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WRONG MEANS TO AN UNJUST END? THE ELEVENTH  
CIRCUIT'S DECISION IN *FIRST VAGABONDS CHURCH OF GOD*

*First Vagabonds Church of God v. City of Orlando, Fla.*,  
638 F.3d 756 (11th Cir. 2011)

*Fay O. Pappas*\*

In 2005, Orlando Food Not Bombs (OFNB), a conglomeration of political activists who advocate a “right to food,” began conducting “food-sharing events” once a week in downtown Orlando, Florida.<sup>1</sup> OFNB distributed free vegan meals in Lake Eola Park to the hungry and homeless.<sup>2</sup> Soon, however, the City began receiving complaints related to the number of homeless individuals who would disperse into adjacent neighborhoods following the events.<sup>3</sup> In response, the City enacted the Large Group Feeding Ordinance, which required a permit for any feeding event likely to attract twenty-five or more people.<sup>4</sup> Under the Ordinance, a

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\* This Comment is dedicated to the memory of Pastor Brian Nichols of the First Vagabonds Church of God, as well as to my birthplace, the City of Orlando. I would like to first thank my colleagues and friends at the *Florida Law Review*, Professors Joe Jackson and Lyrissa Lidsky, as well as Mr. Glenn Katon, Esq. for their scholarship and guidance in writing this work. I'd also like to thank Dr. Jayashree Shivamoggi for encouraging me to start what would become a five-year journey (and counting) into this controversy. But most of all, I owe my sincerest thanks to my father, mother, and brother for their unwavering support in every endeavor I've pursued, this one being no exception.

1. *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds I)*, 578 F. Supp. 2d 1353, 1356 (M.D. Fla. 2008), *aff'd in part, vacated in part, rev'd in part*, 610 F.3d 1274 (11th Cir.), *reh'g en banc granted, opinion vacated*, 616 F.3d 1229 (11th Cir. 2010), *opinion reinstated in part, aff'd in part, vacated in part, rev'd in part*, 638 F.3d 756 (11th Cir. 2011).

2. *See id.*

3. *Id.*

4. *Id.* at 1356–57. The challenged ordinance reads as follows:

Except for activities of a governmental agency within the scope of its governmental authority, or unless specifically permitted to do so by a permit or approval issued pursuant to this Chapter or by City Council:

(a) It is unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or park facility owned or controlled by the City of Orlando within the boundary of the Greater Downtown Park District without a Large Group Feeding Permit issued by the City Director of Families, Parks and Recreation or his/her designee.

(b) It is unlawful to fail to produce and display the Large Group Feeding Permit during or after a large group feeding, while still on site, to a law enforcement officer upon demand. It is an affirmative defense to this violation if the offender can later produce, to the City Prosecutor or the Court, a Large Group Feeding Permit issued to him/her, or the group, which was valid at the time of the event.

person or organization can only receive two permits per year for use of the same park.<sup>5</sup> The issue received wide-scale local media attention when an OFNB volunteer, Eric Montanez, was arrested after undercover Orlando police filmed him ladling soup to thirty homeless individuals, five above the legal limit.<sup>6</sup>

The Ordinance also adversely affected a religious organization of homeless congregants: the First Vagabonds Church of God, led by Pastor Brian Nichols.<sup>7</sup> The Church met on Sunday afternoons in Langford Park for song, prayer, Bible readings, and a Christian food-sharing tradition—the breaking of bread.<sup>8</sup> The heavily wooded park, which was on the far edge of the City, provided restrooms,<sup>9</sup> a pavilion, water, and a grill for the congregants.<sup>10</sup> Though the City did not receive any complaints regarding the Church’s use of Langford Park, enforcement of the Ordinance would make it impossible to hold services with the sacrament.<sup>11</sup>

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(c) The Director of Families, Parks and Recreation or his/her designee shall issue a Large Group Feeding Permit upon application and payment of the application fee as established by the City. Not more than two (2) Large Group Feeding Permits shall be issued to the same person, group, or organization for large group feedings for the same park in the GDPD in a twelve (12) consecutive month period.

