IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

Appellate Case No. 3D14-2603
Lower Tribunal No. 11-33223 CA 25

SILVIO MEMBRENO and FLORIDA ASSOCIATION OF VENDORS, INC.,

Plaintiffs/Appellants,

v.

CITY OF HIALEAH,

Defendant/Appellee

ANSWER BRIEF

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PREFACE

In this Answer Brief, Appellants (Plaintiffs below), Silvio Membreno and the Florida Association of Vendors (FAV), will be referred to as "Appellants" The Appellee (Defendant below), the City of Hialeah, will be referred to as "the City." The record is referenced by volume and page. For example, "R-III-549" means volume III, page 549 of the record on appeal.

Introduction

This Court should affirm the circuit court's summary judgment order and final judgment in favor of the Appellee, the City of Hialeah ("the City"). Similarly, the Court should affirm the trial court's denial of Appellants' Motion for Rehearing. The trial court correctly applied the deferential rational basis test to determine that the City's itinerant vendor ordinance is constitutional. Similarly, the trial court correctly found that Florida Statute § 337.406(1), which regulates the use of rights- of-way on certain state roads, is applicable within a municipality and that the City's enforcement of the statute in the City is not *ultra vires*.

Appellees, Silvio Membreno and the Florida Association of Vendors, Inc., (collectively, "Appellees"), are street vendors, many of whom sell their goods in the City. They challenged two sections of the City's itinerant vending ordinance, claiming that the provisions regulating standing still and displaying merchandise violate their "right to earn a living in the occupation of one's choice" under the Due Process Clause of the Florida Constitution. R-I-94.

By its very title, "Peddlers, Solicitors, Itinerant Vendors," it is clear that the particular ordinance at issue governs "*itinerant* vendors," not vendors who operate out of storefronts and other permanent locations. Yet, Appellants, who are itinerant vendors, want the privileges associated with operating a storefront -- a fixed location -- with the ability to set up displays. By definition, a fixed location

is *not itinerant*. If Appellants want those privileges, they must comply with the other applicable ordinances, including the City's zoning code, that deal with storefronts, private property and permanent locations. The itinerant vendor ordinance does not prevent them from doing so.

No fundamental right is implicated by Appellants' claims, and the parties agree that the rational basis standard applies. In their Initial Brief, however, Appellants argued that the trial court should have applied a stricter, heightened version of the rational basis test instead of the well-established deferential rational basis test that has been applied consistently by Florida courts for years.

Appellants also argued that Fla. Stat. § 337.406(1) applies only outside of incorporated areas and that therefore the City's application of the statute within the City is *ultra vires*. The statue is clear on its face. By its terms, the statue, as the circuit court correctly found, is applicable within a municipality.

STATEMENT OF THE CASE AND FACTS

Nature of the Case

On October 13, 2011, Appellants, street vendors who operated mainly in the City, filed their initial Complaint against the City, challenging several provisions of the City's Code of Ordinances Chapter 18, Article VI, Division 2, "Peddlers, Solicitors, Itinerant Vendors," codified at sections 18-301 through 18-311 of the City of Hialeah Code of Ordinances (the "Old Ordinance"). R-I-6-27. They

alleged that the Old Ordinance violated their substantive due process rights under the Florida Constitution.

Subsequently, the City amended the Old Ordinance on January 9, 2013 ("Amended Ordinance"). App. 001-007. Thereafter, Appellants filed an Amended Complaint challenging two provisions of the Amended Ordinance, one precluding itinerant vendors from setting up fixed locations and the other regulating the itinerant vendors' display of merchandise. R-I-6-27. Appellants alleged that these provisions were unconstitutional under the Due Process Clause of the Florida Constitution. They also contested the City's enforcement of Fla. Stat. § 337.406(1), arguing that it applies only outside municipalities.

