**IN THE COURT OF COMMON PLEAS**
**LORAIN COUNTY, OHIO**

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| **JACQUELINE STOWERS,** ***et al.,*** | ) | **Case No. 08 CV 159968** |
| **Plaintiffs,** | ) | |
| **-VS-** | ) | **Hon. James M. Burge** |
| **OHIO DEPARTMENT OF AGRICULTURE,** ***et al.*****,** | ) | **PLAINTIFFS' COMBINED MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** |
| **Defendants.** | ) | |

Now come Plaintiffs, by and through counsel, and respectfully request that this Court enter judgment in its favor on its request for a declaratory and injunctive ruling that Plaintiff's activities do not constitute a "Retail Food Establishment," and that Ohio's Retail Food Establishment Law is unconstitutional as applied to Plaintiffs.

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## I. FACTS

### A. Background

Defendants seek to prevent Ohioans like John and Jackie Stowers from voluntarily cooperating with their neighbors to acquire agricultural products that are not otherwise as readily available. Their chosen vehicle for accomplishing this task is an audaciously-broad application of the "retail food establishment" designation.

Plaintiffs John and Jacqueline Stowers maintain a small, private membership-oriented organic food cooperative, named Manna Storehouse, in Lagrange, Ohio. John and Jackie have been married for 30 years and have eight children, ranging in age from six to 29.[1] All of these children, other than John and Jackie's oldest son, live with them at their rural home on State Route 303, outside of LaGrange, Ohio in Lorain County. John and Jackie's oldest son Chad, his wife Katie, and their four children, also live at the residence.[2] John and Jackie home educate their children, and Chad and Katie do the same.[3]

The Stowers family adheres to a lifestyle consisting of religiosity, self sufficiency, and organic food. They observe the Sabbath. They raise their own lamb, make most of their food from scratch, home school their children, and even make some of their own clothes.[4] The entire family adheres to a relatively strict diet of organic food, i.e. grass-fed and Pasteur-raised animals and organic grains and

[1] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

[2] Id.

[3] Id.

[4] Id.

produce.[5] In addition John and Chad work outside of the home, both in artisan trades.[6] The Stowers two eldest sons are also enlisted in the United States Navy.[7]

**B. Manna Storehouse**

John and Jackie started Manna Storehouse in 2001. At the advice of friends of the family and food suppliers, they registered Manna Storehouse with the secretary of state as Limited Liability Company. Lacking business experience and acumen, but similarly not knowing how to characterize the activities of Manna Storehouse, they noted on their filing, at the advice of a friend who was an accountant, that Manna was both a cooperative and retail.[8]

However, Manna Storehouse is anything but a typical retail store. Manna is effectively located in two rooms that are separate from but connected to John and Jackie's residence.[9] John and Jackie consider Manna to be a cooperative, rather than a typical commercial operation.[10] They and Manna's members share an interest in supporting locally-grown organic food over large-scale commercial farming. They and Manna's members also share an interest in learning about and obtaining for their families what they fervently believe to be healthy and responsibly-grown food. [11]

John and Jackie visit each food producer to ensure that their production, processing, storage and manufacturing processes are consistent with the philosophy of Manna Storehouse, i.e., sustainable agriculture that promotes the health of humans, the environment and animals. If a producer is

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[5] Id.

[6] Id.

[7] Id.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

acceptable to John and Jackie, then Manna Storehouse members begin to acquire food from that produce.[12]

**i. Manna's Private Nature.**

No person can simply step off of Lagrange Road and into the storehouse to acquire food. First, Manna only distributes food to its members. And in fact, although it has occasionally happened, it is unlikely that one would become a member of Manna Storehouse, or even find out about its existence, unless he or she has a friend or family member who is already a member.[13] This is because Manna does not advertise to the public.[14]

To be a member of Manna Storehouse, one must (1) fill out an application; (2) review and approve of Manna Storehouse facilities, i.e. where the food is stored until pickup; (3) sit with Jackie Stowers for an interview that may be as long as several hours; and (4) pay an annual $10 membership fee.[15] The membership application inquires into issues beyond what a normal grocery store would address, such as viewpoints about agriculture and the person's personal and family life.[16] One of the reasons for the stringent interview and membership criterion is that members come to the Stowers personal home, and are around John and Jackie and their children.[17] Accordingly, when John and Jackie cease to view a member as "truthful and honest," they address the situation, and sometimes revoke the membership, or agree that the member will leave the group.[18]

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12 Id.

13 Id.

14 Id.

15 Id.

16 Id.

17 Id.

18 Id.

Although Manna Storehouse maintains a password-protected website to facilitate members' ordering, it does not advertise to the public in any way. The only outward reference to its existence is a small sign next to the door to Manna Storehouse, indicating, truthfully, that Manna Storehouse is "a PRIVATE, not Public, Business."[19] The sign further indicates that Manna storehouse has some limited hours, but is otherwise open to members by appointment only.[20]

And indeed, Manna does not operate within the typical parameters of a commercial business. Manna is often closed during what would be considered normal business hours, and is closed during all Jewish holidays.[21] Since Manna is part of the Stowers home, nobody is permitted or expected to simply enter the storehouse without first knocking or ringing the door bell (Jackie was shocked when Department of Agriculture agent William Lesho, acting under the cover of a false identity, entered the storehouse portion of the home).[22]

**ii. Manna's cooperative nature.**

Once a member, one still cannot simply walk into Manna and purchase food off of the shelf. Although Defendants appear poised to derisively label Manna as nothing more than a small scale Sam's Club (a membership is required to shop at Sam's Club), its plain to any ordinary observe that Manna bears no resemblance, in kind or magnitude, to Sam's Club.

