

**No. 08-16788-DD**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**CITY OF ORLANDO,**  
Defendant-Appellant-Cross-Appellee

v.

**FIRST VAGABONDS CHURCH OF GOD, an unincorporated association;  
BRIAN NICHOLS; ORLANDO FOOD NOT BOMBS, and unincorporated  
association; RYAN SCOTT HUTCHINSON; BENJAMIN B. MARKESON;  
ERIC MONTANEZ; and ADAM ULRICH,**  
Plaintiffs-Appellees-Cross-Appellants

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On Appeal from the United States District Court  
for the Middle District of Florida  
Case No. 6:06-cv-1583-Orl-31KRS

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**BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,**  
in support of Plaintiffs-Appellees-Cross-Appellants  
Supporting reversal of FRFRA Claim

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DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae* The National Legal Foundation, is a corporation that issues shares of stock to the public.

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4. Brenner, Alana Caldwell
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7. Demings, Val, Orlando Police Chief
8. Dowd, Jacqueline H.
9. Downs, Mayanne
10. Dyer, Buddy, Mayor
11. Early, Lisa, Director of Families, Parks, and Recreation, City of Orlando
12. First Vagabonds Church of God, Plaintiff-Appellee-Cross-Appellant

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40. Soffin, Rachel
41. Spaulding, Karla R., Honorable
42. Strickland, Brittany
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## **INTEREST OF *AMICUS CURIAE***

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF, as a public interest law firm, has an interest, on behalf of its constituents and supporters, and in particular those in Florida, in arguing on behalf of people of faith. The NLF believes that an ordinance restricting the manner in which people of faith gather in public for worship and fellowship should be carefully evaluated by this Court so as to permit full free exercise of religion under the Constitution.

This brief is filed pursuant to consent of all parties.

## **STATEMENT OF THE ISSUES**

Your *Amicus* concurs with the Statement of the Issues as set out in the Brief of the Plaintiffs-Appellees-Cross-Appellants First Vagabonds Church of God and Brian Nichols's (collectively "FVCG" or the "Church," as context requires).

## **SUMMARY OF THE ARGUMENT**

This Brief expands on one argument made by FVCG. The City of Orlando's (the "City") "Large Group Feeding" ordinance (the "Ordinance") presents a substantial burden on FVCG's free exercise of religion under Florida's Religious



Freedom Restoration Act of 1998 (“FRFRA”). Fla. Stat. § 761.03 (LEXIS through 2009 Sess.). In particular, FVCG’s conviction that it serve a fellowship meal as part of worship is well grounded in the history and traditions of the Christian church, and the Ordinance effectively forbids it from engaging in this required religious practice.

## ARGUMENT

### **I. THE COURT BELOW ERRED IN DENYING THE CHURCH’S CLAIM UNDER FLORIDA’S RELIGIOUS FREEDOM RESTORATION ACT BECAUSE THE ORDINANCE FORBIDS THE CHURCH TO ENGAGE IN CONDUCT ITS RELIGION REQUIRES.**

FVCG has persuasively argued for this Court’s reversal of the district court’s holding that FVCG failed to demonstrate a substantial burden to his exercise of religion under FRFRA. (*See* Appellee FVCG’s Br. 10-28.) Your *Amicus* agrees with FVCG’s reasoning and will not reiterate those arguments here. Rather, your *Amicus* will focus on the significance of “breaking bread” within the Christian tradition and how the Ordinance effectively “forbids” FVCG to “engage in conduct that [its] religion requires.” *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

#### **A. FVCG has direct biblical warrant for its conviction that it must “break bread” as part of its worship service.**

The Bible records that the early Christian church regularly gathered for fellowship meals in conjunction with its worship. *See, e.g.*, Acts 2:42. It is from

this fact that FVCG grounded its motivation for a fellowship meal. FVCG unequivocally explained that the meal is part of worship and not simply an act of charity to a less fortunate member of the community. (Tr. at 31, 69-71.) It is to that scriptural basis for the fellowship meal that your *Amicus* now turns.