The City's Itinerant Vendor Ordinance, As Amended

In 2013, the City amended section 18-302 of the Old Ordinance to address the concerns raised in Appellants' initial Complaint and to remove a prohibition on standing still for more than ten minutes. App. 001-007. Section 18-302 of the Amended Ordinance prohibits peddlers and itinerant vendors from "permanently stop[ping] or remain[ing] at any one location on public property; or private property (unless allowed for by zoning), for the purpose of soliciting, displaying goods, merchandise or wares, or conducting sales." *Id.* at 003-004. Peddlers and itinerant vendors are also prohibited from "stop[ping] or remain[ing] at any one

location with such regularity and permanency that would lead a reasonable person to believe the location is the vendor's fixed business location." *Id.*

In addition, to address Appellants' issues, the City amended Section 18-304 of the Old Ordinance to remove the blanket prohibition on placing supplies, materials, merchandise, and/or equipment on public or private property. *Id.* at 005-006. Instead, under the Amended Ordinance, peddlers and itinerant vendors are prohibited from placing, storing or displaying their goods, merchandise, or wares on any portion of the public right-of-way, including the swale or sidewalk. *Id.* In addition, the Amended Ordinance permits peddlers and itinerant vendors to store their goods on private property, but they must obtain the prior written approval of the property owner, must make the proof of authorization available upon request by a code or license inspector and must comply with the applicable Code provisions relating to storage. *Id.* Nothing in the Amended Ordinance prohibits itinerant vendors from vending, including setting up displays, on private property, to the same extent the private property owner has such right consistent with the applicable Code provisions and to the extent the private property owner authorizes such use by the vendor. App. 001-007.

The Amended Ordinance begins with the following declaration of its purpose and intent, in part:

> **WHEREAS**, the City has significant government interests in vehicular and pedestrian safety and the free flow of traffic; and
> …
>
> **WHEREAS**, street vending is an inherently dangerous activity that compromises both pedestrian and vehicular safety by causing a motorist to obstruct traffic or disregard traffic signals if engaged in buying goods from a street vendor or by causing a street vendor to remain in the roadway after traffic flow has resumed;
> …
>
> **WHEREAS**, the purpose and intent of this ordinance is to restrict the conduct of street vending on the roadways where the safety of vehicular and pedestrian traffic is paramount;
> …
>
> **WHEREAS**, the purpose and intent of this ordinance is to restrict the conduct of street vending as it concerns the display and storage of their merchandise on the public rights-of-way and public property to preserve safety and order in the use of the public rights-of-way and to equally enforce the provisions of the City's zoning code."

Id. at App. 001-002.

The Amended Ordinance defines "*peddlers and itinerant vendors*" as "all persons going from place to place for the purpose of selling or offering for sale, any goods, merchandise, or wares for immediate delivery of the goods, merchandise, or wares at the time the order is taken, whether or not using a wagon, pushcart or other vehicle." *Id.* at App. 002-003.

Appellant Silvio Membreno is a peddler and/or itinerant vendor within the Amended Ordinance's definition. *See* R-1-76. Appellant Florida Association of Vendors, Inc. represents a group of individuals who are peddlers or itinerant vendors within the Amended Ordinance's definition. *Id*.

Florida Statute § 337.406(1)

Florida Statute § 337.406(1) regulates the use of rights of way on state roads. In pertinent part, it states that:

> 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.
>
> * * *
>
> [l]ocal 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. . . . *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.* (emphasis added).

The City has applied Fla. Stat. § 337.406 on certain roads within the City, regulating street vendors on those roads. This statute unambiguously states that the permitting authority granted by the statute "shall be exercised by the municipality within incorporated municipalities. . ." and that local governments may enforce the statute within their jurisdictions. *Id*.

Course of Proceedings and Disposition

On May 8, 2013, Plaintiffs filed their Amended Complaint based on the Amended Ordinance. R-I-75-97. Appellants alleged that the prohibitions on standing still and on displaying their merchandise contained in sections 18-302 and 18-304 of the Amended Ordinance violate the Due Process Clause of the Florida Constitution by depriving them of their right to earn an honest living. R-I-93-94. Appellants also alleged that the City's enforcement of Fla. Stat. § 337.406 within the municipality exceeded statutory authority and was thus invalid as an *ultra vires* application of the law. R-I-95-96.

On January 13, 2014, the City filed its Motion for Summary Judgment and Memorandum of Law in Support. R-I-157-211. The City filed a Supplemental Memorandum in Support of its Motion for Summary Judgment on May 23, 2014. R-III-927-1209. The City argued that the contested provisions of the Amended Ordinance were constitutionally sound based on the rational basis test. There were legitimate state interests supporting the Amended Ordinance, and the challenged

provisions were rationally related to the legitimate governmental interests. The City also argued that its enforcement of Fla. Stat. § 337.406 was expressly authorized by the plain language of the statute.