First, Manna's activities are far more limited than that of a commercial grocery store such as Sam's club: John and Jackie (1) pick up and transports food from local farmers; and (2) store the food for no more than 48 hours until Manna members come and pick it up.[23]

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19 Id., see also Exhibit A, Picture of Manna Storehouse door.

20 Id.

21 Id.

22 Id.

23 Id.

Unlike at Sam's Club or elsewhere, the Stowers only transact with truthful and honest people; actually show/discuss their freezers, refrigerators, other storage methods with the members prior to the members joining Manna, and members "order together," work to create an order for a case/bulk amount of something by each committing to take and pay for a certain amount of that case/bulk amount. The members actually control what food comes through Manna Storehouse. Sam's Club, on the other hand, presumably selects food that will be the most profitable for it to sell. Manna does no such thing.

Moreover, Manna's members do not rely on Manna for safety or labeling, since they have sought out, and selected, the food for themselves. Jackie always discloses to potential members that Manna Storehouse is not licensed, regulated, or inspected by any government agency. Unsurprisingly, the members don't seem to mind - - in fact, they tend agree with this position.[24]

Once one becomes a member of Manna Storehouse, he or she has access to acquiring food along with other Manna members. In doing so, costs are not established in a manner that typically would be, or should be, considered "retail." The prices listed on the website are not set by John, Jackie, or Manna. Instead, they reflect the prices set by the particular supplier of the food.[25] While Manna does charge a fee, this fee is to cover costs associated with filling the order: the gasoline and wear and tear on vehicles necessary to pick up the food for the members, the electricity necessary to run the freezers that keeps the food cold, etc.[26]

The "ordering" process works as follows: (1) orders are due by Monday nights; (2) members place their orders for items; and if a sufficient amount of a particular item has been ordered; (3) the items are stored at Manna until they are pickup up on Monday or Tuesday of the next week; (4)

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[24] Id.

[25] Id.

[26] Id.

members pay John or Jackie for the items at the time they pick up, and John or Jackie sends this money to the appropriate supplier.[27]

Manna allows members combine their resources to obtain items that are typically only sold in bulk. Members do this through a "split." A quintessential example of a split is where members wish to acquire beef from a grass-fed cow. Rather than one family having to pay for the entire cow, pay the farmer to slaughter the entire cow, and then store the entire cow in its personal freezer, the split method allows member families to purchase just a portion of that cow - - a cow that would not otherwise be slaughtered on those particular terms.[28] This same principle is applied to certain types of flour, nuts, rice and coffee beans, which are also sometimes only available in amount much larger than the average family would wish to purchase.[29] For example, through a split, a member may acquire ten pounds of flour even though that particular type of flour is sold in nothing smaller than a 50 pound bags.[30]

Importantly, John and Jackie do not buy and then resell items that are on the split list. Instead, they only pick up the item up if members have ordered the *entire* cow, or the *entire* 25 pound bag.[31] Otherwise, the item is not available. Put another way, the only reason any food that belongs to members is stored at Manna is because the food items have been *ordered* by the members: without the members ordering any food items, there would not be any food items belonging to the members that would be stored at Manna Storehouse.[32] In this sense, Manna Storehouse does not "sell" these items.

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27 Id.

28 Id.

29 Id.

30 Id.

31 Id.

32 Id.

### iii. Safety at Manna Storehouse.

Manna conducts this process in a safe manner. John and Jackie ensure that food items that must be refrigerated or frozen are kept at the proper temperature while (1) they are being transported (less than four hours) to Manna; and (2) they are being stored at Manna (for 24 to 48 hours).[33] John and Jackie routinely check the temperature of the refrigerators and the temperature is always between 34 and 38 degrees Fahrenheit.[34] They routinely check the temperatures of the freezers and the temperature is always between 26 and 28 degrees Fahrenheit.[35] Freezer efficacy is also observable to the naked eye, since ice is built up in the freezers so long as their temperature remains under 32 degrees Fahrenheit.[36]

These precautions are the same as what Jackie, as the head of a family household, has used to raise her own family. And they have proven to be more than sufficient to ensure the health and safety of the food during the limited time that it is in Manna's possession: there are no reported cases of Manna Storehouse food making people ill, or otherwise being unsafe.[37] Manna Storehouse is clean and safe enough that all of its members approve of it.[38] Additionally, the food is already butchered by a government licensed butcher, and processed by a government-licensed processer;[39] or acquired from an otherwise "approved" source, such as United Natural Foods (an organic food distributor), or a small farmer who could himself sell the food.[40]

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33 Id.

34 Id.

35 Id.

36 Id.

37 Id.

38 Id.

39 Id.

40 Id.

Meanwhile, members of Manna seek out Manna because it offers what they want: they know exactly what they're getting, and don't need the same type of labeling that is in grocery stores.[41] They are knowledgeable about the products they are getting, aware of any risks, and disclaim those risks.[42] All of the members have sought out the association in order to become members, and are not arms-length purchases. Members of Manna engaged in informed consent: they are shown and review the premises, including not only the room, but the inside of the freezers and refrigerators where their food is temporarily stored.[43] Members know John, Jackie, and Katie, the people responsible for acquiring and storing the food, personally, and have a level of trust and a relationship that does not and cannot exist with a commercial grocer, i.e. "retail food establishment."

