; *Nehme*, 822 So. 2d at 522 (discussing *Myklejord v. Morris*, 766 So. 2d 1160, 1162–63 (Fla. 5th DCA 2000)).

J., concurring). Both the plurality and concurrence agreed that the asserted interest could not withstand Florida's test because the statutory cap on noneconomic damages would not benefit doctors—only insurance companies. *See id.* Only two dissenting justices advocated a position similar to the City's: That "[u]nder the rational basis standard, there just has to be a *conceivable* factual predicate that would provide a rational reason for the Legislature to have done what it chose to do." *Id*. at 932 (Polston, C.J., dissenting) (emphasis added). That view did not prevail with the Florida Supreme Court and should not prevail here.

To be sure, Justice Pariente expressed reservations in her concurrence "with the plurality's independent evaluation and reweighing" of information the Legislature considered. *Id.* at 916 (Pariente, J. concurring). But this Court need not *reweigh*, or even look at, legislative findings, and Appellants are not asking for that—there were none here. Appellants only ask that the Court evaluate, like the majority of *McCall* justices, whether the Restrictions—in light of facts regarding their real-world effects—reasonably advance "the asserted State interest." *Id*. at 919 (Pariente, J., concurring); *see also id.* at 912 (plurality opinion) ("We conclude that the record and available data fail to establish a legitimate relationship"). In keeping with *McCall*, Appellants proved that the Restrictions' real-world effects have nothing to do with the City's asserted interests in safety and in zoning equality for vendors and the public. Initial Br. 29–40. The City fails to undermine

McCall, and Appellants should prevail under *McCall* for the reasons explained in their Initial Brief.

The City also argues that Appellants are wrong to cite *Eskind* and *Larson* for the proposition that courts look at evidence of the real-world impact of a law to determine whether it is reasonably related to stated justifications. *Compare* Answer Br. 16–17 *with* Initial Br. 24–26. But both *Eskind* and *Larson* explicitly engaged in factual analysis to look at the actual effects of contested laws. *See Eskind*, 159 So. 2d at 211–12 (reviewing record evidence in striking down ban on hotel advertising rates); *Larson*, 106 So. 2d at 192 ("Search as we have done in this record, we fail to find any reasonable basis whatever in the public health, welfare or safety."). The City thus fails to distinguish binding authority on the first prong.

b. The City's Cases Either Attack a Strawman or Are Distinguishable.

The City fails to distinguish Appellants' cases, and it commits the additional error of citing irrelevant cases. The City's first tactic is to cite cases that attack a strawman. The City seeks to combat, in the City's words, "perfection"[4] as the test for whether laws advance legislative goals in " 'the best manner possible.' "[5] But

[4] Answer Br. 23–24 (citing *Dep't of Corr. v. Fla. Nurses Ass'n*, 508 So. 2d 317 (Fla. 1987); *Sasso v. Ram Prop. Mgmt. & Fireman's Fund Ins. Co.*, 431 So. 2d 204 (Fla. 1st DCA 1983)).

[5] *Id*. 23 (quoting *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 917 (Fla. 2013)).

Appellants do not seek some impossible "perfection" standard—only what the first prong of the Florida test requires: a *reasonable* relationship to a law's purported purpose based on facts. Initial Br. 24–25. The City also cites several district court cases for the proposition that the Florida test should be the equivalent of the lower court's "loosey goosey," R. 1259:7, version of the federal test, permitting " 'illogical' "[6] laws that " 'would further [a] hypothesized purpose.' "[7] Rather than equating the two tests, these cases merely applied the federal test—not the Florida test. *See supra* notes 5–6; Answer Br. 24 (citing *D.P. v. State*, 705 So. 2d 593, 597 (Fla. 3d DCA 1997) (quoting lower court ruling, relying on federal test)). In short, the City may wish that the Florida Supreme Court adopted a "loosey goosey" version of the federal test, but it cannot find support for this wish in the case law it cites.

Point 3—The Restrictions Are Not Reasonably Related to Purported Interests in Pedestrian/Vehicular Safety and Equality Under the Zoning Code.

a. Pedestrian and Vehicular Safety.

The first prong of the Florida test assesses whether a law is reasonably related to a legitimate governmental interest. Initial Br. 21–23 (citing cases). When

[6] Answer Br. 23 (quoting *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1121 (Fla. 4th DCA 2014) (interpreting and quoting federal case law)).

