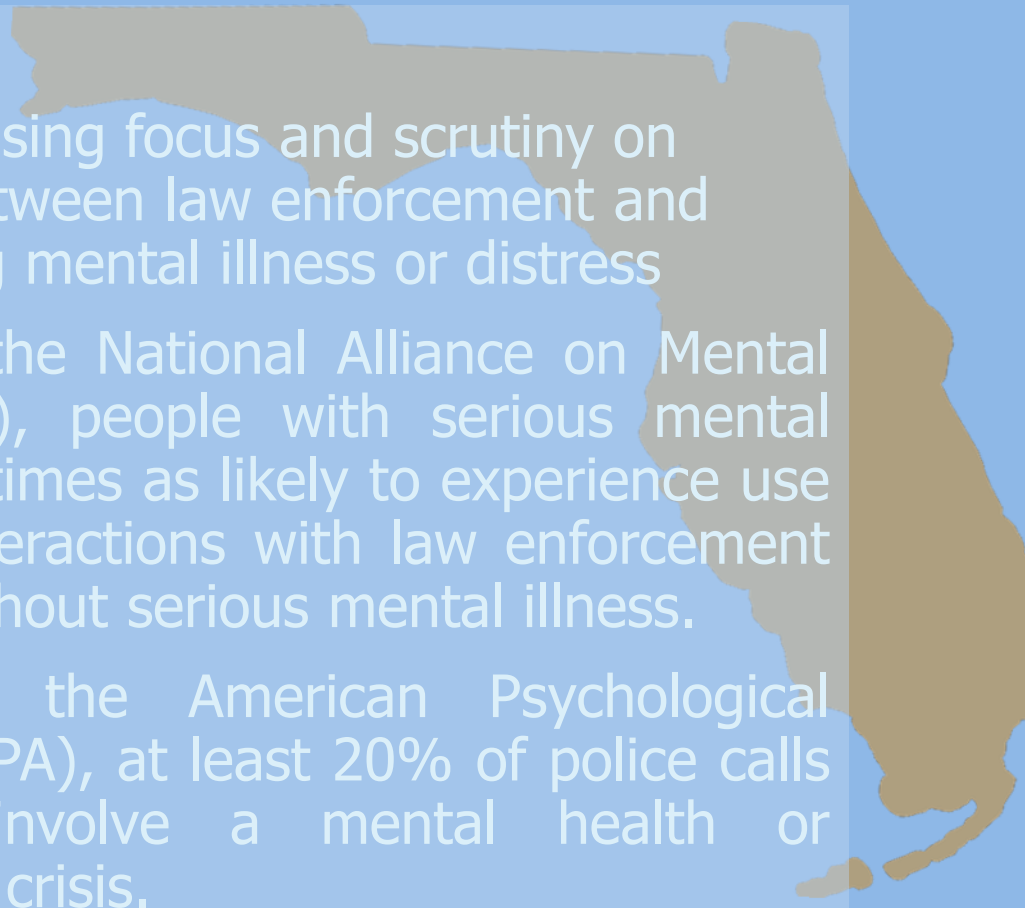




# LEGAL TRENDS IN LAW ENFORCEMENT

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# **LAW ENFORCEMENT ENCOUNTERS AND USE OF FORCE WITH PERSONS IN MENTAL DISTRESS OR CRISIS UNDER THE FOURTH AMENDMENT**

- There is increasing focus and scrutiny on encounters between law enforcement and those suffering mental illness or distress
  - According to the National Alliance on Mental Illness (NAMI), people with serious mental illness are 10 times as likely to experience use of force in interactions with law enforcement than those without serious mental illness.
  - According to the American Psychological Association (APA), at least 20% of police calls for service involve a mental health or substance use crisis.
  - However, although law enforcement officers often do not know whether a person posing a threat is mentally ill or in mental distress, law enforcement officers nevertheless cannot disregard deadly threats because someone is in a mental health crisis.
- 

# Use of Force Fourth Amendment “Objective Reasonableness Test”

- Officer’s actions must be objectively reasonable in light of the facts and circumstances confronting them
- Analysis must account for the totality of circumstances
- Analysis looks only to facts that were knowable to the officer
- The use of force must be judged from the perspective of a reasonable officer on the scene at the time of the use of force, and not with 20/20 hindsight

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)

# Graham v. Connor Three-Part Test

When analyzing the “totality of circumstances” and to survive Fourth Amendment scrutiny, the Court in *Graham* provides the following elements to consider:

1. The severity of the crime at issue.
2. Whether the suspect poses an immediate threat to the safety of the officers or others.
3. Whether he is actively resisting arrest or attempting to evade arrest by flight.