(d) Any applicant shall have the right to appeal the denial of a Large Group Feeding Permit pursuant to appeal procedure in Section 18A.15 with written notice to the Director of Families, Parks and Recreation and with a copy to the City Clerk.

ORLANDO, FLA., CODE OF ORDINANCES § 18A.09-2 (2006).

5. ORLANDO, FLA., CODE OF ORDINANCES § 18A.09-2(c) (2006).

6. See *First Vagabonds I*, 578 F. Supp. 2d at 1357. Eric Montanez, the member who was arrested, was later acquitted of violating the ordinance after a high-profile jury trial. See *id.* at 1357 n.8; *Coverage of Eric Montanez’s Trial, Ladle Fest Day 1*, THE BLOG OF ORLANDO FOOD NOT BOMBS (Oct. 8, 2007, 6:27PM), <http://orlandofnb.blogspot.com/2007/10/coverage-of-eric-montanezs-trial-ladle.html> (“Lake Eola Ladle Fest and Eric Montanez’s trial were covered by Channels 2, 6, 9 and 13, plus two Spanish-language TV channels, WMFE-FM (90.7, public radio) and the *Orlando Sentinel*.”); see also *Group Intentionally Violates City Ordinance during “Ladle Fest,”* WFTV.COM (Oct. 8, 2007), available at <http://www.wftv.com/news/news/group-intentionally-violating-city-ordinance-durin/nJj4C/>; Sean Kinane, *Food Not Bombs Activist in Orlando Faces Trial*, WMNF.COM (Oct. 8, 2007), available at [http://www.wmnf.org/news\\_stories/food-not-bombs-activist-in-orlando-faces-trial](http://www.wmnf.org/news_stories/food-not-bombs-activist-in-orlando-faces-trial); Kate Santich, *Man who feeds homeless cleared*, ORLANDO SENTINEL (Oct. 10, 2007), available at [http://articles.orlandosentinel.com/2007-10-10/news/MMONTANEZ10\\_1\\_homeless-city-ordinance-feedings](http://articles.orlandosentinel.com/2007-10-10/news/MMONTANEZ10_1_homeless-city-ordinance-feedings).

7. See *First Vagabonds I*, 578 F. Supp. 2d at 1356–57.

8. *Id.* at 1358.

9. “Langford Park is a heavily-wooded, relatively isolated park located to the east of downtown Orlando.” *Id.* at n.9.

10. *Id.* at 1358.

11. *Id.* (“[I]n order to comply with the Ordinance, Nichols will either have to limit his services to twice per year, rotate them to other parks within the [Greater Downtown Park District], or move them to a park outside of the [Greater Downtown Park District].”).

In 2006, OFNB and the Church filed suit in the U.S. District Court for the Middle District of Florida against the City, alleging that the Ordinance violated the First and Fourteenth Amendments, as well as Florida's Religious Freedom Restoration Act (FRFRA).<sup>12</sup> The district court denied the City's motion for summary judgment and, after a bench trial, concluded that the Ordinance lacked a rational basis to curtail the feedings and permanently enjoined the City from enforcing it.<sup>13</sup> The City then appealed.

In *First Vagabonds Church of God v. City of Orlando*,<sup>14</sup> the Eleventh Circuit reversed the district court's decision and held the Ordinance to be a reasonable time, place, and manner restriction on free speech and a valid regulation of expressive conduct.<sup>15</sup> To reach that conclusion, the Eleventh Circuit made two curious moves: first, the court found it unnecessary to decide the question of expressive conduct at the heart of the matter, and second, it silently reversed an outcome-determinative factual finding of the district court through its misuse of the constitutional-fact doctrine.

This Comment argues that the Eleventh Circuit incorrectly employed the constitutional-fact doctrine to tip the balance against free speech in this case—an action that trails a dangerous pattern in recent Eleventh Circuit jurisprudence.<sup>16</sup> What follows is an explanation of the constitutional-fact doctrine and its relevant jurisprudence. Through that lens, this Comment sets forth the district court's findings. Finally, it proceeds to analyze the Eleventh Circuit's treatment of the district court's findings and the reasoning behind the decision to uphold the city ordinance.