Finally, unlike at a grocery store, 95 percent of food passes through Manna within a matter of hours: Manna's only role is to obtain and store the food, and most members pick up their orders of frozen/refrigerated food the same day that the food comes into Manna.[44] Manna receives orders up through Monday night, pick the food up on Sunday and Monday, and members come on Mondays and Tuesday.[45] The longest any food is at Manna is typically 48 hours.[46]

This may beg the question as to how the Stowers family profits from running Manna Storehouse. And the answer is that the family profits in the same way that its members do, but to a greater magnitude because of the greater size of their family. The Stowers, a family of *fourteen*, obtain lower prices and greater access to food through engaging in the splitting and ordering process with the

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[41] Id.

[42] Id. See membership agreements.

[43] Id.

[44] Id.

[45] Id.

[46] Id.

members of Manna.[47] Moreover, if something is left over, the family is able to keep it and consume it on their own.[48]

Despite these vast differences between Manna Storehouse and a commercial grocery store or commercial restaurant, the Department of Agriculture and Lorain County General Health District seek to impose regulations on John, Jackie and Manna that would put it out of business. Specifically, Defendants seek to characterize John, Jackie, and Manna as a "retail food establishment." Pursuant to R.C. 3717, this type of establishment needs a license. And in fact, it is a third degree misdemeanor, punishable by considerable fines and imprisonment, to operate a "retail food establishment" without a license.

To this end, on December 1, 2008, armed Lorain County Sheriff's Deputies surrounded and then aggressively raided John and Jackie's home, with guns drawn, and with the assistance and direction of the Defendants, confiscated the family's personal food, cell phones, computers, and other personal possessions. Plaintiffs only brought this action after that occurrence, asking this Court to declare, amongst other things, that (1) Manna is not a retail food establishment under the governing statute; and (2) if the governing statute were read to embrace the limited and basic activities of Manna, then that statute is unconstitutional *as applied* to John, Jackie, and Manna.

## II. ISSUES

Plaintiffs request declaratory and injunctive relief. The first issue before the Court is whether Plaintiff's private membership cooperative, Manna Storehouse ("Manna"), is a "retail food establishment." If the Court finds that Manna is not a retail food establishment, then its analysis may terminate, as it will have sufficiently determined the rights and responsibilities of the parties to this matter.

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[47] Id.

[48] Id.

If, however, this Court were to find that Manna is a Retail Food Establishment, then its analysis must continue. It must determine whether Plaintiffs may be stripped of their right to operate Manna by virtue of application of the Ohio Uniform Food Safety Act, codified collectively through R.C. 3717 and OAC 3717. More specifically, the Court must determine whether the terms of the statute and regulations may eviscerate, on one hand, Plaintiffs' fundamental rights to private property, to do business, to contract, to privacy, and to be left alone and separately, Plaintiffs' rights to Due Process and Equal Protection.

## III. SUMMARY JUDGMENT

### A. Standard

In *Harless v. Willis Day Warehousing Co.*, it was held that for summary judgment to be granted, it must appear "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence strongly construed in his favor."[49]

In moving for summary judgment "* * * the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or a material element of the nonmoving party's claim."[50] The moving party must specifically point to some evidence of the type contemplated by Civ. R. 56(C) which affirmatively demonstrates that the non-moving party has no evidence to support the non-moving party's claim. Mere conclusory assertions are not sufficient.

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[49] *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46; and *Conley-Slowinski v. Superior Spinning & Stamping Company* (1998), 128 Ohio App.3d 360, 714 N.E.2d 991. See, also, Civ.R. 56(C); and *Leibreich v. A. J. Refrigeration, Inc.,* 67 Ohio St.3d 266, 617 N.E.2d 1068.

[50] *Dresher v. Burt*, 75 Ohio St.3d 280 at 296, 1996-Ohio-107, 662 N.E.2d 264.

Once the moving party has met its burden, the non-moving party has a reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings.[51] The non-moving party must set forth "specific facts" by the means listed in Civ. R. 56(C) showing a genuine issue for trial exists. The allegations and denials in the pleadings are not sufficient for this purpose.[52]

### B. Evidence before the Court

Before the Court are the December 16, 2009 affidavits of Jackie and Katie Stowers. They establish the facts above. Plaintiffs have also submitted the Exhibit C, a packet of several pictures of the front of Manna Storehouse and the Stowers' home, Exhibit D, a packet of sample membership agreements for Manna Storehouse. Also before the Court are the deposition transcripts of Charles Kirchner and James Boddy. They address many of the regulations that would apply to Manna, concede that there is reason to believe that many exempt entities pose similar or greater risks to the public than does Manna, and acknowledge that Manna would be responsible for complying with many regulations that do not pertain to Manna's particular business.

## IV. LAW AND ANALYSIS

### A. THE ACTIVITIES OF JOHN AND JACKIE STOWERS AND MANNA STOREHOUSE DO NOT CONSTITUTE A RETAIL FOOD ESTABLISHMENT

#### i. Manna is not "retail" because it does not distribute food to the general public.

Defendants seek to prevent Ohioans from voluntarily cooperating with their neighbors to acquire agricultural products that are not otherwise as readily available. Their chosen vehicle for accomplishing this task is an audaciously-broad application of the "retail food establishment" designation. However, even such an aggressive interpretation is thwarted by the innocent facts that Manna Storehouse

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[51] *Id*. at 293.

[52] Civ.R. 56(E).

is not a retail food establishment because it does not engage in retail sales of agricultural products to the general public.

