No. 24-6499

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORMA THORNTON,

Plaintiff-Appellant,

v.

CITY OF BULLHEAD CITY, ARIZONA

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 3:22-cv-8195
Hon. Susan M. Brnovich

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The City's brief fails to contend with Norma's main points about the City's restrictions on charitable food sharing. It disregards history, whether that's the history of charity that stretches back more than a millennium, or even its own history of adopting the Ordinance, where the City sought to reduce its visible homelessness not by regulating large gatherings or capping the amount of time anyone can spend in a park, but by outlawing kindness. Instead, the City repeats the errors of the district court and demonstrates the feebleness of its defense of the Ordinance.

This brief proceeds in three parts. First, it addresses the City's misconceptions of both Norma's challenge and the laws regulating food in Bullhead City. Second, it turns to Norma's due-process challenge, where it walks the Court through her careful articulation of her right to perform charity, the history and tradition supporting that right, and how the Ordinance violates that right. Third, it addresses her equal-protection claim and how the City's efforts to evade the very distinction made by the Ordinance cannot carry the day.

Ultimately, this Court should reverse the district court's decision.

ARGUMENT

I. The City Misconstrues Norma's Challenge and the Laws at Issue.

Norma's opening brief explained that the challenged Ordinance, which restricts Norma solely because of her charitable motivation, violates her fundamental right to engage in charity and her right to equal protection of the law. In response, the City resorts to a stream of mischaracterizations about her challenge and the relevant laws. Norma first corrects the City's assertions before moving to her constitutional claims.

A. Norma is challenging a law that punishes her specifically because of her charitable motivation.

The City casts Norma's challenge as seeking "an unfettered right to serve charitable food . . . without regulation." Resp. Br. 32. It argues that she is trying to make "the public parks her proprietary domain," *id.* at 53, and that she seeks to be "above the law," *id.* at 46. None of this is true. Norma does not challenge ordinary regulations that apply to everyone, such as the hours the parks are open or the ban on littering. *See* Opening Br. 40. But the Ordinance does not apply to everyone; it singles out for regulation those who share food for "charitable purposes." BCO § 5.36.020. If Norma shares the same food for, say, a social purpose, she is not regulated. Norma doesn't want to be treated in a special way; she simply wants to be able

to use the parks as others do without being singled out for punishment for her charitable motivation.

The City also suggests that Norma is not harmed by the law because she continues to serve people a few blocks from where she used to. *See* Resp. Br. 29–31, 35–36. Her current location is a far cry from the area she used in the Park. The alley is less visible than the Park, resulting in her reaching fewer people. 2-ER-186; *see also* 2-ER-197. Even though it is nearby, the distance presents a challenge for some, including those who have difficulty walking or use walkers or wheelchairs to get around. 2-SER-365–66. The alley is less hygienic than the Park, as it has no bathroom with handwashing facilities. 2-ER-185; *see also* 2-ER-196, 235. It is also much more unpleasant than the Park, as it has no shade to protect from the elements, no tables or seating areas, and no grass, leaving people to sit on the dirt or stand in the road. 2-ER-185; *see also* 2-ER-196–97, 234, 298, 303. It's dehumanizing to be forced to share food in a dusty alley, 2-ER-234–35, while others can continue to share food at the Park's facilities because the City deems their motivations acceptable.

B. The Ordinance places unique burdens on charitable food sharing.

The City's brief gets the applicable laws all wrong. Here, Norma addresses exactly what is at issue: the significant burdens the Ordinance places on charitable

food sharing, the other laws that touch upon sharing or distributing food in the City, and that the state is no barrier to Norma's food sharing.