The constitutional-fact doctrine is an extremely narrow exception by which appellate courts can meddle in lower courts' authority to make factual determinations.<sup>17</sup> The Federal Rules of Civil Procedure typically bind an appellate court to the factual findings of the trial court.<sup>18</sup> Issues of

12. *See id.* at 1355.

13. *Id.* at 1361–62.

14. *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds III)*, 638 F.3d 756 (11th Cir. 2011).

15. *Id.* at 758.

16. *See infra* notes 33–43 and accompanying text.

17. This doctrine permits an appellate court to review *de novo* a factual finding of the trial court by reclassifying that fact as a “constitutional fact,” or one where law and fact are so intertwined that a finding of fact has significant constitutional ramifications. *See generally*, Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE. L. J. 1427 (2001) (arguing that a profound circuit split exists, regarding the ever-straying use of constitutional-fact doctrine from its original pro-free speech Supreme Court precedence). Specifically, some scholars believe that because such factual legal conclusions are increasingly not subject to lower court deference, that “confuses and undermines a unique First Amendment Tradition.” Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1235 (1996).

18. *See* FED. R. CIV. P. 52(a)(6) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”).

law are reviewed *de novo*,<sup>19</sup> but issues of fact are reviewed only for clear error.<sup>20</sup> This deference arises from the role of the trial court as fact-finder<sup>21</sup>—especially where, as here, there is a bench trial and the judge is the sole finder of fact. The trial court is where the parties present exhibits and take testimony; it then makes judgment based on an in-person review of the evidence.<sup>22</sup> Appellate courts’ lack of firsthand access to evidence—and lack of time to adequately review that evidence—make them an inappropriate place for an independent review of facts.<sup>23</sup> But there is at least one way an appellate court can review a factual finding *de novo*: appellate courts may review both issues of law *and* issues of “constitutional fact” as if for the first time.<sup>24</sup>

This “constitutional-fact” doctrine arose, nevertheless, under extremely narrow circumstances for a singular purpose. According to United States Supreme Court precedent, if the constitutional-fact doctrine must come into play, it should only be used for its intended purpose—to tip the balance in *favor* of First Amendment rights. In *New York Times Co. v. Sullivan*,<sup>25</sup> the Chief of the Alabama state police, in his personal capacity, sued the *New York Times* for libel and defamation over a full-page ad that ran in the paper and graphically described violent acts against civil rights protestors.<sup>26</sup> Giving the threat to free speech greater weight than the consequences of meddling in a trial court’s fact-finding role, the Supreme Court reviewed *de novo* the outcome-determinative “actual malice” standard and found in favor of the *New York Times*.<sup>27</sup> Later, in *Rosenbloom v. Metromedia, Inc.*,<sup>28</sup> the Supreme Court proclaimed that an “excursion into factfinding” is required when the guarantees of the First and Fourteenth Amendments are at stake.<sup>29</sup> Employing this rationale, the *Rosenbloom* Court similarly concluded that “First Amendment questions of

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19. “The Congress that adopted the EAJA certainly was aware of the general rule that issues of law are reviewed *de novo* while issues of fact are reviewed only for clear error.” *Pierce v. Underwood*, 487 U.S. 552, 584 (1988) (citing FED. R. CIV. P. 52(a); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982)). *see also First Vagabonds III*, 638 F.3d at 760 (citing *Gold Coast Publ’ns, Inc. v. Corrigan*, 42 F.3d 1336, 1343 (11th Cir. 1994)).

20. *Id.*; *see also Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011).

21. *See supra* note 19.

22. *See United States v. Or. Med. Soc’y*, 343 U.S. 326, 339 (1952) (“Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.” (quoting *Boyd v. Boyd*, 169 N.E. 632, 634 (1930))).

23. *Id.*

24. *See supra* note 17.

25. 376 U.S. 254 (1964).

26. *Id.* at 256.

27. *See id.* at 285–86.

28. 403 U.S. 29 (1971).

29. *Id.* at 53–54.