The book of Acts, Chapter 2, opens with the early Christian church's reception of the Holy Spirit during Pentecost. Although the term "Pentecost" is simply descriptive of the fiftieth day after the Jewish Passover celebration, the event recorded on that day following Christ's resurrection has long been held as the "birthday" of the Christian church. Merrill C. Tenney, *Pentecost, in* Evangelical Dictionary of Theology 835 (Walter A. Elwell ed., 1984). Following a sermon by the Apostle Peter, many in attendance were "cut to the heart," and were immediately baptized into the church. Acts 2:37, 41. The writer then records the budding church's first unified act—they "devoted themselves to the apostles' teaching and fellowship, to *the breaking of bread* and the prayers." Acts 2:42 (emphasis added). Furthermore, "day by day" the believers "attend[ed] the temple together and br[oke] bread in their homes." Acts 2:46.

Although the term "breaking bread" may have at times referred to the more limited partaking of the Lord's Supper (also known as the Eucharist), the context suggests that religious ritual *and* meal sharing were both in view. David H. Wheaton, *Love Feast, in* Evangelical Dictionary of Theology 660 (Walter A.

Elwell ed., 1984). This view is also consistent with the “appointment of the seven [deacons] to serve tables” mentioned in Acts 4, the number seven likely chosen to have one helper to serve a common meal for each of the seven days of the week. Wheaton, *supra*, at 660. *See also*, Acts 6:1-4.

When the Apostle Paul visited the city of Troas, the believers gathered on the first day of the week to “break bread,” the full context of which indicates both religious ritual eating (the Eucharist) and a more full fellowship meal. Acts 20:6-11; Wheaton, *supra*, at 660. At times, the Bible also records, the breaking of bread was done improperly. Paul chided the church in Corinth for its gluttony, drunkenness, and exclusivity<sup>1</sup> in its fellowship meal. 1 Corinthians 11:17-34; Wheaton, *supra*, at 660. Jude rebuked the church for its immorality that “blemishes” their “love feasts.”<sup>2</sup> Jude 12; Wheaton, *supra*, at 660. Peter’s second letter offers a similar rebuke to Jude’s in the context of the fellowship meal. 2 Peter 2:1-13; Wheaton, *supra*, at 660.

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<sup>1</sup> Pertinent to FVCG’s convictions concerning sharing its food, (*see* Tr. at 68-69, 71-72), the improper exclusivity in 1 Corinthians 11 was not about the church’s exclusion of unbelievers from the meal, but rather the practice of some to bring large portions of food that they failed to share with those who came with nothing. 1 Corinthians 11:17-34.

<sup>2</sup> Fellowship meals were often called “Love Feasts” (*αγαπαι*), deriving their name from the Greek “αγαπε,” a word usually translated into English as “love” or “charity.” Wheaton, *supra*, at 660.

B. The early Church Fathers record a continuation of “breaking bread” after the apostolic age had ended.

After the events recorded in the Bible had ended, the growing but still young church continued to regularly observe the sharing of a fellowship meal. The writings of Ignatius (an early second century Christian martyr, *see* <http://www.earlychristianwritings.com/ignatius.html>) and the *Didache* (a document known as the *Teaching of the Twelve Apostles* probably written around 100 A.D., *see* <http://www.earlychristianwritings.com/didache.html>) suggest that a fellowship meal continued to precede the Eucharist during worship gatherings. Wheaton, *supra*, at 660. The later writings of Tertullian, a second century Christian from Carthage who was educated in Rome, *see* Richard C. Kroeger and Catherine Clark Kroeger, *Tertullian*, in *Evangelical Dictionary of Theology* 1078-79 (Walter A. Elwell ed., 1984), show that the fellowship meal continued in the church, but that it occurred in a separate service at a completely different time from the Eucharist. Wheaton, *supra*, at 660.

Chrysostom, a late fourth century Christian writer, *see* Harlie K. Gallatin, *Chrysostom, John*, in *Evangelical Dictionary of Theology* 228 (Walter A. Elwell ed., 1984), praised the value of the fellowship meal, calling it “a custom most beautiful and beneficial; for it was a supporter of love, a solace of poverty, and a discipline of humility,” in spite of the corruption surrounding it in his day. Wheaton, *supra*, at 660. The fellowship meal continued pervasively through the

third century, even being held in prison with condemned soon-to-be martyrs.