1. The burdens on charitable food sharing are crippling.

Norma has explained that, in addition to other requirements, the City's Ordinance severely (and uniquely) restricts the frequency of charitable food sharing in its parks. Opening Br. 9. Even with a permit, the Ordinance limits Norma to sharing her food once per month, regardless of location. BCO § 5.36.050(D). Moreover, it limits each location to one event per month, regardless of host. *Id.*

The City—like the district court—entirely ignores these frequency restrictions, the Ordinance's strictest provisions. With a permit, Norma could charitably share her food anywhere in a park an absolute maximum of twelve times per year. She would not be allowed to share food in a location where someone else has done so within the last month, and her own charitable food sharing would preclude anyone else from doing so in the same location for another month. To be sure, the Ordinance's other restrictions are burdens on charity, as well; an applicant must pay $280, obtain $1,000,000 in insurance, provide a site plan, and submit her application between five and 60 days before the event. BCO § 5.36.040; *see also* 2-ER-177–78, 250, 146, 279–81. But the frequency limitations in particular transform the Ordinance from what might be considered a "regulation" to what is, effectively, a ban,

particularly when applied to someone who shares food several times per week, *see* 2-ER-197. That the Ordinance effectively acts as a ban has borne out in practice: The City has not received a single permit application since the Ordinance went into effect. 2-ER-182; *see also* 2-ER-282.

2. The City allows people with different motivations to share food under a less burdensome permitting system or no permitting system at all.

The City asserts that all food sharing, whether charitable or not, is "strictly regulated and require[s] permits." Resp. Br. 19; *see also id.* 45, 54–56. It specifically references its special event permits and food trucks. *Id.* at 19. However, the City never addresses the details. And for good reason, as the other requirements are far less burdensome than that for charitable food sharing.

Three kinds of park food distribution require preauthorization from the City: (1) charitable food sharing, (2) foods associated with a "special event," and (3) foods sold by a "mobile food vendor." *See* BCO §§ 5.06.020, 5.36.030, 17.06.315.

Charitable food sharing is, of course, when someone like Norma wishes to give food away "for charitable purposes." BCO § 5.36.020. This was perfectly legal in Bullhead City before the Ordinance passed in 2021, with no permitting requirement at all. *See* Opening Br. 6–10.

The City requires a permit for special events. A "special event" is defined as a temporary activity "intended for purposes of entertainment, education, cultural, patriotic, religious, ethnic, or political expression." BCO § 5.06.010. A special event may include people "buying food." *Ibid.* While a charitable "food sharing event" limits the sharer to an absolute maximum of twelve days annually (even with a permit), the special event permit allows people to host a qualifying event in the Park for sixty days annually (that is, five days every thirty, as opposed to one day). *Id.* § 5.06.015. Moreover, hosting a special event in the Park does not preclude anyone else from doing so at that location. Nor would one be denied a special event permit merely because someone else has hosted a special event at that location within the last thirty days.

A "mobile food vendor" is a mobile "food establishment that is licensed by this state," *i.e.*, a commercial food operation. Ariz. Rev. Stat. § 9-485; BCO §§ 17.04.514, 17.06.315. They can operate in the Park with a licensing agreement from the City, BCO § 17.06.315(A)(3), and the law nowhere limits the frequency of their operations.

A host of events do not require a permit at all. Some events are held for a purpose other than "entertainment, education, cultural, patriotic, religious, ethnic, or political expression," and thus do not fall under the definition of special event. BCO

§ 5.06.010. Other events are expressly exempted from the definition, including political rallies, Little League tournaments, and family reunions. *Ibid*. People at these events can distribute food in the parks without any permit.

So, if Norma wanted to share food to celebrate her ethnic heritage or her appreciation for the troops, she would need a special-event permit, but she could do so frequently. If she sought to sell from a food truck, she would need to sign a licensing agreement with the City, but she could do so frequently. If she wanted to share brownies to test out a new recipe, celebrate the first day of spring, or as part of an event advocating against the City's homelessness policies, she could do so without any permit whatsoever. But as soon as she shares those same brownies with people who are needy, she becomes subject to the Ordinance's uniquely harsh restrictions.

3. Nor is Norma's food sharing regulated by the state.

The City insinuates that Norma's food is somehow worse because it lacks the state's sign-off. *See* Resp. Br. 29. But the state's regulations[1] regarding food safety further undermine the City's claims. Under Arizona law, food "[s]erved at a

[1] Arizona's Director of the Department of Health Services has "general supervision over all matters relating to sanitation and health throughout this state." Ariz. Rev. Stat. § 36-136(A)(6). This includes food safety. Ariz. Rev. Stat. § 36-136(I)(4). To the extent a county attempts to regulate food safety, it can only do so to the degree—and under express delegation from—the Director. Ariz. Rev. Stat. § 36-136(E).