On May 23, 2014, Appellants filed their cross Motion for Summary Judgment, seeking to have this Court declare sections 18-302 and 18-304 of the Amended Ordinance unconstitutional and to have the trial court enjoin the City's enforcement of Fla. Stat. § 337.406 as an *ultra vires* act. R-II-217-926.

The trial court held a hearing on the cross motions for summary judgment on June 13, 2014. R-IV-1257-1312. Based on the record and the parties' argument, the court granted summary judgment in favor of the City and denied Appellants' motion for summary judgment. *Id.* On July 23, 2014, the court issued its Order on Cross Motions for Summary Judgment and Final Judgment in Favor of the City of Hialeah. R-V-1498-1501. Based on the reasons stated on the record, the trial court granted the City's Motion for Summary Judgment and denied Appellants' Motion for Summary Judgment. *Id.* The court entered final judgment in favor of the City. *Id.*

On August 7, 2014, Appellants filed a Motion for Rehearing. R-IV-1238-1487. They claimed the City's counsel made "inaccurate statements" during the summary judgment hearing. R-IV-1239. The trial court summarily denied the Motion for Rehearing on October 6, 2014. R-V-1502-1503.

On October 24, 2014, Appellants filed their Notice of Appeal. R-V-1488-1497. They appeal from the July 23, 2014 Order and Final Judgment as well as the October 6, 2014 Order on Plaintiffs' Motion for Rehearing. *Id.* For the reasons explained in this Answer Brief, the trial court's rulings should be affirmed in their entireties.

SUMMARY OF THE ARGUMENT

The trial court correctly granted summary judgment in favor of the City as to the constitutionality of the challenged provisions of the Amended Ordinance. Appellants failed to show that sections 18-302 and 18-304 were not reasonably related to any conceivable legitimate state interest, including the City's legitimate interests in maintaining pedestrian and vehicular safety on its public roads and thoroughfares, maintaining safety on public rights-of way and equally enforcing its zoning provisions. Under the rational basis test, the lowest level of constitutional scrutiny, Appellants bear the heavy burden of demonstrating that these sections bear no reasonable relationship to the City's legitimate interests. This rational basis test is equally applicable to claims under both the United States Constitution and the Florida Constitution. Despite Appellants' theory, there is no distinction between the application of the standard, whether analyzed under state or federal law.

Sections 18-302 and 18-304 of the Amended Ordinance simply place reasonable regulations on vendors' activities in order to meet the legitimate state objectives and do not prohibit Appellants from working as itinerant vendors. The restrictions are not arbitrary, oppressive or discriminatory and are rationally related to the state interests. As such, Appellants failed to satisfy their heavy burden. This Court should therefore affirm the trial court's orders.

The trial court also correctly entered summary judgment in favor of the City on Appellants' claim that the City improperly enforced Fla. Stat. § 337.406 by regulating vending on some state roads within the City. Citing only one sentence of Fla. Stat. § 337.406 in isolation and ignoring the rest of the statute, Appellants argued that the statute precludes a municipality from enforcing the statute. Contrary to the meaning ascribed to it by Appellants, Fla. Stat. § 337.406 is clear that the City may prevent certain prohibited uses of a state transportation facility within its incorporated municipality. When read in its entirety, Fla. Stat. § 337.406 demonstrates that it is applicable within a municipality. Thus, the trial court was correct in granting summary judgment in favor of the City and denying Appellants' motion for summary judgment and motion for rehearing.

STANDARD OF REVIEW

Constitutional challenges to statutes or ordinances involve pure questions of law reviewable on appeal de novo. *Caribbean Conservation Corp. v. Fla. Fish &*

Wildlife Conservation Comm'n, 838 So. 2d 492, 500 (Fla. 2003); *see also Kuvin v. City of Coral Gables*, 62 So. 3d 625, 629 (Fla. 3d DCA 2010).