R.C. 3717.01(C) defines a "retail food establishment" as "a premises or part of a premises where food is stored, processed, prepared, manufactured, or otherwise held or handled *for retail sale*."[53] Thus, any storage, holding, or handling of food must be for a particular type of purpose, and even a particular type of sale: "retail sale." "Retail" is defined by R.C. 3717.01(C)(1) as "the sale of food to a person who is the ultimate *consumer*." "Consumer," in turn, is defined by Ohio Adm. Code 3717-1-01(B)(21) as, in part, a person "who is a member of *the public*." Consequently, Manna is only a "retail food establishment if it (1) holds, handles or stores food; (2) for sale; and (3) *to the public*.

**a. The Plain Language of the "public" demonstrates that Manna Storehouse is not public.**

Even if cooperation amongst Manna members were characterized as "sale," which it is not, it could not be characterized as to "the public." The Court's initial inquiry is into the meaning of the word "public." Although the word "public" is not defined in the Ohio Revised Code or Ohio Administrative Code, it is a word with a plain meaning.[54]

"*[T]he intent of the lawmakers is to be sought first of all in the language employed*, and if words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation * * * The question is not what did the general assembly intend to enact, *but what is the meaning of that which it did enact*."[55] To the same end, R.C. 1.42, a codified standard of statutory construction, states: "[w]ords and phrases shall

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53 Emphasis added.

54 *See Cawker v. Meyer,* 147 Wis. 320 ("it is very difficult, if not impossible, to frame a definition for the word 'public' that is simpler or clearer than the word itself."); *State v. Hensley,* 75 O.S. 255 ("The term 'public,' in its enlarged sense, takes in the entire community, the whole body politic, and a public trial means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all.").

55 *Beau v. Lindley* (1978), 56 Ohio St.2d 310, 383 N.E.2d 907, 10 O.O.3d 438, citing *Slingluff v. Weaver* (1902), 66 Ohio St. 621, 64 N.E. 574. (Emphasis added).

be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Black's Law Dictionary defines "public" as "1. Relating or belonging to an entire community, state, or nation. 2. Open or available for all to use, share, or enjoy. 3. (Of a company) having shares that are available on an open market." The evidence below demonstrates that this plain meaning of the word public is inconsistent with the nature of Manna's operations.

**b. Ohio's historic treatment of the term "public" in the food regulation context demonstrates that Manna Storehouse is not public.**

If the term "public" is not plain and unambiguous, then the particular meaning it has acquired in the context of Ohio food regulation clearly demonstrates that Manna is not public. Again, the latter clause of R.C. 1.42 provides that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." The distinction between public and private has been addressed in numerous Ohio Attorney General Opinions. These opinions focused on the meaning of "public" in the context of a "food service operation" as defined by former R.C. 3732.01 which provided, in part, as follows: "A food service operation, commonly known as a restaurant, is defined as any structure or building. . . which is kept, maintained, advertised, or *held out to the public* to be a place where meals or lunches are served for a consideration. . . ." (Emphasis added). Thus the determination of whether a food distributor was a "food service operation" often depended on whether the establishment was *held out to the public*.

In *1946 OAG 1024*, the Ohio Attorney General ruled that a company-owned establishment that only served food to its own employees on the premises was not required to have a license because it "did not serve the public."[56] In concluding that this establishment was not offering meals to the public, the Ohio Attorney General found that *even though food safety was a concern*, "we

[56] *1946 OAG 1024*

cannot construe a law to cover ground which we are sure it ought to cover, unless by its own terms it does so. If it fails to regulate something which is just as much in need of regulation as that which is within its terms the defect is for legislative correction, and not for enlargement by construction."[57] Thus, the statute in question did not encompass "private" action that was presented in the case.

Similarly, in *1954 OAG 3700*, the issue was whether a county children's home or a county infirmary was "held out to the public" so as to constitute a "food service operation," as defined by former R.C. 3732.01. In that opinion, the Ohio Attorney General concluded that a county children's home or county infirmary did not constitute a food service operation because the food service was offered only to those who were employed or housed at the institution, and thus not to the public.[58]

Finally, in *1920 OAG 1240*, the Ohio Attorney General determined that a company-owned eating establishment located in or on the premises of a manufacturing plant that sold sandwiches and coffee in addition to candies, gum, soft drinks, tobaccos and related items only to the employees of such a plant was not public, so as to constitute a food service operation.

The second clause of R.C. 1.42 is also applicable because the term "public" has acquired a particular meaning in the context of "food service operations" which should be applied here when dealing with "retail food establishments." Although the legislature has been silent on how "public" is to be defined the Ohio Attorney General opinions have given "public" particular meaning when interpreting statutes that deal with the sale of food. The Ohio Attorney General's interpretation giving a particular meaning to the term "public" must be applied to R.C. 3717.21 as is mandated by the Ohio rules of construction.

The language of former R.C. 3727.01 was changed by the legislature in 1960 to remove the "holding out to the public" requirement on which the Ohio Attorney General based his early opinions. The legislature made this change to make sure that restaurants that had been excluded from regulation

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57 *Id*.

58 *Id*. at 187-188

would now be regulated. However, the legislature has not made a similar change to the language of R.C. 3717.21, thus, the distinction between private and public was preserved. Instead, legislature has kept the requirement of "retail sales" in order for an entity to be considered a "retail food establishment," and the definition of "retail sale" makes clear that these sales must be to a "consumer" who is a member of the "public."