noncommercial social event such as a potluck" is exempt from regulation. Ariz. Rev. Stat. § 36-136(I)(4)(a). Also exempt is food that is "[n]ot potentially hazardous and prepared in a kitchen of a private home for sale or distribution for noncommercial purposes." Ariz. Rev. Stat. § 36-136(I)(4)(c). This includes foods that do not require time/temperature control, Ariz. Admin. Code R9-8-1-201.10(B)(61)—such as cookies or cakes—that are nevertheless prohibited by the City when shared for charitable purposes. If Norma gives away food to the homeless, she is free to do so under Arizona law—just as she would be if she were selling that food in a church bake sale or Little League game. The only difference is that only one of those instances (giving it away for charitable reasons) is illegal under City ordinance, even though they are regulated identically under state law.

And Arizona allows the sharing of homemade food—even "potentially hazardous" foods, even for commercial sale—if the food maker has a food handler card and is registered. Ariz. Rev. Stat. §§ 36-136(I)(4)(g), 36-931–933. In short, the state of Arizona has deemed as safe and legal exactly what Norma is doing.

C. The Ordinance reflects the City's desire that no one charitably share food in its parks.

Norma has explained that the City's uniquely restrictive burdens on "food sharing events" reflects City officials' desire that no one charitably share food in its

parks. Opening Br. 32–33. This is not about *regulating* charitable food sharing in the Park; it is about *banning* it. *See, e.g.*, 2-ER-99 (Bullhead City Regular City Council Meeting, Apr. 5, 2022, 34:08–38:35) (City Manager saying that the City's policy "is to not allow people to sleep on public lands . . . and same thing with feeding in the parks."). Hence, the City has explicitly targeted food sharing "for charitable purposes"—as opposed to regulating the time, place, and manner of food sharing generally.

The City confirms this point. In defending its actions, the City reveals that the Ordinance is all about redirecting charitable food sharing away from public land and toward newly opened shelters (which, as the City acknowledges, are unable to provide sufficient food services for Bullhead City's needy, 2-ER-170–72; *see also* 2-ER-247, 282–83). The City acknowledges that the intent behind its food-sharing-event permit is that "people could be fed in a singular location," *i.e.*, somewhere other than public parks. Resp. Br. 10. Moreover, the City explains that its Ordinance is not about regulating food sharing generally, but about specifically placing a dividing line between "events held at public parks and assistance to the homeless." *Id.* at 53. It is no coincidence that the police report from Norma's arrest, rather than faulting her merely for not having a permit, explains that Norma is not allowed "to feed the homeless" on City property, period. 2-ER-164–65.

In conclusion, the City is incorrect to portray its Ordinance as an evenhanded regulation: The City has uniquely disfavored "food sharing events" (*i.e.*, the sharing of food specifically "for charitable purposes") within its public parks. Having established how the regulatory framework applies, Norma below explains that the City may not place special burdens on charitably minded people.

II. The City Fails to Defeat Norma's Due Process Challenge.

Norma's opening brief shows that her right to perform charity is a fundamental right, as it is deeply rooted in our Nation's history and tradition, and implicit in ordered liberty, and, even if not fundamental, the Ordinance is unconstitutionally arbitrary. Opening Br. 18–43. In response, the City makes four arguments: Norma has not carefully articulated her asserted fundamental interest; even if she did, it is not a fundamental right; the Ordinance is not conscience shocking and thus is constitutional; and her substantive-due-process claim automatically fails because she also raises an equal-protection claim. Resp. Br. 36–44, 49–54. The City is incorrect on all counts.

A. Norma has carefully articulated her asserted fundamental right.

Norma has explained that the right she asserts is quite narrow: a right not to be burdened based on her charitable motivation. Opening Br. 39–41. Accordingly, Norma does not claim that she is immune to ordinary, generally applicable rules—

such as prohibitions on littering or using the Park when it is closed to the public. *Id.* at 40. Therefore, the district court's analysis regarding a so-called "right to give charity *without regulation* on public property" was beside the point. 1-ER-14 (emphasis in original).