[7] *Id*. 15, 23 (quoting *City of Miami v. Haigley*, 143 So. 3d 1025, 1034 (Fla. 3d DCA 2014)) (in turn quoting *WCI Cmtys., Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004)) (in turn quoting federal test from *Restigouche, Inc. v. Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995)).

laws do not bear a reasonable relationship to their purported interest, they are unconstitutional. *Id*. If other laws directly address the asserted interest, it is less likely that there will be a reasonable relationship. *Id*. 31–32 (citing cases). Appellants showed in their Initial Brief that the Restrictions fail the first prong for both reasons. *First*, the Restrictions are unconstitutional because real-world, record evidence showed that the Restrictions do not bear a reasonable relationship to the City's asserted interests in traffic and pedestrian safety. *Id.* 29–34. Appellants actually proved that the ambulatory restriction *decreases* safety. *Id*. 29–31. *Second*, the lack of a reasonable relationship was reinforced because other laws address safety head-on—including uncontested portions of the ordinance under review that address sidewalk safety and prohibit blocking rights-of-way. *Id.* 31–35.

The City does not address this evidence negating its purported safety interests. Instead, it focuses almost exclusively on *justifications* for its law. Answer Br. 17–22. But Appellants do not—and never did—dispute that safety is a legitimate governmental interest. The question for this Court—unanswered by the City—is whether the Restrictions are reasonably related to that interest. The City eschews facts and devotes three sentences in its brief, unsupported by citations to the record, to mere assertions that there is a reasonable relationship between the Restrictions and safety. *Id.* 25. The City's Answer Brief is thus a concession that the *record* provides no reasonable relationship between the Restrictions and safety.

b. Zoning.

The City also fails to take Appellants' negation of the zoning interest—the notion that the Restrictions ensure property owners and vendors have the same rights—head-on. *First,* Appellants negated that purported interest with the text of the Restrictions, which makes clear that even if a property owner can vend and display, vendors cannot. Initial Br. 38–39. This was all Appellants needed to prevail. *Second*, as additional support, Appellants showed, on rehearing, that the City's enforcement was consistent with the text of the Restrictions—property owners could vend where vendors could not. *Id*. 39–40. This included: (1) an affidavit showing that law enforcement forced vendor Norma Sequeira away from a property while simultaneously allowing the owner to vend; and (2) a City email indicating it enforced the Restrictions on private property against vendors when the property owner could vend at the same location. *Id*. 39.

The Restrictions on their face unambiguously foreclose coterminous rights between vendors and property owners. The ambulatory restriction forces vendors to keep moving regardless of arrangements with private property owners. *See* Hialeah, Fla., Code § 18-302 (App. 003) ("*Nothing in this section* shall be interpreted to authorize a peddler or itinerant vendor to stop or remain 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.") (emphasis added). The display restriction forces vendors to hide merchandise "out of the public's view" unless they can carry it on their person. *Id.* § 18-304 (App. 005). Because the display restriction governs individual vendors' practices regardless of location, it could not possibly provide coterminous rights with property owners. The only record evidence the City cites to link the display restriction with equal zoning is Chief Velazquez's testimony that the City shut down a flower shop's outdoor display. Answer Br. 21 (citing R. 608–09). The City fails to mention that particular display was shut because it was "outside on the sidewalk." R. 608:15–16. This has nothing to do with the display restriction. As Appellants have stated repeatedly, they do not challenge any sidewalk safety ordinance in this lawsuit. Initial Br. 32–35.

The City does not address the above language prohibiting vendors from standing still and displaying goods. Instead, it quotes the WHEREAS preamble: "that itinerant vendors and private property owners 'should enjoy co-terminous rights on private property.' " Answer Br. 20. The City then jumps to the conclusion that the Restrictions "do[] not prohibit vendors from selling on private property where the private property owner has the right to do so per the City's Code and authorizes the vendor to do so." *Id*. 21. This does not respond to the wording of the challenged Restrictions. The prefatory WHEREAS language mentioning coterminous rights has no legal effect. *See* 1A Norman Singer & Shambie Singer,

Sutherland Statutory Construction § 20:3 (7th ed. 2014) ("[S]tatements regarding the scope or purpose . . . in the preamble may aid the construction of doubtful clauses, but they cannot control the substantive provisions of the statute.") (footnotes omitted). The City relies on the self-serving policy statement, not to interpret the prohibitions on standing still and displaying goods, but to ignore them. The City cannot overcome the plainly unequal language of the Restrictions.[8]

Point 4—Enforcement of Section 337.406, Florida Statutes Is *Ultra Vires*.