'constitutional fact' compel this Court's *de novo* review."<sup>30</sup> Furthermore, in *Pennekamp v. Florida*,<sup>31</sup> the Court declared:

The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.<sup>32</sup>

Thus, precedent exists to justify a narrow use of the constitutional-fact doctrine when First Amendment freedoms are threatened. In fact, the Eleventh Circuit itself has previously defined "constitutional facts" as the "few core facts that determine a First Amendment free speech issue."<sup>33</sup> It, however, has turned the doctrine on its head by using it to justify outcomes that arguably *limit* free speech.

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30. *Rosenbloom*, 403 U.S. at 53–54 ("The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. Clearly, then, this Court has an 'obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments,' and in doing so 'this Court cannot avoid making an independent constitutional judgment on the facts of the case.'") (citing *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964)). Furthermore, the *Rosenbloom* Court stated that the "simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* (citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 205 n.5 (1960)).

31. 328 U.S. 331 (1946).

32. *Id.* at 335. There is additional precedent justifying use of the constitutional-fact doctrine to safeguard due process or the First Amendment. *See* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (explaining that in cases where "the line between speech unconditionally guaranteed and speech which may be legitimately regulated" the appellate court's duty involves "review[ing] the evidence to make certain that those principles have been constitutionally applied"); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (explaining that "it nevertheless remains [the reviewing court's] duty in a case" involving the infringement of First Amendment rights "to make an independent examination of the whole record"); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (explaining that "[i]n cases where there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded"); *see also* *Craig v. Harney*, 331 U.S. 367, 373–74 (1947); *Bridges v. California*, 314 U.S. 252, 271 (1941).

33. *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1205 (11th Cir. 2009).

In *Bloedorn v. Grube*,<sup>34</sup> the Eleventh Circuit used the doctrine to affirm the district court's denial of a preliminary injunction against a university permitting scheme, which the plaintiff argued violated his expressive rights by requiring a permit to speak in a designated free speech zone.<sup>35</sup> The Eleventh Circuit cited *Bloedorn* in its en banc decision in the instant case to set forth the pivotal standard of review, launching its use of the constitutional-fact doctrine.<sup>36</sup>

The language attributed to *Bloedorn* in the *First Vagabonds* opinion, however, is actually an internal citing reference to another, even more questionable Eleventh Circuit decision, *ACLU of Florida v. Miami-Dade County School Board*.<sup>37</sup> That case was initiated when civil rights organizations and parents of elementary school children challenged the removal of a book about Cuba from a school library and sought a preliminary injunction enjoining the school board from removing the book.<sup>38</sup> In determining the standard of review for cases involving preliminary injunctions, the court made an unprecedented move: it acknowledged that findings of fact are ordinarily reviewed only for clear error, but concluded that the standard of review "changes in First Amendment cases like this one."<sup>39</sup> The court then reviewed *de novo* what it considered to be the "core constitutional facts" of the case.<sup>40</sup> The court explained the consequences of this action: "That means if we disagree with the district court's finding about the Board's motive, its decision to enter a preliminary injunction was an abuse of discretion."<sup>41</sup> By using the constitutional-fact doctrine to revise key findings of fact in a way that tipped the scale *against* First Amendment freedoms, the court destroyed the foundation for the injunction.<sup>42</sup>

The irony here should not be discounted. The Eleventh Circuit is employing a doctrine developed in recognition of the importance of First Amendment freedoms to restrict those same freedoms. In his blunt dissent in *ACLU of Florida*, Judge Charles R. Wilson made clear his disapproval of the decision, when he opined that "[w]hile the majority may disagree with the district court about what testimony and evidence was more

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34. 631 F.3d 1218 (11th Cir. 2011).

35. *Id.* at 1225.

36. *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds III)*, 638 F.3d 756, 760 (11th Cir. 2011) ("[W]e review the core constitutional facts *de novo*, unlike historical facts, which are measured only for clear error." (quoting *Bloedorn*, 631 F.3d at 1229) (internal quotation marks omitted)).

37. 557 F.3d 1177, 1198 (11th Cir. 2009) ("[W]e review *de novo* the core constitutional fact.").