The Eleventh Circuit also “considers the need for application of force, the relationship between the need and amount of force used, and the extent of the injury inflicted by the arresting officer.” Ingram v. Kubik, 30 F.4<sup>th</sup> 1241 (11<sup>th</sup> Cir. 2022)

Although the Graham v. Connor test is still the applicable standard, some courts have looked beyond the traditional analysis, and have articulated additional factors when analyzing use of force with individuals suffering from mental health issues and distress.

Ingram v. Kubik, 30 F.4th 1241 (11<sup>th</sup> Cir. 2022): “We apply the ‘Graham framework’ to mental health seizures even though they ‘do [] not involve a criminal arrest.’”

Roell v. Hamilton County, 870 F.3d 471 (6<sup>th</sup> Cir. 2017):

- “The totality of the circumstances includes ‘the fact that at the time of the . . . struggle, the defendant officers had reason to believe that [the suspect] was either on drugs or mentally unstable.’”
- “The deputies were therefore required to take into account [the suspect’s] diminished capacity before using force to restrain him” (citing Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6<sup>th</sup> Cir. 2004)).

Palma v. Johns, 27 F.4<sup>th</sup> 419 (6<sup>th</sup> Cir. 2022):

"However, the Graham factors do not easily map onto cases like this one, where [the officer] was not responding to an ongoing crime and Palma never physically resisted arrest or tried to flee. Recognizing this problem, we have articulated additional factors to consider when officers respond to a medical or mental health emergency: (1) whether the person was experiencing a mental health or medical emergency, and whether that emergency created "an immediate threat of serious harm" to themselves or others; (2) whether "some degree of force [was] reasonably necessary to ameliorate the immediate threat;" and (3) whether "the force used [was] more than reasonably necessary under the circumstances."

(quoting Estate of Hill v. Miracle, 853 F.3d 306, 314 (6<sup>th</sup> Cir. 2017))  
(internal citations omitted).

## Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892 (4<sup>th</sup> Cir. 2016):

- “[A]s the subject of an involuntary commitment order . . . Armstrong was necessarily considered “mentally ill . . . [and his] mental health was thus one of the ‘facts and circumstances’ that ‘a reasonable officer on the scene’ would ascertain.
- “The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense” (quoting Bryan v. MacPherson, 630 F.3d 805, 829 (9<sup>th</sup> Cir. 2010)).
- “[T]he use of force that may be justified by” the government's interest in seizing a mentally ill person, therefore, “differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community.” Id.
- “Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But ‘in some circumstances at least,’ it means that ***‘increasing the use of force may . . . exacerbate the situation’***”

## Estate of Armstrong, cont.'d

- Accordingly, "the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis." And even when this ideal course is not feasible, officers who encounter an unarmed and minimally threatening individual who is "exhibit[ing] conspicuous signs that he [i]s mentally unstable" must "***de-escalate the situation and adjust the application of force downward***" (quoting Martin v. City of Broadview Heights, 712 F.3d 951, 962 (6<sup>th</sup> Cir. 2013) (emphasis added)).



# Resistance v. Threat

- “The subject of a seizure does not create such a risk simply because he is doing something that can be characterized as resistance -- even when that resistance includes physically preventing an officer's manipulations of his body. Erratic behavior and mental illness do not necessarily create a safety risk either. To the contrary, when a seizure is intended solely to prevent a mentally ill individual from harming himself, the officer effecting the seizure has a lessened interest in deploying potentially harmful force.”

Estate of Armstrong, 810 F.3d at 909-10.

# FAILURE TO TRAIN / DELIBERATE INDIFFERENCE / POLICY OR CUSTOM

C.P. v. Collier County, 2017 U.S. Dist. LEXIS 159815 (M.D. Fla. 2017); 2017 WL 1952402

- Suspect autistic and developmentally disabled, but this was unknown to officers at time of encounter.
- Sheriff's Office started training its deputies on interacting with individuals with mental illness or disability in 2006.
- Both deputies at issue had not received such training as of 2013.
- "The fact that the Sheriff's Office recognized that its deputies should be trained is enough to overcome the usual hurdle in §1983 failure-to-train cases that the entity be on notice that a lack of training could cause constitutional violations."
- "A reasonable jury could find that the Sheriff was on notice that . . . deputies who had not been trained to deal with individuals with mental disabilities might mistake a lack of eye contact and nervousness as signs of guilt rather than symptoms of autism."