The standard of review of an order granting summary judgment is de novo. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *City of Miami v. Haigley*, 140 So. 3d 1025 (Fla. 3d DCA 2014).

ARGUMENT

I. THE COURT CORRECTLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE CITY ON APPELLANTS' DUE PROCESS CHALLENGES

A. The Amended Ordinance is Constitutional

1. Presumption of Constitutionality

As a threshold matter, Florida law is clear that properly enacted acts of legislation, including ordinances, "come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." *City of Fort Lauderdale v. Gonzalez*, 134 So. 3d 1119 (Fla. 4th DCA 2014); *Miami v. Haigley*, 143 So. 3d 1025, 1033 (Fla. Dist. Ct. App. 2014). "Under Florida law, '[a] regularly enacted ordinance will be presumed to be valid until the contrary is shown, and a party who seeks to overthrow such an ordinance has the burden of establishing its invalidity.'" *Miami-Dade Cnty. ex rel. Walthour v. Malibu Lodging Invs., LLC*, 64 So. 3d 716, 719 (Fla. 3d DCA

2011) (quoting *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1203 (Fla. 4th DCA 2000)). As the trial court found, Appellants failed to meet their heavy burden.

2. There are no Fundamental Rights at Issue

There is no fundamental right at issue in Appellants' substantive due process claims. Nor have Appellants argued otherwise in their Initial Brief. Appellants' two asserted constitutional rights, the right to pursue a lawful occupation and the right to bargain for goods and services rendered, are not fundamental rights. *See Lane v. Chiles*, 698 So. 2d 260, 264 (Fla. 1997) (approving trial court's finding that the legislation restricting marine net fishing did not violate a protected liberty interest where it "does not completely prevent the plaintiffs from engaging in their chosen occupation" but rather "restricts certain methods" of engaging in their chosen occupation); *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000) (applying the rational basis test where appellee argued that statute violated a citizen's right to bargain or negotiate for insurance rates).

3. Appellants Did Not Satisfy Their Burden Under the Rational Basis Test

Where, as here, there is a substantive due process claim with no fundamental right at issue, the highly deferential rational basis test applies. *See, e.g. Lane*, 698 So. 2d at 263. Indeed, Appellants agree that the rational basis test is the appropriate standard in this case. Initial Brief at 21. However, they urge this Court to depart from the long settled "highly discretionary" rational basis test in

favor of a stricter rational basis test that scrutinizes the record and involves serious judicial inquiry. They are essentially seeking to impose the strict scrutiny standard while calling it the "Florida rational basis standard."

Appellants argue that there are actually two rational basis standards – one used for review under the Florida Constitution and a different one utilized for review under the United States Constitution. That simply is not the law. Appellants' application of a heightened rational basis test is flawed, improperly shifts the burden to the City and contravenes binding precedent.

Appellants' argument that are two different rational basis tests hinges on the non-binding plurality decision in *McCall v. U.S.*, 134 So. 3d 894 (Fla. 3d DCA 2014). There was no majority decision in *McCall*, and the plurality decision, upon which Appellants' theory is premised, relied on cases where fundamental rights were involved.

In reviewing the constitutionality of a Florida statute, the plurality in *McCall* conducted its own independent evaluation and reweighed the facts and the legislature's policy findings. Despite years of Florida law to the contrary, the plurality stated that courts using the rational basis standard are not required to accept the findings of the legislature at face value, and courts must conduct their own inquiry. *Id.* at 906. Strongly disagreeing with the manner in which the plurality applied the rational basis standard, Justice Pariente, concurring in result,

explained that established Florida precedent "does not allow this Court to engage in the type of expansive review of the Legislature's factual policy findings that the plurality engages in when undertaking a constitutional rational basis analysis. . . . [T]his Court has never engaged in the type of expansive, independent review when conducting a rational basis inquiry that the plurality undertakes in this case." *Id*. at 921-922.

In applying a heightened version of the rational basis test, the plurality relied on *North Florida Women's Health and Counseling Services, Inc. v. State*, 866 So. 2d 612, 627 (Fla. 2003). *North Shore*, however, involved the fundamental right to privacy – to which the strict scrutiny standard, not the rational basis test, applied. The plurality also cited to *Warren v. State Farm Mutual Automobile Ins. Co.*, 899 So. 2d 1090, 1095 (Fla. 2005) to justify the use of a scrutinizing rational basis test. *Warren* does not support such an application of the rational basis standard. Indeed, *Warren* recognized that the appropriate application of the test provides deference to the legislature's action. *Id.* at 1096.