Although the City spends most of its brief incorrectly supposing that Norma asserts a right to be free from any and all regulation, it does at one point acknowledge Norma's actual argument. Resp. Br. 53–54 ("Thornton states . . . that she has a right to give charity without being specifically burdened for having a charitable intention."). And here is the City's entire response: "Candidly, this is double-talk and exposes Thornton's position that she has an 'unfettered' right to serve prepared food in public parks without regulation." *Id.* at 54. The City makes no attempt to explain what "double-talk" means in this context, nor does it explain how Norma's articulation of a narrow right "exposes" that she actually asserts a much broader right.

In any event, this Circuit has recently explained how courts are to "consider whether the asserted right itself, or one in which it is encompassed" meets the test for fundamental rights. *Regino v. Stanley*, 133 F.4th 951, 965 (9th Cir. 2025). Courts "must consult both the scope of the challenged regulation and the nature of [the claimant's] allegations." *Id.* at 964 (cleaned up). Thus, "carefully formulating" the right asserted in this case requires evaluating (1) how the Ordinance restricts

charitable food sharing and (2) comparing that with Norma's "articulation of the particular fundamental right she asserts." *Ibid.* And it is important that courts "closely examine the details of the challenged" ordinance, *id.* at 965, rather than rush through.

The Ordinance's text makes this a simple exercise, as it explicitly burdens people based on their charitable motivation. On its face, it imposes heavy permit restrictions on anyone sharing food in a public park "for charitable purposes." BCO § 5.36.020. If Norma shared food "for purposes of entertainment, education, cultural, patriotic, religious, ethnic, or political expression," then she would face less burdensome permit restrictions. *Id.* § 5.06.010 (definition of "special event"). *See also supra* Argument pt. I(B)(2). If Norma shared food for yet another purpose—perhaps because she wished to solicit feedback on a new recipe from fellow parkgoers or as part of a larger event advocating against the City's homelessness policies—then she would face no permit restriction at all, even if she shared food with one hundred people or more. *Ibid.* For years, Norma too faced no permit restriction, until the Ordinance outlawed sharing food in a park "for charitable purposes" more than an absolute maximum of twelve times a year (even with a permit). Indeed, the whole reason that the City needed to adopt the Ordinance was that, in its absence, Norma was breaking no law. She was allowed to feed people in public parks for noncommercial

purposes until the City adopted a new law that forbade her from doing so—when she did it out of kindness.

Norma has therefore alleged a violation of her right not to be burdened (or punished) for her charitable intent, a right that necessarily "is encompassed" in her right to perform charity. *Regino*, 133 F.4th at 965. Of course, Norma's right of charity, like many fundamental rights, "is not absolute." *Id.* at 961. But if a right of charity exists at all, it must at the very least include the right not to be punished, or face special permit restrictions, specifically for performing an act "for charitable purposes." And, as discussed in the following section, it is beyond debate that Norma has a fundamental right to perform charity.

B. Norma has established that she has a fundamental right to perform charity.

In her opening brief, Norma explained that her right to perform charity is fundamental. The standard for "fundamental" rights asks whether the right is deeply rooted in history and tradition (particularly that surrounding the Founding and Reconstruction periods), or whether it is implicit in the concept of ordered liberty. Opening Br. 18–20. Hence, Norma outlined a deep and consistent tradition in Anglo-American history (and across the world) of encouraging charitable acts, and of protecting rights of charity from abridgment—that is, until very recently with laws like

the Ordinance. *Id.* at 20–29. Since she filed her opening brief, an article has been published that meticulously addresses this history, tracing the right to engage in charity back to ancient Greece and Rome, charting its prevalence in Judaism and Christianity, and addressing its treatment in the common law and through to American law. Adam J. MacLeod & Mark David Hall, *Foundations of the Right of Charitable Uses*, 94 Miss. L.J. 251 (2025). As the authors note, "the right has always been understood as natural, pre-political, and nearly absolute." *Id.* at 259. Moreover, Norma explained that the right to assist those one encounters in need—or, as the district court put it, "the right to serve one's community," 1-ER-14—is necessarily implied in our system of "ordered liberty." Opening Br. 28.

The City does not argue that the right to perform charity fails to meet the foregoing test. Instead, the City asserts that such a right is not "intimate and personal," and that its Ordinance (or enforcement thereof) is not "conscience shocking." Resp. Br. 42, 54. The City does not explain why Norma's deeply held desire to assist people in need is not "intimate and personal," nor does the City explain why it is not "conscience shocking" to place extra restrictions on Norma—indeed, to arrest and criminally prosecute her—specifically for performing an act with charitable intent. Regardless, the City, like the district court, focuses on the wrong tests.