38. *Id.* at 1183.

39. *Id.* at 1198.

40. *Id.*

41. *Id.*

42. *Id.*

credible and persuasive, this is not the majority's place."<sup>43</sup>

To examine the use (and misuse) of the constitutional-fact doctrine, we begin with a brief overview of the district court's initial findings. In coming to its decision to permanently enjoin Orlando's Ordinance, the district court employed a modernized version of the test for expressive conduct used in *Texas v. Johnson*.<sup>44</sup> The court examined, first, whether OFNB intended to convey a message and, second, whether that message was likely to be understood by third parties.<sup>45</sup> Without any difficulty, the court found OFNB's message—that society “should provide food for all of its members, regardless of wealth”<sup>46</sup>—sufficient, rejecting the City's assertion that the message lacked the required specificity.<sup>47</sup> Next, the court asked whether this message was cognizable to third parties.<sup>48</sup> At trial, Orlando Mayor Buddy Dyer stated that he believed that OFNB provided food to advance its political message.<sup>49</sup> In addition, a video clip presented at trial showed a police officer at a food-sharing event stating his opinion that feedings were held for political purposes.<sup>50</sup> Recognizing that OFNB's use of “signs, T-shirts, and buttons”<sup>51</sup> likely enhanced the comprehensibility of OFNB's message, the court concluded that the testimony was adequate to satisfy the second prong of the modified *Johnson* test, finding that OFNB's conveyed message was “understood by the public.”<sup>52</sup> Thus, the district court concluded that OFNB's food-sharing events were expressive conduct within the scope of the Free Speech Clause of the First Amendment.<sup>53</sup>

After finding that OFNB's conduct constituted speech protected by the First Amendment, the district court then examined the constitutionality of the Ordinance's restrictions on that speech.<sup>54</sup> The court first inquired whether the Ordinance was content-based<sup>55</sup> or content-neutral, a distinction

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43. *Id.* at 1232 (Wilson, J., dissenting).

44. 491 U.S. 397 (1989). The *Johnson* test originally required that the message asserted be “particularized,” or specific, *id.* at 404, a requirement later qualified by the Eleventh Circuit, which only required “some” message. *See Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004).

45. *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds I)*, 578 F. Supp. 2d 1353, 1358–59 (M.D. Fla. 2008).

46. *Id.* at 1358.

47. *Id.* Although the City had asserted that OFNB lacked the “particularized” message required in *Johnson, id.*, the Eleventh Circuit had previously noted that only “some” message must be communicated, *see Holloman*, 370 F.3d at 1270, and that requirement was met here.

48. *See First Vagabonds I*, 578 F. Supp. 2d at 1358.

49. *Id.*

50. *Id.* at 1358–59.

51. *Id.* at 1359.

52. *Id.*

53. *Id.*

54. *See id.* at 1359–61.

55. *Id.* at 1359. “As a general rule, laws that by their terms distinguish favored speech from

that determines the level of scrutiny that the court will apply.<sup>56</sup> In finding that the Ordinance did not facially discriminate amongst speakers and appeared to apply equally to all,<sup>57</sup> the court labeled the Ordinance content-neutral; thus, intermediate scrutiny applied.<sup>58</sup> The court then turned to whether the Ordinance's restrictions furthered an "important government interest" under the intermediate scrutiny test.<sup>59</sup>

To justify the Ordinance, the City offered three main concerns: public safety, public health, and most relevant to this discussion, the prevention of park overuse.<sup>60</sup> Concerning public safety, the district court found no evidence that an uptick in crime between 2005 and 2006 had any connection to the food-sharing events.<sup>61</sup> The City never presented evidence of crimes committed during feedings, around feedings, or by any event participants.<sup>62</sup> Moreover, even assuming that a connection between the food-sharing events and crime did exist, the court saw no evidence that distributing the feedings to other parks would mitigate crime as the Ordinance's drafters intended.<sup>63</sup>