Even assuming the plurality decision was consistent with longstanding law on the deferential rational basis application, which it is not, such decision is not binding and should not be adopted by this Court. There is no majority opinion in *McCall*, where one judge authored an affirmance, another judge concurred in result only, and a third judge filed a dissenting opinion. *See, e.g. Schaap v. Publix*

Supermarkets, Inc., 579 So. 2d 831 (Fla. 1st DCA 1991) (plurality opinion not binding precedent). Thus, *McCall* does not stand as precedent for the individual views expressed in the three separate opinions. *See, e.g.*, *Nehme v. Smithkline Beecham Clinical Laboratories, Inc.*, 822 So. 2d 519 (Fla. 5th DCA 2002).

Under both the Florida Constitution and the U.S. Constitution, Florida law is clear that where no fundamental right is at issue, legislation is valid if it "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*, 770 So. 2d 1210; *Haigley*, 143 So. 3d at 1034. Even since the *McCall* decision, the Third District has reaffirmed the highly deferential two prong rational basis test:

> When determining whether the legislation survives the **highly deferential rational basis test**, the first step is to 'identify[] a legitimate government purpose which the governing body **could have** been pursuing.' *WCI Cmtys., Inc. v. City of Coral Springs*, 885 So. 2d 912, 914 (Fla. 4th DCA 2004). 'The second step of the rational basis test asks whether a rational basis exists for the enacting government body to believe that **the legislation would further the hypothesized purpose**.'

Haigley, 143 So. 2d at 1034 (emphasis added). In reviewing the constitutionality of a municipal ordinance under Florida law, this Court did not use a probing, heightened rational basis test. *Id.* As in *Haigley* and the numerous cases preceding

it, this Court should apply the highly deferential rational basis test to the Amended Ordinance, as did the trial court.

Appellants also relied on *Eskind v. City of Vero Beach*, 159 So. 2d (Fla. 1963). *Eskind* is distinguishable from the instant case. The Court in *Eskind* did not conduct the type of intensive inquiry that Appellants seek to have this Court undertake here. Rather, the Court, based on "obvious" logic, determined that aesthetics was not a basis for the ordinance restricting motels and hotels from advertising rates on outdoor signs while allowing other types of businesses to post such signs. The Court also addressed the unsupported, discriminatory nature of the ordinance which allowed only certain types of businesses to advertise rates and allowed hotels to advertise amenities (ie., pools, air conditioning etc.) but not rates. That is not the case here. If, for instance, the Amended Ordinance applied only to vendors selling flowers but not to vendors selling water, *Eskind* might apply. But the Amended Ordinance does not contain any sort of discriminatory provisions.

The *Eskind* Court concluded that the only conceivable reason for the legislation was economic protectionism, which is not the case here. There are, as discussed *infra*, multiple conceivable legitimate objectives supporting the Amended Ordinance – even if Appellants disbelieve the Amended Ordinance actually furthers these objectives. None of these interests has to do with economic protectionism.

Appellants' reliance on *Larson v. Lesser,* 106 So. 2d 188 (Fla. 1958), is also misplaced. In *Larson,* the Court could not conceive of any legitimate basis for the legislation preventing public adjusters, as opposed to all other adjusters, from directly or indirectly soliciting business. The Court could not find any reasonable basis for the restriction in public health, welfare or safety. In the absence of even a hypothetical basis to support the ordinance, the Court found there was no rational relationship between the prohibition and any legitimate interest. In contrast, as discussed *infra*, there are multiple legitimate bases for the provisions regulating itinerant vendors in this case.