**c. The words "retail" and "public" must retain *some* meaning, and applying them to Manna would abdicate their meaning.**

Defendants' position requires the Court to read the statute as though the word "retail," and thus the "public" requirement, does not exist. Parts of a statute must be interpreted so as to render the entire statute effective. R.C. 1.47(B) states "[i]n enacting a statute, it is presumed that the entire statute is intended to be effective." But if "retail" is read to include a quintessentially private membership organization like Manna, and is thus read to regulate an Ohioan any time there is the holding of food, then what effect does the word "retail" have? The answer: none. For the convenience of their enforcement, Defendants would have this Court read the word "retail" out of the statute.

**d. Courts' treatment of the term "public" compels the conclusion that Manna Storehouse does not sell to the public.**

Ohio courts that have made a more general distinction between "private" and "public" have used a seven factor balancing test developed in the federal courts to distinguish between public and private in discrimination cases. In *Tippecanoe Country Club, Inc. v. Ohio Civil Rights Commission*, the Court of Appeals for the Seventh District of Ohio, in adjudicating the public vs. private nature of the Tippecanoe Country Club for purposes of public accommodation, applied a seven factor test.[59] The factors that the court considered were: (1) the genuine selectivity of the group; (2) the memberships' control over the operation of the establishment; (3) the history of the organization; (4) the use of facilities by nonmembers; (5) the club's purpose; (6) whether the club advertises for members; and (7) whether the

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[59] *Tippecanoe Country Club, Inc. v. Ohio Civil Rights Commission*, 2000 WL 341128 (Ohio App. 7 Dist. 2000).

club is nonprofit or for profit.[60]

**e. Summary Judgment should be granted in Plaintiffs' favor because reasonable minds could only come to the conclusion that Manna does not distribute food to the "public."**

All summary judgment evidence before the court demonstrates that Manna Storehouse is not public. First, the affidavits of Jackie and Katie Stowers demonstrate that Manna can by no means be said to belong to the entire community, state or nation: it is located on the private property of John and Jackie Stowers, is not open to the people who are not members, is conducted for the benefit of the Stowers and the members, and is conducted without government subsidization.[61] By the same token, those affidavits, along with Manna's membership agreements and the affidavits of Manna members demonstrate that Manna is *not* available for all to use, share, or enjoy: again, only private members who have undergone an interview, paid a membership fee, and reviewed the facilities may cooperate with Manna to acquire agricultural products.[62] Finally, Manna is not a publicly traded company and there are no shares on the open market.[63] Defendants adduce no evidence to contravene these facts. Accordingly, no reasonable mind could conclude that Manna is a "retail food establishment" because it does not engage in "retails sales," which are, ostensibly, sales to "the public." Summary judgment should be granted on this basis alone.

If, however, the Court were to proceed to interpret "public" by its "acquired meaning" in Ohio food regulation, all evidence still demonstrates that Manna is not public. The affidavits of Jackie and Katie indicate that, just as with the operations denoted in the Ohio Attorney General opinions above, who served only employees of a particular workplace, Manna only distributes food to a discreet and

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60 *Casey Martin v. PGA Tour Inc.* 984 F.Supp. 1320 (D. OR. 1998), citing *United States v. Lansdowne Swim Club*, 713 F.Supp. 785 (E.D. Pa. 1989). See also *Nasal v. BJS NO. 2, Inc.* 127 Ohio Misc.2d 101, 806 N.E.2d 208.

61 December 16, 2009 affidavits of Jacqueline and Kathryn Stowers.

62 Id.

63 Id.

limited class: Manna Storehouse members.[64] In fact, it would not be surprising if many employment interviews were actually shorter than the sometimes two-hour interviews Jackie performs[65] prior to admitting one as a member of Manna. There are only approximately 100 members, and no person who is not a member is permitted to obtain food from Manna.[66]

Moreover, all evidence also demonstrates that Manna, like the operations at issue in the Ohio Attorney General opinions, Manna does not hold itself out to the pubic: it does not advertise;[67] the sign on its door indicates that it is "a PRIVATE not public, business;[68] and its website, which has always been for the limited purpose of facilitating member orders, is password protected.[69] And in fact, although it has occasionally happened, it is unlikely that one would become a member of Manna Storehouse, or even find out about its existence, unless he or she has a friend or family member who is already a member.[70] Defendants adduce no evidence to contravene these facts. Accordingly, in light of the evidence, reasonable minds could only come to the conclusion, even if applying the meaning of "public" acquired through the history of Ohio food regulation, to the conclusion that Manna does not hold itself out to the public, is therefore not a retail food establishment, and summary judgment should be granted in its favor.

Finally, even if this Court were to brush aside the plain and acquired meanings of "public," and look to the seven factor test that Ohio and federal courts have applied in public accommodation and civil rights contexts, evidence would definitively demonstrate that the Manna is not

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64 Id.

65 Id.

66 Id.

67 Id.

68 Id.

69 Id.

70 Id.

"public." The level of advertising, selectivity, and member control, along with the history of the organization, dictate as much. First, as noted above, all evidence demonstrates that Manna does not advertise.