# TRAINING cont'd

## Furtado v. Law, 51 So.3d 1269 (Fla. 4<sup>th</sup> DCA).

- Decedent had tried to commit suicide a few days earlier, had a long history of depression, kept knives at her side for protection, and was suffering from delusional paranoia.
- “The Sheriff’s Office provides specialized classes each year to address the circumstances presented by the mentally ill, and to provide needed tools to handle encounters with them. These classes are part of the Palm Beach County Crisis Intervention Team Program (CIT). The CIT addresses suicide prevention, dealing with suicidal persons and persons who pose a threat to themselves or others, communicating with the mentally ill, and techniques for calming mentally ill persons. Although participation is voluntary, more than 200 deputies in the Sheriff’s Office have been trained as CIT officers, including the lead deputy in this case.”
- “The Sheriff presented evidence that crisis intervention training was available to the deputies on a voluntary basis and this deputy had taken the training. While tragic, this was an isolated incident. There was no showing of multiple incidents that would place the Sheriff on notice of a need for more training. Without proving deliberate indifference, the *section 1983* claim against the Sheriff cannot be sustained.”



# FIRST AMENDMENT AUDITORS



# Topics for Discussion



1. First Amendment
2. First Amendment Auditors
3. Public v. Private Property
4. Seizure of Media
5. Public Records

# First Amendment



The government may impose reasonable time, place, and manner restrictions, as long as the restrictions are:

- Content neutral
- Narrowly tailored to serve a significant governmental interest
- Leave other channels of communication

# First Amendment



## First Amendment and Public Officials

- 1st Amendment protects a citizens' right to gather information about what public officials do in the course and scope of their employment and to record matters of public interest. *Dunn v. Ft. Valley*, 464 F.Supp.3d 1347 (M.D. Ga. 2020)
- This is commonly known as “public auditing”.
- On-duty LEOs are generally considered to be public officials when engaged in their duties and therefore have no reasonable expectation of privacy.
- Courts have held that “filming the police contributes to the public’s ability to hold police accountable, ensure that the police are not abusing their power, and make informed decisions about police policy”. *Turner v. Driver*, 848 F.3d 678 (5th Cir. 2017)



# First Amendment Auditors



Who

What

Why

Where

# First Amendment Auditors



## Who

- Social movement of citizens to monitor government

## What

- Take and publish photographs, videos, and live stream interactions with governmental officials

## Why

- Test the protection of their constitutional rights (pass/fail test)
- Promote transparency and open government

# First Amendment Auditors



## Where

- Public property/governmental buildings
- Pass/Fail test
  - Pass
    - Protection of citizens' rights
  - Fail
    - When auditor is prevented from recording, provokes a reaction, or the official say something inaccurate or embarrassing.

# First Amendment Auditors



## Results of Failing the Test

- Video will be posted on various social media sites and new media
- Humiliate the official and/or agency
- Gain attention, support, and contributions
- Civil suit



# First Amendment Auditors



## Limitations

### Auditors cannot:

- Place themselves or others in peril
- Trespass on private property or cordoned off public property (Security)
- Enter a crime scene
- Materially interfere with police activities

# First Amendment Auditors



## Material Interference

- Must materially inhibit, obstruct, delay, or otherwise negatively affect an operation
- Cannot be based solely on the act of recording
- When interference exists, officers must direct the citizen to another location within reasonable distance (Reas. Time, Place and Manner)

# First Amendment Auditors



## Reasonable Distance - Perimeters

- Depends on the situation
  - Hostage/Barricaded subject
  - Traffic stop for civil infraction
  - Arrest
- Restriction must apply to everyone



# First Amendment Auditors



F.S. 843.31 Approaching a first responder with specific intent after warning (2nd Degree Misdemeanor)

- It is unlawful for a person, after receiving a verbal warning not to approach from a person he or she knows or reasonably should know is a first responder, who is engaged in the lawful performance of a legal duty, to knowingly and willfully violate such warning and approach or remain within 25 feet of the first responder with the intent to:
  1. Impede or interfere with the first responder's ability to perform such duty;
  2. Threaten the first responder with physical harm; or
  3. Harass the first responder.