4. Legitimate Government Interests

Appellants argued that the City did not present a legitimate basis for the Amended Ordinance. Even if that were accurate, which it is not, the law does not require the City to articulate a basis to support its Amended Ordinance. Courts have consistently held that under the rational basis test, the legislature need not actually articulate the purpose or rationale for its ordinances. *Gonzalez*, 134 So. 2d at 1122. Under this first prong of the rational basis test, the Court need determine only whether *any conceivable* rational basis exists, not whether the basis is actually considered by the legislative body. *WCI Communities, Inc. v. City of Coral Springs*, 885 So. 2d 912 (Fla. 4th DCA 2004). The question is whether there is *any* legitimate purpose the government *could have been* pursuing. *Id.* The burden is

squarely on the party challenging the legislation to "negate every conceivable basis which might support it." *Id.*; *Haire v. Florida Dep't of Agri. and Consumer Servs.*, 870 So. 2d 774 (Fla. 2004); *Eastern Airlines, Inc. v. Dep't of Revenue*, 455 So. 2d 311 (Fla. 1984).

Although not required in order to pass constitutional muster under the rational basis test, the City's purposes in enacting these sections are stated in the various WHEREAS introductory clauses to the Amended Ordinance. App. 001-002. Moreover, Florida courts have repeatedly found that each of these purposes constitute legitimate interests.

The legitimate stated purposes of these sections, as evidenced by the introductory clauses to the Amended Ordinance, include: vehicular and pedestrian safety, the free flow of traffic, the preservation of safety and order in the use of the public rights-of-way and equal enforcement of the provisions of the City's zoning code. *Id.*

Under Florida law, the power of a municipality to safeguard the character of its streets, sidewalks, and all other common grounds has long been held to be a legitimate state interest. *See Flores v. City of Miami*, 681 So. 2d 803, 805 (Fla. 3d DCA 1996) (citing *State ex rel. Nicholas v. Headley*, 48 So. 2d 80, 81 (Fla. 1950), for proposition that, "a municipality has the power to safeguard and maintain the character of its streets, sidewalks, and all other common grounds for the benefit of

the general public through regulation."); *see also State v. Baal*, 680 So. 2d 608, 610 n. 2 (Fla. 2d DCA 1996) (citing *Headley* for proposition that, "right of a citizen to use public streets not unconditional and absolute but may be controlled and regulated in the interest of the public good[.]")

Furthermore, the City has "strong interests in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida citizens." *Johnson v. Women's Health Ctr., Inc.*, 714 So. 2d 580, 581 (Fla. 5th DCA 1998) (citing *Operation Rescue v. Women's Health Ctr., Inc.*, 626 So. 2d 664, 672 (Fla. 1993)).

In addition to the well-settled law establishing that these purposes constitute legitimate state interests, Appellant Membreno himself admitted that the City has an interest in keeping its pedestrians safe and making sure that traffic on the roadways flows freely. R-III-999, 1001, 1032. He also conceded that boxes, stands and chairs on the sidewalks could pose safety problems for pedestrians. *Id.* All of these issues are directly addressed by the Amended Ordinance. Similarly, Police Chief Sergio Velazquez testified that the Amended Ordinance serves to protect public safety and enable safe traffic flow. R-II-506, 511-515, 527-531.

In addition to the foregoing legitimate interests, the Amended Ordinance also supports equal enforcement of the City's Zoning Code by preventing peddlers from having greater rights on private property than the private property owner has

as per the zoning regulations. Appellants accused the City's counsel of raising this argument for the first time at the summary judgment hearing. That is not the case (and even if it were, it is of no moment given that the City did not need to articulate the legitimate interests, as discussed *supra*). This legitimate state interest is set forth in the introductory language and the WHEREAS clause of the Amended Ordinance. Indeed, the Amended Ordinance specifically states that itinerant vendors and private property owners "should enjoy co-terminous rights on private property" and that the display restriction (§ 18-304) is intended to govern vending on *public* rights-of-way and *public* property. *See* App. 001-002. In addition, during his two depositions, Chief Velazquez generally testified regarding outdoor displays on private property and the zoning implications. R-II-607-609.

In that regard, if a private property owner is located within a designated zoning district and has the appropriate permits to set up outdoor displays, the private property owner can authorize a peddler to do the same, with written permission. But this would fall outside the ambit of the itinerant vendor regulations and within the zoning code. The Amended Ordinance does not prohibit this. To the extent a private property owner cannot set up a display outdoors on its property, neither can a peddler. That would run afoul of equal enforcement of the zoning code. A private property owner cannot, for instance, authorize a peddler to set up a display in the parking space, even if the parking lot is on private property.