For nearly thirty years, the Supreme Court has clarified that the proper scope of the "fundamental rights" inquiry is not whether a right is "intimate and personal," but whether it is deeply rooted in history and tradition. Opening Br. 42–43 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), and *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)). The City's reliance on the "intimate and personal" test, like the district court, depends solely on out-of-circuit, pre-*Glucksberg* cases, which no longer reflect the proper standard. *See* Resp. Br. 42.

To be sure, in addition to invoking the *Glucksberg-Dobbs* test for fundamental rights, a claimant may also assert that a governmental act (usually of executive discretion) "shocks the conscience." *See Regino*, 133 F.4th at 960 n.5. That, however, is an entirely independent basis for a substantive-due-process claim; it is not a component of the "fundamental rights" test. *See ibid.* ("Because Regino asserts a violation of her substantive due process rights solely under a fundamental rights theory, we do not address the shocks-the-conscience standard and express no opinion on its applicability.").

The City provides only a single case that rejected a claim based on the *Glucksberg-Dobbs* standard, but that case is inapposite. In *Gallagher v. City of Clayton*, 699 F.3d 1013 (8th Cir. 2012), the Eighth Circuit upheld a ban on smoking in public parks, finding that it did not infringe on any fundamental right. *See* Resp. Br. 40 (discussing

Gallagher). However, the ordinance in *Gallagher* did not arbitrarily ban smoking based on the smoker's motivation for doing so; instead, it banned smoking in public parks, period. The deleterious health effects of smoking are well documented; some people have allergic or other bad reactions to cigarette smoke; and smoking in public parks directly subjects third parties in the vicinity, including children, to secondhand smoke, which is said to be "responsible for the early deaths of approximately 53,000 Americans annually." *Gallagher*, 699 F.3d at 1019. By contrast, the City has not banned all food sharing in its public parks; its Ordinance allows people to share food freely with other members of the community in a public park, including with strangers, so long as they are not doing so "for charitable purposes." Such a law is contrary to Anglo-American history and traditions, as well as the very concept of ordered liberty,[2] in a way that is entirely incomparable to a law preventing people from smoking on public property.

[2] Norma notes that, since *Gallagher*, the Supreme Court has suggested that a right is fundamental if it is either implicit in the concept of ordered liberty *or* deeply rooted in this Nation's history and tradition, not that it needs to be both. *See Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

C. Norma has shown that the food-sharing ordinance violates her right of charity.

As noted above, if Norma has any right of charity, that right must at least encompass the right not to be burdened specifically because of her charitable intent. Yet the Ordinance does just that. If Norma were again arrested and prosecuted for engaging in a "food sharing event" without a permit, then an element of her "crime" would be that she shared food "for charitable purposes." BCO § 5.36.020. A viable defense, should the facts support it, would be that she had given food away for non-charitable purposes, *i.e.*, that her intention was not to help people in need. This perverse policy violates Norma's fundamental right of charity; it contravenes the very foundations of criminal law; and it is patently arbitrary, violating any standard of constitutional review. Opening Br. 29–34.

The City compares this case to *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 759 (11th Cir. 2011) (en banc), which upheld Orlando's restriction on "large group feeding[s]" in certain public parks against First Amendment attack. Resp. Br. 39–40. However, that comparison does not hold. Orlando's ordinance operated evenhandedly, defining a "large group feeding" as "an event intended to attract, attracting, or likely to attract twenty-five (25) or more people for the delivery or service of food" in a public park. *First Vagabonds*, 638 F.3d at 759

(cleaned up). The challenger argued that its feeding of homeless people was expressive conduct, and that "it has a right under the First Amendment to conduct feedings of large groups in any park as often as it likes." *Id.* at 758. The Eleventh Circuit rejected that argument, finding that Orlando's ordinance satisfied constitutional standards for incidental burdens on expressive conduct. *Id.* at 762. But rather than restrict events where food is shared to a particular group size, the City here chose only to forbid feeding people out of charity, a universal human impulse that cannot be outlawed.[3] Even accepting *arguendo* that, through their respective ordinances, the City and Orlando seek to advance "more or less the same interests," they have chosen critically different ways of advancing those interests. *Cf. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1296 (11th Cir. 2021) (distinguishing *First Vagabonds*, while finding that Fort Lauderdale's restriction on food sharing was unconstitutional).