# First Amendment Auditors



*Waite v. State*, 2024 Fla. App. Lexis 6377 (Fla. 5<sup>th</sup> DCA, 8/19/24)

- Waite had a long standing dispute with Citrus County SO over property boundaries.
- Called 911 to report CCSO personnel trespassing on his property
- Sgt. Call Waite and Waite secretly records conversation
- Sent copy of recording to SO requesting IA investigation
- Search warrant reveals multiple recordings
- 5th DCA examined F.S. 934.02(2) held officers had no REP in calls with citizens in the line of duty
- Court turned to public auditor cases

# First Amendment Auditors



## Public Property

- Location that is accessible and open to the public
- Location where an individual has a legal right to be present
- Subject to reasonable time, place and manner restrictions
  - Examples:
    - Public portions of government buildings
    - Streets and sidewalks
    - Parks

# First Amendment Auditors



## Quasi-public locations:

- Subject to property owners' restrictions
  - Examples:
    - Businesses
    - Shopping centers

# First Amendment Auditors



## Protecting Privacy

- Officers may have to take measures to protect victims and witnesses from Public Auditors
  - Shielding victims and witnesses
  - Moving victims and witnesses to a more private area

# First Amendment Auditors



## Seizure of Media

- Seizure of a recording device is subject to the 4th amendment
- If no arrest, warrant required to seize device
- Warrant exceptions (exigent circumstances) may be applicable
  - Examples:
    - PC to believe that a serious crime was committed
    - Good faith belief that the device has evidence of the crime
    - Good faith belief that evidence will be lost or destroyed
  - or
  - objectively reasonable that the recording could prevent imminent death or serious bodily injury
- Search incident to lawful arrest does not authorize a search of device
  - Can take the phone
- Warrant required to search device

Los Angeles  
7:43 AM PT



**VIDEO: U.S. DEPUTY MARSHAL SMASHES CELLPHONE**

**CNN**

7:43 AMPT

NEWSROOM

# First Amendment Auditors



*Ford v. Boynton Beach*, 323 So. 3d 215 (Fla. 4<sup>th</sup> DCA 2021)

- In 2009 Ofc detained juvenile for trespassing and called his mother (Ford)
- Ford came to scene with a video camera and recorded LEO's with her son and asked questions
- Ofc told her she needed permission to record and later asked her to turn camera off
- Ofc took camera and arrested Ford for obstruction and wiretap violation (SAO did not file)
- Ford sued for false arrest/civil rights violation
- In May 2021, summary judgment granted for City, but Court reversed in August 2021, holding that Ford's words and actions did not obstruct and that Ofcs had no REP at arrest scene



# BODY WORN CAMERAS

# BODY WORN CAMERAS



- Seven states require statewide use of BWC (Some pending funding)
  - Colorado, Connecticut, Illinois, Maryland, New Jersey, New Mexico and South Carolina.

National Conference of State Legislatures, 2024

# BODY WORN CAMERAS



- 89% of Americans support law enforcement's use of BWC
- 68% of law enforcement officers favor the use of BWC

(John Ortiz Smykla et al., "Police Body-Worn Cameras: Perceptions of Law Enforcement Leadership." *American Journal of Criminal Justice* 41 (2016): 424-443)

# BODY WORN CAMERAS



- PROS

- Training
- Transparency and Accountability
- Evidence Collection and Additional Documentation of Citizen Contacts
- Reduced Citizen Complaints
- Reduces Litigation and Liability

# BODY WORN CAMERAS



## CONS

- Cost for equipment, maintenance and storage
- Privacy
  - officers, victims, witnesses and citizens
- Reliability
  - Only works when it is recording
  - Only sees what it is pointed at (two dimensional) (chest mount v. glasses or visor)
  - Video resolution
  - Lighting
- Decreases officer safety (assaults on officers increased 14% when BWC Present) (Barak Ariel, et al., "*Wearing Body Cameras Increases Assaults against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment*," sagepub.com, 2016)
- Officers Reluctance to Act (Stephen Henderson, "*Fourth Amendment Time Machines (and What They Might Say about Police Body Cameras)*," upenn.edu, 2016)

# BODY WORN CAMERAS



## F.S. 943.1718

- Mandates agencies to “establish policies and procedures addressing the proper use, maintenance, and storage of body cameras and the data recorded by body cameras”.
- Provides minimum guidelines for agency policy and procedures.