There are parking ordinances that prohibit that. Indeed, Chief Velazquez testified that where a private property owner -- a flower shop -- set up an outdoor display without zoning approval, the display was shut down. R-II-608-609.

Contrary to Appellants' argument and its accusations that the City's counsel made misrepresentations regarding vending on private property, the Amended Ordinance does 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. Indeed, the Amended Ordinance expressly states that the private property owners and street vendors have "co-terminous right on private property." In part, the Amended Ordinance provides:

> **WHEREAS**, street vendors in the conduct of their lawful business activity should enjoy co-terminous rights on private property as would the owners themselves to display or store merchandise.

Despite this clear language in the Amended Ordinance and the well-established law as to the rational basis standard, Appellants try to complicate the straightforward issues by introducing affidavits and documents that are not probative of the facial challenges to the Amended Ordinance. For instance, their reliance on the affidavit of street vendor Norma Sequeira is without merit for multiple reasons and should be rejected by this Court. First, the affidavit was dated and filed two months ***after*** the summary judgment hearing. R-IV-1418-1419. Second, the affidavit contains inadmissible hearsay. Third, the substance of

the affidavit does not bear on whether the Amended Ordinance is facially constitutional, and no as applied challenge is at issue in this case. Equally unavailing is Appellants' reliance on an unauthenticated e-mail, dated February 10, 2011 (pre-Amended Ordinance), without any context and without ever having deposed the author of the e-mail. Certainly, the author of the e-mail could have clarified what he meant by the statements made, had he been asked. The e-mail, which Appellants did not raise until *after* the summary judgment hearing, does not help Appellants satisfy their heavy burden.

Based on the record and the arguments presented, the trial court correctly found that there were legitimate state interests supporting the Amended Ordinance. In satisfaction of Florida's rational basis test, there are multiple hypothetical and conceivable legitimate state interests to support the Amended Ordinance. Moreover, far exceeding the requirements of the rational basis standard, the record shows that the Amended Ordinance is grounded in several concrete, significant state interests actually considered by the City in enacting the Amended Ordinance. Appellants did not, and could not, negate every conceivable legitimate basis for the Amended Ordinance, and thus they failed to overcome the presumptive validity of the Ordinance.

5. The Challenged Sections Are Reasonably Related to the Legitimate State Interests

Under the second prong of the rational basis test, courts ask "whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose." *Id.* Contrary to Appellants' argument, it is not the court's "task to determine whether the legislation achieves its intended goal in the best manner possible, but only whether the goal is legitimate and the means to achieve it are rationally related to the goal." *Samples v. Fla. Birth-Related Neurological Injury Comp. Ass'n*, 114 So. 3d 912, 917 (Fla. 2013) (quoting *Loxahatchee River Envtl. Control Dist. v. Sch. Bd. of Palm Beach Cnty.*, 496 So. 2d 930, 938 (Fla. 4th DCA 1986).

The standard is highly deferential and recognizes that governments deal with practical problems that may justify, if they do not require, solutions even where the means employed may be illogical and unscientific. *Gonzalez*, 134 So. 2d at 1121-22. The legislation may not be perfect, but perfection is not the standard. The rational basis test requires only that the means chosen to fulfill the legislation's objectives are constitutional. *Dep't of Corrections v. Florida Nurses Assoc.*, 508 So. 2d 317 (Fla. 1987). "The Legislature has a great deal of discretion in determining what measures are necessary for the public's protection, and this Court will not, and may not, substitute its judgment for that of the Legislature insofar as the wisdom or policy of the act is concerned."); *Sasso v. Ram Property*

Management, 431 So. 2d 204 (Fla. 1st DCA 1983) (As long as the legislation "rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld."). In *D.P. v. State*, 705 So. 2d 593 (Fla. 3d DCA 1998), the Third District affirmed the trial court's finding of constitutionality where the trial court reasoned that:

> The rational basis test does not turn on whether this Court agrees or disagrees with the legislation at issue, and this Court will not attempt to impose on a duly-elected legislative body his reservations about the wisdom of the subject ordinance. Instead, the rational basis test focuses narrowly on *whether a legislative body* ***could rationally believe*** *that the legislation* ***could achieve*** *a legitimate government end*. (emphasis added).