The City implies that its intent is not to burden people "because they wish to perform an act of charity" but, instead, to "establish[] the balance between food

[3] The City's Ordinance is more restrictive than Orlando's in other ways. Even with a permit, Norma would be allowed to charitably share food in a public park a maximum of twelve times per year, and she would restrict other people's charitable sharing by doing so. *Supra* Argument pt. I(B)(1). By contrast, Orlando's ordinance applies only to certain parks, allowing people to host "for a total of 84 group feedings a year at [those] parks." *First Vagabonds*, 638 F.3d at 761.

sharing events held at public parks and assistance to the homeless." Resp. Br. 53. That argument, however, ignores the text of the City's own Ordinance—which, again, explicitly burdens people acting "for charitable purposes." Whether or not the City meant to burden people acting out of charitable motivation, its Ordinance does exactly that. And, whatever the limits on the government's power to restrict charity, it surely cannot restrict charity simply because it is charity.

D. Norma's due-process claim does not fail merely because she has also brought an equal-protection claim.

Norma has explained that claimants may assert both a substantive-due-process claim and an equal-protection claim. Opening Br. 35–39. Although these rights can "be instructive as to the meaning and reach of the other," they "rest on different precepts and are not always co-extensive." *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015). The district court, by finding that the potential applicability of equal protection necessarily subsumes a substantive-due-process claim, misapplied precedent. *See Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) (owners may assert both a takings claim and a substantive-due-process claim against a given property restriction, as the tests are distinct from each other). The City cannot defeat these arguments, which is why its only response is to say, without further explanation, that the district court's analysis was correct. *See* Resp. Br. 53.

III. The City Fails to Defeat Norma's Equal Protection Challenge.

The City's main defense to Norma's equal protection challenge is to assert that the similarly-situated analysis should focus not on the distinction made by the text of the Ordinance but instead should look to other City laws regulating food. But the distinction made by the Ordinance is the relevant one for this Court's review. And that distinction lacks even a rational connection to any legitimate governmental interest, leaving only an illegitimate interest that cannot bear the weight of the Ordinance.

A. The City has singled out charitable food sharers as a disfavored class.

The first step in equal-protection analysis is to identify how the challenged law classifies groups. *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Ibid.* Singling out a particular group without a rational or logical reason for doing so is strong evidence of irrational animus. *Craigmiles v. Giles*, 312 F.3d 220, 227–29 (6th Cir. 2002). Indeed, when a law singles out one group "in connection with a rationale so weak that it undercuts the principle of non-contradiction," it violates equal protection. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

The City first says that there is no classification, that the Ordinance "applies to all persons equally." Resp. Br. 45–46. According to the City, "all food service at public parks to the public at large requires a permit issued by Bullhead City." *Id.* at 46. But that isn't true; plenty of food may be provided to the public at large in public parks without a permit, whether at a Little League tournament or a political rally. *See supra* Argument pt. I(B)(2). And of the food that does require a permit, none face a harsh cap on their frequency like under the Ordinance. *Ibid.*

The City describes Norma's equal-protection claim as seeking to distinguish her group—those sharing food in public parks at no cost—from three other groups: (1) those sharing food in public parks for a cost, (2) those sharing food at private social gatherings, and (3) those sharing food on private property. Resp. Br. 46. This, it says, is "an arbitrary and artificially made-up means to attempt to create a class where none exists." *Ibid.* But these aren't the relevant groups for the equal-protection analysis. The groups, on the face of the city's ordinances, are: (1) people who give away food for charitable purposes, and (2) people who distribute food for any other reason—religion, politics, youth sports, even avarice—and are regulated more leniently.