The court found the Ordinance's purported concern for public health similarly suspect.<sup>64</sup> The City focused on litter and excess garbage, but the court found that no evidence indicated a littering problem was connected to the food-sharing events.<sup>65</sup> In fact, the court noted that OFNB did not use disposable items and that its members "le[ft] the park cleaner than it was

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disfavored speech on the basis of the ideas or views expressed are content based." *Id.* (quoting *Turner v. FCC*, 512 U.S. 622, 643 (1994)) (internal quotation marks omitted). Another way of viewing content-based regulations is asking whether the regulation is viewpoint-discriminatory. *See Turner*, 512 U.S. at 685 (Ginsburg, J., concurring in part and dissenting in part). The implication is that content-based discriminatory regulations are owed greater scrutiny by the court. *Id.*

56. *See Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1251 (11th Cir. 2004). A content-neutral ordinance "places no restrictions on . . . either a particular viewpoint or any subject matter that may be discussed," *First Vagabonds I*, 578 F. Supp. 2d at 1359 (quoting *Hill v. Colorado*, 530 U.S. 703, 723 (2000)) (internal quotation marks omitted), and "applies equally to all, and not just to those with a particular message or subject matter in mind," *id.* (quoting *Burk*, 365 F.3d at 1254) (internal quotation marks omitted). A content-neutral regulation requires the additional evaluation of whether the regulation furthers a substantial or important government interest. *See Burk*, 365 F.3d at 1251.

57. *See First Vagabonds I*, 578 F. Supp. 2d at 1359.

58. *Id.*; *see also Bartnicki v. Vopper*, 532 U.S. 514, 522 (2001) ("All three members of the panel agreed with the petitioners and the Government that the federal and Pennsylvania wiretapping statutes are 'content-neutral' and therefore subject to 'intermediate scrutiny'").

59. *Id.* at 1359 ("Accordingly, the Court finds that the Ordinance is content-neutral and must now determine whether the Ordinance is adequately supported by an important governmental interest.").

60. *See id.* at 1360.

61. *See id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

when they arrived.”<sup>66</sup> The court found the “rotating parks” rationale behind the Ordinance unpersuasive; even assuming that a littering problem existed, the regulation would only distribute the garbage among different parks, rather than decrease it.<sup>67</sup>

Finally, the court examined the City’s evidence that its park system was being overused—evidence that, once more, the court found lacking.<sup>68</sup> Lisa Early, the City’s Director of Families, Parks and Recreations, testified that between 2005 and 2007, her department observed an “overall increase” in the use of the park system.<sup>69</sup> But the City not only failed to connect the overall rise in use with the food-sharing events, it also failed to offer “any credible evidence of overuse.”<sup>70</sup> Indeed, the court noted that the Ordinance did nothing to limit the size of groups once they received permits and therefore that it would do nothing to prevent “twenty-five different groups from receiving permits to hold large group feedings at the same time, on a single day, and at the same park.”<sup>71</sup> Thus, the court concluded that the Ordinance failed to address overuse.<sup>72</sup>

The district court found that these three factual findings completely undermined the City’s rationale for the restrictions.<sup>73</sup> The court therefore concluded that without a rational basis, the Ordinance was an unconstitutional infringement on free speech, and thus, the court permanently enjoined the City from enforcing it.<sup>74</sup> The City appealed the injunction.<sup>75</sup>

A three-judge panel of the Eleventh Circuit reversed 2–1 in favor of the City, finding that OFNB’s conduct was not expressive and vacating the injunction.<sup>76</sup> Judge Rosemary Barkett vehemently dissented.<sup>77</sup> In part because of this vigorous dissent, the Eleventh Circuit accepted plaintiffs’ petition for a rehearing en banc.<sup>78</sup>

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66. *See id.* at 1360 (citing Transcript of Record at 197–98).

67. *Id.* at 1360.

68. *See id.* (“Finally, as to the City’s desire to prevent crowding, there is no evidence that the parks in the GDPD are being overused.”).

69. *Id.* at n.11 (citing Transcript of Record at 337, 344, 349).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 1361.