As with the constitutional challenges, the City ignores, rather than refutes, the substance of Appellants' *ultra vires* argument. The City has told vendors they cannot sell on state roads under a state law forbidding the "sale, of any

[8] The City's secondary argument challenges, for the first time on appeal, Appellants' evidence on rehearing on the grounds that: (1) the evidence was not admissible; (2) facially challenging the zoning interest does not warrant evidence at all; and (3) the evidence was presented after summary judgment. Answer Br. 21–22. These arguments are beside the point because the Restrictions' text conclusively resolves the zoning issue in Appellants' favor. Furthermore, these assertions are wrong. *First*, the City did not object to the evidence below—it did not even file an opposition on rehearing. *See Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) ("[E]videntiary objections should not be considered . . . for the first time on appeal."). *Second*, it makes no difference that the challenge is facial. *See Dep't of Health & Rehab. Servs. v. Cox*, 627 So. 2d 1210, 1212 (Fla. 2d DCA 1993) ("[F]acial constitutionality can be a mixed question of fact and law. When the constitutional issue is a mixed question of fact and law, the parties need to present evidence.") (citations omitted), *approved in part, quashed in part on other grounds*, 656 So. 2d 902 (Fla. 1995). *Third*, evidence on rehearing was appropriate. The City prompted the motion when it raised zoning code provisions for the first time at the summary judgment hearing. Initial Br. 36–37. While the WHEREAS clause mentions zoning, the City never litigated this interest and disclaimed any reliance upon it until reversing course at the hearing. *Id*.

merchandise, goods, property or services" as one of several "prohibited uses" on state roads. § 337.406(1), Fla. Stat.; Initial Br. 47–48. Appellants showed that the statute's vending prohibition applies only to state roads outside incorporated municipalities like Hialeah. *Id*. 48–49; § 337.406(1), Fla. Stat. ("[I]t is unlawful to make any use of the right-of-way of any state transportation facility, including appendages thereto, *outside of an incorporated municipality*") (emphasis added).

The City counters by selectively quoting portions of the statute that allow municipalities to issue permits for temporary use of state roads and enforce violations, contending: "[A] municipality 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 a municipality." Answer Br. 27. The City omits critical permitting language, which reads:

> [A]ny 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* . . . .

§337.406(1), Fla. Stat. (emphasis added). This language appears to grant the City authority to issue permits for an art festival, parade, fair, or other special event. The statute is not a model of precise drafting, and there is arguably ambiguity as to whether the term "prohibited uses" also includes uses, like vending, prohibited outside of an unincorporated municipality. *See Bischoff v. Florida,* 242 F. Supp. 2d

1226, 1254–55 (M.D. Fla. 2003) (§ 337.406(1) "is unclear as to whether the term '*these* prohibited uses' refers only to uses 'for an art festival, parade, fair or other special event.' "). Because there is ambiguity, canons of construction apply. *See Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198 (Fla. 2007).

The City identifies the correct canon: "[A] 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.'" Answer Br. 26 (citations omitted). But the City applies the canon incorrectly—its proposed reading does not accord meaning and harmony to all of Section 337.406(1) and gives *no* meaning to the text stating the prohibition does not apply outside an incorporated municipality. The only way to give meaning to the phrase "outside of an incorporated municipality" *and* the permitting language is to read the latter as giving municipalities limited authority over state roads for special events. This renders the permitting consistent with the vending prohibition only applying *outside* of an incorporated municipality.

III. CONCLUSION

For the foregoing reasons, in addition to those explained in Appellants' Initial Brief, the lower court's entry of summary judgment for the City and against Appellants should be reversed, and the Restrictions should be declared unconstitutional. Enforcement of Section 337.406, Florida Statutes should be declared *ultra vires*.

DATED this 21st day of September, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September 2015, a true and correct copy of the foregoing Appellants' Initial Brief was filed and served electronically on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.100(*l*) of the Florida Rules of Appellate Procedure as it is computer-generated and is in Times New Roman 14-point font.

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