# BODY WORN CAMERAS



## F.S. 943.1718 - Minimum Guidelines

- Proper use, maintenance, and storage
- Any limitations on which officers are permitted to wear BWC
- Any limitations on activities officers may wear BWC
- Permitting officers using BWC to review footage before writing a report or giving a statement
- Proper storage, retention, and release of BWC recordings
- All personnel who “wear, use, maintain, or store” BWC data must be trained on the agency policy and procedure
- Periodic review of practices to ensure compliance

# BODY WORN CAMERAS



## Policy Considerations

- When to Record?
  - All citizen contacts
    - Citizen does not want to be recorded
  - Likely to take law enforcement action
  - All contacts with victims, witnesses, suspects
    - Victim or witness do not want to be recorded



# BODY WORN CAMERAS



## Policy Considerations – When Activation Should be Mandated?

- Arrests
- Issuance of summons or citations
- Pursuits (vehicular and foot)
- Searches (consent)
- Dealing with person acting erratically
- Encounter where individual becomes hostile after initial contact
- Any enforcement/investigative contact or detention, including voluntary
- Motor vehicle stops (stranded motorist?)
- Officer initiated activity (when communications is notified?)
- Documenting injury
- When requested by an individual

# BODY WORN CAMERAS



## Policy Considerations

- When Can a Recording be Stopped?
  - Event has ended or officer clears scene
  - At request of victim, witness or suspect
  - Communications with fellow officers, Informants or Strategy/Tactics
  - Medical or mental health facilities
  - Inside residences
  - Places of worship, shelters, or other sensitive locations
  - Tactical responses
  - Community policing activities
  - Officer discretion
  - Location where individual has REP

# BODY WORN CAMERAS



## Policy Considerations – F.S. 119.071(2)(I)(2)

- BWC recording confidential and exempt:
  - Interior of private residence
  - Interior of health care, mental health, or social service facility
  - Place that a reasonable person would expect to be private
- Does not prohibit recording just dissemination
  - Should officer record in these locations

# BODY WORN CAMERAS



## Policy Considerations

- Notifying individuals that they are being recorded?
  - F.S. 934.02(2)(a)3.(c)
    - One party consent if at the direction of a LEO to obtain evidence
    - Is there a REP if conversation in a public place
- Agency personnel access to BWC footage
  - Command staff
  - IA
  - Supervisors
  - Other officers or personnel
    - Administrative investigations, training, report writing, court preparation, idle curiosity

# BODY WORN CAMERAS



## Policy Considerations

- Storage and Retention
  - In-house servers (CJIS)
  - Vendor (CJIS)
  - State record retention schedules v. agency schedules
    - Is there an agency need to retain longer than state schedules
    - F.S. 119.071(2)(1)(5) requires retention for at least 90 days

# BODY WORN CAMERAS



## Policy Considerations

- Release of Recordings
  - F.S. Ch. 119 [F.S. 119.071(2)(1)]
  - Designated personnel trained on system and public records laws
  - Agency need to disseminate confidential data in critical situations
- Buffering
  - Timeframe
- Negotiating with Police Union
  - Decision to implement BWC not subject to bargaining
  - Policy and procedure relating to training, the use of footage for evaluations and discipline and how the footage can be used against the officer in subsequent proceedings is subject to bargaining.
    - *Jacksonville Consolidated Lodge 5-30, FOP v. City of Jacksonville*, 44 FPER ¶129 (Oct. 18, 2017).

# BODY WORN CAMERAS



## Resources

- *Body-Worn Cameras*, International Association of Chiefs of Police Law Enforcement Policy Center, April 2009
- *Fort Lauderdale Police Department Body Worn Camera Policy 2020*



UNHOUSED INDIVIDUALS  
PANHANDLING/SOLICITATION  
OUTDOOR FEEDINGS



# PANHANDLING/SOLICITATION



- Cosac Foundation, Inc. v. City of Pembroke Pines, 2013 U.S. Dist LEXIS 165598, \*1 (S.D. Fla. Sept. 21, 2013) (citing Village of Schumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (“[p]rior authorities, therefore clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests – communications of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment”))
- Smith v. City of Fort Lauderdale, 177 F.3d 954 (11<sup>th</sup> Cir.), cert. denied, 528 U.S. 966, 120 S.Ct. 402, 145 L.Ed.2d 313 (1999) (“[l]ike other charitable solicitation, begging is speech entitled to First Amendment Protection”)
- Messina v. City of Fort Lauderdale, 2024 U.S. Dist. LEXIS 14120, (S.D. Fla. Jan. 26, 2024)(Messina II) (“panhandling is protected speech under the First Amendment”)
- Messina v. City of Fort Lauderdale, 546 F.Supp. 3d 1227 (S.D. Fla. 2021) (Messina I)
- Reynolds v. Middleton, 779 F.3d 222 (4<sup>th</sup> Cir. 2015) (“[t]here is no question that panhandling and solicitation of charitable contributions are protected speech”)
- Homeless Helping Homeless, Inc. v. City of Tampa, 2016 U.S. Dist. LEXIS 103204 (M.D. Fla 2016) (“soliciting ‘donations or payment’ is a form of speech protected by the First Amendment”)