74. *Id.*

75. *See* *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds II)*, 610 F.3d 1274, 1281–82 (11th Cir. 2008), *reh’g en banc granted, opinion vacated*, 616 F.3d 1229 (11th Cir. 2010), *opinion reinstated in part, aff’d in part, vacated in part, rev’d in part*, 638 F.3d 756 (11th Cir. 2011).

76. *Id.* at 1285, 1292.

77. *Id.* at 1294 (Barkett, J., dissenting).

78. *See* *First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds III)*, 638 F.3d 756, 763 (11th Cir. 2011).

Nevertheless, the Eleventh Circuit, sitting en banc, vacated the permanent injunction and reinstated part of the panel opinion.<sup>79</sup> The court found that the Ordinance as applied was a reasonable time, place, or manner restriction and a valid regulation of expressive conduct, and it concluded that the Ordinance did, in fact, have a rational basis after all—namely, mitigating the burden on the park system.<sup>80</sup> Thus, the Eleventh Circuit silently reversed the district court’s finding of fact that the plaintiffs’ activities placed no burden on parks,<sup>81</sup> a judicial sleight-of-hand that will now be examined.

In its brief opinion, devoid of a dissent, the Eleventh Circuit en banc reversed the district court’s finding without even deciding the disputed question of whether OFNB’s feeding of homeless persons was expressive conduct.<sup>82</sup> Instead, the Court concluded that, even assuming that the food-sharing activities were protected expressive conduct, the Ordinance was still constitutional.<sup>83</sup> It accomplished this feat by finding, on its own, that the City *did* have a substantial interest at stake—mitigating the parks’ overuse.<sup>84</sup> This decision directly contradicted the district court’s express finding that there was no overuse of the parks and that the Ordinance would not have ameliorated overuse even if it had existed.<sup>85</sup> The circuit court never explicitly stated its basis for rejecting the district court’s finding and went so far as to opine that the district court “failed to explain why sharing the burden of large group feedings among a larger group of parks and neighborhoods is not a substantial government interest.”<sup>86</sup> And yet the Eleventh Circuit decided for itself, without explanation, that ameliorating overuse in this manner constituted a substantial interest of the City.<sup>87</sup>

The district court in the instant case found that the facially content-neutral regulation, which placed a burden on free speech, failed to serve a single interest asserted by the City.<sup>88</sup> The Eleventh Circuit’s contradictory finding—that the Ordinance’s purported interest in ameliorating overuse of

79. *Id.*

80. *See id.* at 762.

81. *See First Vagabonds Church of God v. City of Orlando, Fla. (First Vagabonds I)*, 578 F. Supp. 2d 1353, 1360 (M.D. Fla. 2008).

82. “We assume, without deciding, that the feeding of homeless persons by Orlando Food Not Bombs is expressive conduct protected by the First Amendment, but we uphold the ordinance . . . .” *First Vagabonds III*, 638 F.3d 756, 758 (11th Cir. 2011).

83. *See id.*

84. *See id.* at 763.

85. *See First Vagabonds I*, 578 F. Supp. 2d at 1360, 1361 (“Finally, as to the City’s desire to prevent crowding, there is no evidence that the parks in the [Greater Downtown Park District] are being overused . . . [i]n sum, there is no evidence that the Ordinance furthers a substantial governmental interest.”).

86. *First Vagabonds III*, 638 F.3d at 762.

87. *See id.* at 763.

88. *See supra* notes 59–74 and accompanying text.

the park system was indeed substantial—was totally outcome-determinative; the Court turned the question of overuse into an issue of constitutional fact subject to de novo review. It thereafter used the constitutional-fact doctrine to re-decide a factual issue upon which the case turns. Unfortunately, in doing so, the court also reimagined the doctrine in a way that endangers free speech and runs contrary to the doctrine's original intent.

The Eleventh Circuit's transformation of the constitutional-fact doctrine from a means to protect free speech into a justification for appellate courts to interfere with factual findings heralds a troubled future for civil liberties in the Eleventh Circuit. The Supreme Court must clarify its narrow mission. If appellate courts such as the Eleventh Circuit continue to misuse this doctrine to limit First Amendment protections, the right to free speech in this country will inevitably continue to weaken.