Wheaton, *supra*, at 660-61. Although the fellowship meal is no longer practiced in some modern Christian traditions, it still persists in parts of the Eastern Orthodox church, as well as in certain Methodist churches. Wheaton, *supra*, at 661.

The previous discussion is not meant to argue that FVCG's conviction to serve a weekly fellowship meal as part of its worship is common within the Christian communion of the twenty-first century. Furthermore, it is not meant to argue for this Court to become an arbiter of the biblical warrant for a particular religious practice. *See Warner*, 887 So. 2d at 1033-34. Rather, the discussion is meant to show that FVCG's conviction is well within the pale of orthodox Christianity, and that the fellowship meal was, in fact, one of the first acts undertaken by the early church. *See Acts 2:42*. As such, the breaking of bread is clearly "conduct" which FVCG's "religion requires," and the forbidding of which creates a substantial burden to FVCG's free exercise of religion. *Warner*, 887 So. 2d at 1033.

C. The Ordinance effectively forbids the Church from engaging in the breaking of bread as part of worship because serving food necessitates frequent changes in worship location that would likely dissolve the church.

The law has frequently held that it will not place a burden of the impossible upon a party, yet that is what the Ordinance has done to FVCG. It is instructive for the instant case to consider several analogous concepts in other fields of law. For

instance, if the conditions under which two parties formed a contract have changed drastically and unforeseeably so that performance becomes impossible, the law relieves the parties of the requirements of the bargain. *Cook v. Deltona Corp.*, 753 F.2d 1152, 1557-58 (11th Cir. 1985). Although certain types of causes of action normally require a party to exhaust administrative remedies before seeking redress in the courts, the law does not require such exhaustion when it would be futile to do so. *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1224 (11th Cir. 2008).

Similarly, the government must compensate a landowner when its regulations have made economic use of the property essentially impossible. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (“When, however, a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”).

With these principals in mind, it is apparent that the City has asked FVCG to do the impossible. Although technically true that FVCG could move to a different park every two weeks in order to abide by the Ordinance, the uncontroverted testimony bears out that the church would cease to exist by such an action. (*See Tr.* at 37-38, 43.) Simply put, the homeless population requires a structure and routine in ways perhaps not as necessary for the general population. (*See Tr.* at 37-38.) As FVCG set out more fully in its brief, communication is poor among the

homeless population, and even a single change in worship location would likely take months to recover attendance to levels previously attained. (Appellee FVCG's Br. 18-20.)

It is worth noting, however, that the very act of requiring FVCG to periodically change worship locations logically leads to a strange irony. Because of the unstable nature of the homeless population, as FVCG has pointed out, a change in the worship location would likely result in poor attendance at worship. (Tr. at 37-38.) Poor attendance at worship immediately removes FVCG from the confines of the Ordinance and would arguably allow it to meet at any City park at any time without a permit. Thus, FVCG is in the strange position of not being impacted by the Ordinance until its membership increases to a level beyond the twenty-five-person threshold, which then forces FVCG to begin moving locations for its worship, which then lowers its attendance, and ultimately permits it to return to its park of choice—that is, unless it grows again. Therefore, the Ordinance perpetually condemns the church to fewer than twenty-five attendees.

Crucial to the analysis is the fact that any of the above discussion of numbers and changes in attendance and worship location is only relevant because FVCG shares in a fellowship meal *as an act of worship*. In other words, FVCG would be in complete compliance with the Ordinance, even presumably with hundreds of homeless worshipers who each carry in a sandwich and drink of their

own, if FVCG simply did not provide food as part of the service. Put still differently, because the Ordinance requires FVCG to do the impossible (that is, change worship locations bi-weekly), it has in essence forbidden FVCG from serving food, an act intimately entwined in its worship and “require[d]” by its “religion.” *Warner*, 887 So. 2d at 1033.

### CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the District Court denying FVCG’s claim under FRFRA.

Respectfully submitted  
this 18<sup>th</sup> day of March, 2009

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *City of Orlando v. First Vagabonds Church of God, et al.*, 08-16788-DD on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on March 18, 2009, addressed as listed below. The required number of paper copies was filed in the same manner on the same date.

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