# PANHANDLING/SOLICITATION



- Reed v. Town of Gilbert, 576 U.S. 155 (2015) (Striking down a sign ordinance) (Speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter)
- Courts have applied Reed to panhandling regulations.
  - In discussing Reed, the District Court in Homeless Helping Homeless opined that “an opinion that resolves a dispute about parishioners temporary planting some small signs directing people to church service is written in such sweeping terms that the opinion appears to govern a dispute about ordinance that regulates face to face demands for money from casual passers-by”. Id. at 2.

# PANHANDLING/SOLICITATION

## How to Regulate it?



- Ordinances prohibiting any type of solicitation in roadway
  - Narrowly tailored to serve a significant government interest and leave alternative channels of communication
  - Need Empirical data pre-enactment to justify regulation
- Don't call it Panhandling
- Regulate the negative impacts of panhandling
  - Pedestrian traffic laws [F.S. 316.130]
  - Obstruction of public streets, highways and roads [F.S. 316.2045]
  - Failure to obey a lawful command [F.S. 316.072(3)]
  - Assault
  - Ordinances
    - Standing/walking on narrow medians
- Selective Enforcement

# OUTDOOR FEEDING



- Florida Food Not Bombs v. City of Fort Lauderdale, 11 F.4<sup>th</sup> 166 (11<sup>th</sup> Cir. 2021)
- Florida Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11<sup>th</sup> Cir. 2018)
- First Vagabonds Church of God v City of Orlando, 638 F.3d 756 (11<sup>th</sup> Cir. 2011)
- First Vagabonds Church of God v City of Orlando, 610 F.3d 1274 (11<sup>th</sup> Cir. 2010), rehearing *en banc* granted, opinion vacated by First Vagabonds Church of God v. City of Orlando, 616 F.3d 1229 (11<sup>th</sup> Cir. 2010), opinion reinstated in part by, First Vagabonds Church of God, 638 F.3d at 763.
- Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, (9<sup>th</sup> Cir. 2006)
- Seeds of Peace Collective v. City of Pittsburg, 2010 WL 2165365, \*6 (W.D. Pa. May 26, 2010), vacated in part, 453 Fed.Appx. 211 (3<sup>rd</sup> Cir. 2011)

# OUTDOOR FEEDING



- First Vagabonds & OFNB v. City of Orlando 610 F.3d 1274 & 638 F.3d 756 (Rehearing en banc) (11<sup>th</sup> Cir.)
  - Orlando Ordinance limited number of feedings at parks in a district.
  - First Vagabond Church and FNB brought suit alleging a violation of FRFRA, First and Fourteenth Amendments (vagueness) and an Equal Protection claim.
  - On rehearing, the Court citing to Clark v. Cmty for Creative Non-Violence, 468 U.S. 288, (1984) , assumed the speech was expressive and held that the City's regulation was a reasonable time. place, and manner regulation.
    - City had a substantial interest in managing and preserving its parks by spreading the feedings throughout the park system.

# OUTDOOR FEEDING



- First Vagabonds & OFNB v. City of Orlando

- 14<sup>th</sup> Amend Vagueness claim: Pl claimed that officers misunderstood the ordinance and were misapplying it therefore it must be vague.
  - Ct held that officers' conduct was immaterial and that the plain language of the ordinance was clear.
  - EP Claim Pl argued that since the ord exempted city contractors and licensees it violated EP.
  - Ct found that met rational basis test because city could effectively regulate these entities to ensure protection of the park.
- FRFRA Church argued that congregation was primarily homeless and the regulation would prevent their congregation from attending services due to a lack of ability to communicate the location of services.
  - Ct held that regulation did not prohibit exercise of religion, but merely was an inconvenience. Ct also found that Church could hold services all at one park outside the district and then no communication issue.



# THANK YOU

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