Next, Manna is genuinely selective. To be a member of Manna Storehouse, one must (1) fill out an application; (2) review and approve of Manna Storehouse facilities, i.e. where the food is stored until pickup; (3) sit with Jackie Stowers for an interview that may be as long as several hours; and (4) pay an annual $10 membership fee.[71] The membership application asks questions beyond what a normal grocery store would ask, inquiring into personal beliefs and personal backgrounds.[72] One of the reasons for the stringent interview and membership criterion is that members come to the Stowers personal home, and are around their children.[73] Additionally, there is an implicit requirement that Manna Storehouse members share John and Jackie's ideology regarding healthy food.[74] Accordingly, if John and Jackie do not view a member as "truthful and honest," or do not believe that members' goals are in line with the benefits that Manna offers, they may revoke his or her membership.[75] And indeed, memberships have been revoked for a variety of reasons.[76]

With respect to history of the organization, Manna started over 10 years ago as an informal group of friends pooling their money to obtain food from healthy alternative sources. The Stowers had a few connections with people who produced food in a manner that they and their friends believed to be healthier and more responsibly-grown than what was available in grocery stores. Through word of mouth, friends of friends began to become interested in obtaining their food from the suppliers

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71 Id.

72 Id.

73 Id.

74 Id. The applicants come to Manna because they share the same values and concerns about eating healthy food. This means that Manna's applicant pool consists of individuals who are already, in a sense, "pre-qualified."

75 Id.

76 Id.

the Stowers knew. As the overall trend in organic and whole food products has grown more people have been drawn to Manna Storehouse. Manna Storehouse still does what it has always done: assist likeminded people with the acquisition of healthy food by pooling their resources and the Stowers resources. The only difference is that instead of only family and very close friends doing this, Manna now has a membership of around 100 individuals who share the same values.

Next, the members of Manna have control over what food comes through Manna,[77] and non-members are not permitted to use any Manna "facilities."[78] If members do not place orders then Manna does not operate: Manna does not buy food to put on their shelves and wait for resale to consumers; instead, Manna fills orders for members.[79] In other words, if there are no orders from members, there is no food in the Manna Storehouse.[80]

Finally, although Manna is not incorporated a nonprofit, John and Jackie do not run it in a manner that is typical a "public" commercial enterprise: they do not take depreciation on any equipment used for Manna, do not pay themselves a salary, do not strictly reimburse themselves for utilities or other costs, and all taxes are paid through the Stowers personal income tax.[81] John and Jackie only organized Manna as a Limited Liability Company because doing so, they were informed, would allow them to obtain better prices on food acquired from United Natural Foods.[82]

Defendants have not adduced, and cannot adduce any facts in contravention of this evidence. Accordingly, even if this court were to apply the seven-factor public vs. private test set forth through case law, no reasonable mind could conclude that Manna is a "public" enterprise. For these

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[77] Id.

[78] Id.

[79] Id.

[80] Id.

[81] Id.

[82] Id.

reasons, John, Jackie, and Manna, as a matter of law, are entitled to a declaration that Manna Storehouse is not a retail food establishment.

## B. IF THIS COURT CHARACTERIZES PLAINTIFFS' ACTIVITIES AS SUBJECT TO REGULATION UNDER OHIO'S RETAIL FOOD ESTABLISHMENT LAW, THEN THAT LAW IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS.

> *The Constitution is not neutral. It was designed to take the government off of the backs of the people.*
>
> \- *Supreme Court Justice William O. Douglas*[83]

### i. THE "AS APPLIED" CAUSE OF ACTION

Defendants seek to prevent Ohioans from voluntarily cooperating with their neighbors to acquire agricultural products that are not otherwise as readily available. R.C. 3717 is defendants' chosen vehicle for stripping Ohioans of this capacity. Because this is an as-applied challenge to R.C. 3717 and OAC 3717, this Court has the capacity to leave those statutes in place, as they apply to commercial grocery stores, restaurants, and others, but to declare that the application of those statutes to the John, Jackie, and Manna Storehouse is unconstitutional.

A court may hold a statute unconstitutional either because it is invalid "on its face" or because it is unconstitutional "as applied" to a particular set of circumstances. While a "facial" challenge means a claim that the law is "invalid *in toto* -and therefore incapable of any valid application,"[84] an as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular activity, even though the law may be capable of valid application to others.[85] "Each holding carries an important difference in terms of outcome: if a statute is unconstitutional as applied, the State may continue to

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83 Supreme Court Justice William O. Douglas, *The Court Years*, 1939-1975: *The Autobiography of William O. Douglas* (New York: Random House, 1980), p.8.

84 *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974). In

85 *See id.* at 803 & n. 22, 104 S.Ct. at 2127-28 & n. 22.

enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances."[86]

Accordingly an as-applied challenge does not implicate the enforcement of the law against third parties.[87] Therefore, a successful as-applied challenge does not render the law itself invalid but only the particular application of the law. This leave the plaintiff's burden in an as-applied challenge as different from that in a facial challenge. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional."[88] Thus, the constitutional inquiry in an as-applied challenge is limited to the plaintiff's particular situation.

In this case, John, Jackie, and Manna are asking this Honorable Court to declare that applying the retail food establishment designation and attendant regulations to their narrow scope of activities is unconstitutional because (1) their basic and limited activities are not of the type that the constitution permits to be regulated; and (2) the effects of those regulations on Manna Storehouse, such as permanently shutting it down, violates their property, business and contract rights under the Ohio Constitution, violates their rights to due process and equal protection, and is not a valid application of the state's police power.

### ii. THE OHIO CONSTITUTION IS MORE PROTECTIVE OF PLAINTIFF'S RIGHTS.

The Stowers wish to avail themselves of the additional protections offered by the *Ohio* Constitution. There are provisions of the Ohio Constitution, and attendant holdings, that, although perhaps more obscure than counterpart provisions and holding in the federal constitution, protect individual rights to a greater extent than do their federal counterparts.