Nor must the Amended Ordinance be supported by unequivocal evidence in the record. *See Heller v. Doe,* 509 U.S. 312, 320 (1993) (A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.' ") (quoting *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315 (1993)). If the court can conceive of a possible factual predicate that provides a rational basis in furtherance of a legitimate state interest, the legislation does not violate the Florida Constitution. *Id*.

As the trial court found, sections 18-302 and 18-304 are constitutional because these sections bear a rational, reasonable relationship to the City's legitimate interests. Sections 18-302 and 18-304 bear a reasonable relationship to these legitimate interests by prohibiting street vendors from remaining stationary on the public rights-of-way for extended periods of time and by prohibiting street vendors from impeding the free flow of traffic with their merchandise. It is more than conceivable that these measures help ensure that the general public has unobstructed use of the sidewalks and swales. It is equally reasonable that these provisions help protect against distractions on the roadways and the avoidance of injuries, even catastrophic, to drivers, pedestrians and the vendors themselves.

Although Appellants may disagree with some aspects of the Amended Ordinance and may find certain provisions cumbersome, that is not a basis for striking down legislation as unconstitutional. Moreover, even if one member of Appellant FAV may believe that she is safer when she vends in a fixed location, that does not negate the rational relationship of these provisions to the state interests. Appellants simply failed to rebut the presumptive constitutionality of the Amended Ordinance. Accordingly, this Court should affirm the trial court's orders and find that sections 18-302 and 18-304 of the Amended Ordinance do not violate the due process clause of the Florida Constitution.

II. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT IN FAVOR OF THE CITY ON APPELLANTS' DECLARATORY RELIEF CLAIM UNDER § 337.406(1)

In Count II, Appellants sought a declaration that the City's application of Fla. Stat. § 337.406 is *ultra vires*, claiming that the City inappropriately enforced this statute within municipal limits. The trial court correctly determined that the City was entitled to summary judgment on Appellants' second cause of action because the language of Fla. Stat. § 337.406(1), when read as a whole, makes clear that it is applicable within a municipality.

"[A] 'statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.'" *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008) (quoting *Jones v. ETS of New Orleans, Inc.*, 793 So. 2d 912, 914-15 (Fla. 2001)). "'Related statutory provisions must be read together to achieve a consistent whole, and … where possible, courts must give full effect to all statutory provisions and construe related statutory provisions in harmony with one another.'" *Id.* (quoting *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007)).

In making their argument, Appellants cite to only one sentence of the statute: "Except when leased as provided in § 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." They completely ignore the balance of the statute. Despite Appellants' selective quoting from the statute, the complete language of Fla. Stat. § 337.406(1) unambiguously states that 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. The statute also plainly states that the local government, within its jurisdiction, may enforce the statute. In pertinent part, the statute states that:

> [l]ocal 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. . . . 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.

Thus, the statute authorizes the City to grant permits for uses of a state transportation facility inside the municipality that would be absolutely prohibited otherwise and allows the City to enforce the statute within its jurisdiction. Despite Appellants' contentions, the City is simply exercising its statutorily-delegated

authority under Fla. Stat. § 337.406 to "issue permits for limited duration for the temporary use of the right-of-way of a state transportation facility for any of these prohibited uses," where the City has "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." Absent such a permit, vending in these areas is prohibited both within and outside a municipality. The City has also chosen to enforce this prohibition pursuant to the statute.

Accordingly, the circuit court correctly ruled that Appellants' *ultra vires* claim failed as a matter of law and that the City was entitled to summary judgment. This Court should affirm the circuit court's ruling.

CONCLUSION

WHEREFORE Appellee City of Hialeah respectfully requests that this Court affirm the trial court's July 23, 2014 order on summary judgment as well as the trial court's October 24, 2014 order denying Appellants' motion for rehearing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically this **17th** day of August, 2015 upon: **Robert A. Peccola, Esq.**, Institute for Justice, 901 North Glebe Rd., Ste. 900, Arlington, VA 22203, rpeccola@ij.org.

/s/ Jennifer Glasser

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Jennifer Glasser