Even if one were to engage with the City's articulation of the groups, none save the Ordinance. The first group the City cites, those sharing food in public parks

for a cost,[4] aren't sharing food as much as they are selling it, an activity covered by the City's vending licensing that doesn't impose a hard cap on the frequency with which food may be sold. *See* BCO § 17.06.315. As for the second group, those sharing food at private social gatherings, that distinction falls apart in practice. There is no cap on the number of people who can attend a "private social gathering," nor a limit on how many or where those gatherings can be. Moreover, Norma considers the people she serves food to her friends. 2-ER-191, 194. It is only because she wants to help them that she must obtain a permit. Finally, the fact that the Ordinance does not apply to private property does not save it. Indeed, it shows the City's true motivation: removing homeless people from public parks.

Ultimately, the Ordinance draws one crucial distinction that is the heart of this case: whether a food sharer is charitably motivated. A food sharer could serve the exact same food to the exact same people in the exact same location and not be covered by the Ordinance if her intent is not charitable. But the second she wants to help people, she is committing a crime unless the City has issued her a permit.

[4] This group could ostensibly be covered by the Ordinance, which applies to food distributed "at no cost, or for a nominal charge." BCO § 5.36.020. Whether someone is covered depends on their motivation.

B. None of the City's purported justifications for the Ordinance explains its disfavored treatment of charitable food sharers specifically.

The City only touches upon each of its purported justifications for the Ordinance, and even then it mostly just repeats the district court's holding. As Norma set out in her opening brief, even accepting that the City may rationally regulate its parks in pursuit of a legitimate objective, the Ordinance's distinction between charitable food sharing and non-charitable food sharing serves none of these objectives. *See* Opening Br. 46–56. Instead, only one interest remains—discouraging homeless people from using public parks—and that is an illegitimate interest.

1. Public Health

The City insists that a primary motivation for the Ordinance is ensuring food safety and promoting public health. *See, e.g.*, Resp. Br. 34, 45–47, 55. In doing so, it points the finger at Mohave County, which, it says, insisted that the City enact new park regulations[5] to protect food safety. Perhaps the County did suggest that to the City. Even so, that does not make it rational for the City to place special burdens on *charitable* food distribution specifically.

[5] The City frequently references supposed conversations between Mohave County and City officials regarding the sharing of food. *E.g.*, Resp. Br. 3, 5–6, 10, 12–13. The City cannot rely on these out-of-court statements for the truth of the matter asserted. *Cf.* Fed. R. Evid. 802.

The equal-protection analysis focuses on disparity in treatment—that is, the Ordinance's distinction between food being shared "for charitable purposes" and food being shared for other purposes. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–48 (1985) (concluding a permitting requirement was unconstitutional when the differences in categories fell apart in practice). Thus, Norma's case does not ask whether it is rational to restrict park food sharing as a general matter but, instead, whether it is rational to target charitable food sharers with restrictions that do not apply to non-charitable food sharers. The answer to that question is no, regardless of the City's purported justification for the Ordinance.

There is no instance in which the safety of any given food item depends on the charitable motivation of the food sharer. Indeed, the recipients are people who—by definition—are in need, whose only warm meal is that provided by Norma and others, and who otherwise would go hungry (or worse) without. Opening Br. 48; *see also* 2-ER-174, 193–94, 299. Even accepting that government may nevertheless regulate such food sharing in some capacity, it does not follow that it warrants *extra* regulation.

Moreover, the Ordinance's key restrictions on charitable food sharing do not address food safety. As noted, food safety regulations are promulgated at the state-level, and Norma does not run afoul of those. *See supra* Argument pt. I(B)(3). The only part of the Ordinance relating to food safety is the requirement that a host

possess a food handler's card—which Norma has. 2-ER-170, 199, 207–10, 220–21. The remainder of the Ordinance focuses on forms and fees, as well as various frequency caps. The City has little to say about food safety beyond invoking the County's supposed concerns and parroting the district court's conclusion that food safety somehow explains the Ordinance's targeting charitable-minded people specifically. *See* Resp. Br. 47 (citing 1-ER-17). That is because there is no rational explanation for suppressing specifically charitable food sharing in the name of food safety.

2. Trash, Litter, and Human Waste

Next, the City supposes that reducing trash, litter, and human waste may justify burdening charitable food sharers specifically. Here, the City relies on the district court's pointing to the record that supposedly shows that food-sharing events resulted in trash being left behind. Resp. Br. 16, 48 (citing 1-ER-17). But there is no record citation to support that statement—because the record does not show that.