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[86] Id.

[87] Id.

[88] *Ada v. Guam Soc'y of Obstetricians and Gynecologists,* 506 U.S. 1011, 1012, 113 S.Ct. 633, 634, 121 L.Ed.2d 564 (1992) (Scalia, J., dissenting), *denying cert. to* 962 F.2d 1366 (9th Cir.1992).

It is for this reason that the United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions so as to provide different, and broader, protections of individual liberties than those offered by the federal Constitution.[89] It has further declared that "state courts' interpretations of state constitutions are to be accepted as final, as long as the state court plainly states that its decision is based on independent and adequate state grounds."[90]

Accordingly, Ohio courts are free to interpret the Ohio Constitution without adherence or deference to federal court decisions-- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens."[91] Put another way, "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections*."[92]

Ohio courts have not hesitated to recognize this capacity:

> [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, *state courts are unrestricted in according greater civil liberties and protections to individuals and groups*.[93]

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[89] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

[90] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing *Michigan v. Long* (1983), 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201, 1214-1215.

[91] *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *State v. Brown* (1992), 63 Ohio St.3d 349, 588 N.E.2d 113.

[92] *Arnold,* supra.

[93] *Arnold,* supra. After making this paradigmatic statement, the Ohio Supreme Court, recognized an obligation "not to disturb the clear protections provided by the drafters of [the Ohio] Constitution." As such, in *Arnold*, it interpreted the Ohio Constitution's protection of the Right to Bear Arms, articulated in Section 4, Article I of the Ohio Constitution, as more protective of that right than the Second Amendment. Emphasis added.

The above statement leaves no doubt that Ohio courts have the capacity to find that the Ohio Constitution provides protections for individual liberty that stretch beyond those of the U.S. Constitution.[94] In 2008, the Ohio Supreme Court reaffirmed this axiom, acknowledging in *State v. Gardner,* that "[w]e are, of course, free to determine that the Ohio Constitution confers greater rights on its citizens than those provided by the federal Constitution, and we have not hesitated to do so in *cases warranting an expansion*,"[95] and recognized that "state constitutions are a vital and independent source of law."[96]

Ohio recognizes the need to use its own constitution to protect individual rights, and especially the right to be left alone in harmless property and business endeavors. The Ohio Supreme Court's 1941 ruling in *Direct Plumbing Supply v. City of Dayton* stresses the importance using the Ohio Bill of Rights as an independent basis for protecting individual rights:

> 'The guaranties of sections 1, 2, and 19 of the Bill of Rights in the Constitution of Ohio are similar to those contained in the amendment to the federal Constitution referred to [the 14th Amendment].*' If in the midst of current trends toward regimentation of persons and property, this long history of parallelism seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality. Decision here may be and is bottomed on those guaranties*.[97] (Emphasis added).

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[94] *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 21 O.O. 422, 38 N.E.2d 70. To the same effect, see, for example, *State v. Smith* (1931), 123 Ohio St. 237, 174 N.E. 768; *State v. Mapp* (1960), 170 Ohio St. 427, 11 O.O.2d 169, 166 N.E.2d 387; *State ex rel. The Repository v. Unger* (1986), 28 Ohio St.3d 418, 28 OBR 472, 504 N.E.2d 37; and *Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, all cases where the Ohio Supreme Court found the Ohio Constitution as conferring rights greater than those of the U.S. Constitution. See also *Gardner*, infra, *Arnold*, supra, and *Norwood v. Horney* 110 Ohio St.3d 353, 853 N.E.2d 1115, 36 Envtl. L. Rep. 20,161, 2006 -Ohio- 3799

[95] *State v. Gardner* (2008) 118 Ohio St.3d 420, 889 N.E.2d 995, citing *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (holding that the Ohio Constitution's Takings Clause affords greater protection than the corresponding federal provision).

[96] *Gardner*, supra, citing generally William J. Brennan Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights (1986), 61 N.Y.U.L.Rev. 535. asdf

[97] *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540, 38 N.E.2d 70, 137 A.L.R. 1058, 21 O.O. 422, citing *Wilson v. City of Zanesville*, supra; *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N.E. 648, at p. 651.

In *Direct Plumbing Supply*, with no mention of the federal Constitution, and citing only Ohio's Bill of Rights, the Court decisively struck down the regulation at issue, concluding that "[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom of contract beyond the necessities of the situation. The ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio."[98] Thus, this Court must apply the more scrutinizing and protective standards of the Ohio Constitution, and is free to go beyond the baseline federal guarantees, when determining whether to protect the rights of John, Jackie, and Manna in the present matter.

### iii. APPLICATION OF R.C. 3717 TO PLAINTIFFS INTERFERES WITH THEIR FUNDAMENTAL PROPERTY, BUSINESS, AND NATURAL AND UNENUMERATED RIGHTS UNDER THE OHIO CONSTITUTION.

> *"Fundamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution. Our goal should be to preserve the existence of these sacred rights."*[99]

Application of retail food establishment regulations and restrictions to John, Jackie, and Manna unduly upend their fundamental rights and personal liberties. Defendants seek to prevent Ohioans from voluntarily cooperating with their neighbors to acquire agricultural products that are not otherwise as readily available. However, the means through which they would do so, the retail food establishment designation and its attendant requirements, would needlessly impose a plethora of serious and yet unhelpful burdens on Manna, and ultimately put a permanent end to the operations of Manna Storehouse. Thus, application of retail food establishment restrictions to Manna would interfere with John and Jackie's property rights, attendant right to earn a livelihood and freedom to contract, and inherent right to cooperate with friends and neighbors to acquire food.