All events at which food is served generate trash and human waste—and there is no reason to accept that the charitable motivation of the food sharer somehow means that there will be more trash.[6] The City does not quantify trash in its public parks, whether after food-sharing events or otherwise. 2-ER-28; *see also* 2-ER-251.

[6] Littering is already illegal, BCO §§ 8.08.060, 12.12.060(B), as is leaving human waste out in the Park, BCO § 12.12.060(C).

The City's overt goal was to reduce the visible homeless population in its parks. But it didn't do so directly by banning homeless people.[7] And it didn't do so indirectly by regulating the negative activities associated with homelessness—large gatherings, litter, or even eating in the Park. Instead, it directly regulated charity, apparently on the theory that prohibiting kindness would trickle down and deter the presence of people in need of kindness. For the reasons discussed above, that is illegitimate. But it is also ineffective—because the Ordinance forbids Norma from distributing food in the Park (for charitable purposes), but it does not forbid distributing food *near* the Park. And the record shows that, naturally enough, when Norma distributes food near the Park, people take that food a short distance away to eat it where there are benches and bathrooms. In short, the Ordinance fails to eliminate the supposed scourge of homeless people eating free food in the Park. Instead, it eliminates only the thing that it targets: charity, an impulse that every culture since the time of Aristotle has recognized as praiseworthy and just.

Beyond that, the Ordinance otherwise does not make sense in terms of reducing trash. It exempts prepackaged foods, BCO § 5.36.020, which naturally generate more trash and litter than food that doesn't come individually wrapped. It removes

[7] Indeed, the city itself concedes that discouraging homeless people from being in the Park would not be a legitimate interest. 2-ER-182; *see also* 2-ER-291.

food-sharing events from the areas where people eat, and where there are trash receptacles and bathrooms to areas that lack such facilities. Norma, a person who seeks to improve her community, would always clean up after she served in the Park. 2-ER-173, *see also* 2-ER-27–28, 192. But now, some of those she serves take their food from her dusty alley back to the Park, and she's not there to ensure its tidiness afterward. *See* 2-ER-197. This isn't "cherry pick[ing] the record," Resp. Br. 48; it's insisting that a law (and, specifically, the classifications it draws) have at least an ounce of connection to its supposed goals.

3. Threatening Behavior

The City's interest in "reduc[ing] threatening behavior" is nothing more than invective. The City's 30(b)(6) witness—its city manager—made this clear. In discussing the origins of the Ordinance, he contrived a park user as saying, "hey, kid and mom, if you don't leave, I'm going to come get you." 1-SER-124–25.

There is no legitimate basis for accepting that specifically charitable food sharing results in threatening behavior.[8] Once again, the only way to accept this rationale would be to find that people in need are more prone to engaging in threatening behavior, and that the Ordinance discourages such people from using City parks (when

[8] Threatening behavior is already illegal. *See* BCO §§ 9.08.120, 12.12.070(A)(3); *see also* Ariz. Rev. Stat. § 13-1202.

others are allowed to use it). And, again, even the City admits that it may not legitimately pursue that objective. 2-ER-182; *see also* 2-ER-291. This Ordinance isn't about protecting people from unpermitted food sharing. It's about reducing visible homelessness.

C. The only plausible justification for the Ordinance is an invidious interest in keeping homeless people out of sight.

The Ordinance's selective burdens on charitable food sharing do not rationally relate to any of the City's proffered interests. All that remains is an interest that the district court recognized and apparently deemed constitutionally sound: "reducing large gatherings of homeless people" in areas where people are otherwise allowed to gather. 1-ER-15; *see also* Resp. Br. 43. It's clear from the legislative history that what the City wanted to do was ban homeless people from gathering in the Park. *See* Opening Br. 6–8; *see also* Resp. Br. 11. And it's clear from the record that the City believed that it could not constitutionally do this. 2-ER-182; *see also* 2-ER-291 ("Q. Does the City have an interest banning homeless people from congregating in public parks? A. No."). That is why the City rejected this approach. Instead, it banned niceness in the Park, on the theory that the people most in need of niceness are homeless, and therefore a ban on niceness would reduce the homeless population. Whatever cities can do to manage their homeless populations, they cannot default to regulating niceness.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed, and this case should be remanded for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number 24-6499

I am the attorney or self-represented party.

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