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[98] *Direct Plumbing Supply* , supra.

[99] *Arnold*, supra.

### a. Background Principles: Natural and Unenumerated Rights

When the settlers of the Northwest Territory formed Ohio's state government, with the lessons of the American Revolution still fresh in their minds, they delegated a very limited set of powers to the General Assembly, and incorporated a Bill of Rights into the constitution to make sure that the state government would not disregard human rights as the British Parliament had done.[100] Section 1, Article I is the Ohio Constitution's point of departure in expressing these human rights.[101] It serves as a powerful articulation of those rights, outlining the inviolability of liberty and property in a manner more akin to the Declaration of Independence than to the federal Constitution. In fact, this "Liberty Clause" has no counterpart in the federal Constitution. It is, "the starting point for all questions of individual rights in Ohio."[102]

Section 1, Article 1 of the Ohio Constitution provides the following: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."[103] The 1896 Ohio Supreme Court case of *Palmer v. Tingle*,[104] obviously of a closer proximity in time to the drafting of the 1851 Constitution, illuminates the vitality of Section 1, Article I. The Court applied the natural rights language in that Section to mean the following:

> The inalienable right of enjoying liberty and *acquiring property*, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the

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[100] See *State v. Nieto* (1920), 101 Ohio St. 409, 417, 419-420, 130 N.E. 663 (Wannamaker, J., dissenting). See, also, *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 24, 110 N.E.2d 778 ("one of the purposes of a constitution is to curb government power").

[101] See *Daugherty v. Wallace* (1993), 87 Ohio App.3d 228, 235-236, 621 N.E.2d 1374 (noting that this section is one of the specific limitations on the state's police power).

[102] See *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570 (Young, concurring and dissenting).

[103] Section 1, Art. I, Ohio Constitution.

[104] *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313

> enjoyment of our faculties, subject only to such restraints as are *necessary* for the common welfare.[105]

The Court emphasized the importance of using the preamble and Section 1, Article I to create a *context* for constitutional interpretation that effectively amounts to an emphatic "presumption of liberty:"[106]

> It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. *As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument are to be such as shall secure the blessings of freedom, and promote our common welfare.* To make this more emphatic, the first section of the bill of rights provides that, 'All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.'[107]

When speaking of "liberty," the Court did not view it as an amorphous, arbitrary concept: "[t]he word 'liberty,' as used in the first section of the bill of rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are *necessary* for the *common* welfare."[108] (Emphasis added).

In *In Re W.C. Reilly*, the Court relied upon the language of Article I, Section I to invalidate a municipal ordinance that attempted to criminalize the conduct of "employing any person as a special guard during any industrial disturbance or strike, unless such person shall first have been

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[105] Id.

[106] See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004) (discussing why the courts should begin with a presumption in favor of liberty, rather than state power, when construing the constitutionality of challenged regulations).

[107] *Palmer,* supra. (Emphasis added).

[108] Id., citing *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98. Emphasis added.

empowered to act as such special guard by the director of public safety."[109] The Court reasoned that "the assumption heretofore has been that any one was acting entirely within his fundamental rights when he sought, without let or hindrance, from any one, to protect his property."[110]

In 1993, *Preterm Cleveland v. Voinonich*, affirmed the vitality of Section 1, Article I. It did so by acknowledging "[i]t has long been recognized in Ohio that this constitutional provision *grants extensive rights to the individual*."[111] The Court added the following:

> Section 1, Article I, Ohio Constitution, together with Section 2, Article I, Ohio Constitution, * * * make it quite clear that, under the Ohio Constitution's Bill of Rights, every person has inalienable rights under natural law which cannot be unduly restricted by government, which is formed for the purpose of securing and protecting those rights, and that all governmental power depends upon the consent of the people. *Thus, the Ohio constitutional provision is broader in that it appears to recognize so-called "natural law," which is not expressly recognized by the Bill of Rights or any other provision of the United States Constitution, although it is recognized in the Declaration of Independence. In that sense, the Ohio Constitution confers greater rights than are conferred by the United States Constitution*, * * * In general, this provision guaranteeing the enjoyment of life and liberty confers upon the individual the right to do whatever he or she wishes to do so long as there is no valid law proscribing such conduct and so long as the conduct does not infringe upon rights of others recognized by the common law.[112]

The Supreme Court of Ohio has also acknowledged that natural rights commands the recognition of a broad right of privacy: "The right to privacy has been described as '*the right to be let alone*; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be

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[109] *In Re W.C. Reilly* (1919), 31 Ohio Dec. 364, 23 Ohio N.P. (N.S.) 65.

[110] Id.

[111] *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570, citing *Palmer & Crawford v. Tingle* (1896), 55 Ohio St. 423, 45 N.E. 313, and holding that "In light of the broad scope of 'liberty' as used in the Ohio Constitution, it would seem almost axiomatic that the right of a woman to choose whether to bear a child is a liberty within the constitutional protection. * * * Although Ohio recognizes a common-law right of privacy (citing *Housh v. Peth* (1956), 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340), it is not necessary to find a constitutional right of privacy in order to reach the conclusion that the choice of a woman whether to bear a child is one of the liberties guaranteed by Section 1, Article I, Ohio Constitution."

[112] *Preterm Cleveland v. Voinovich* (1993), 89 Ohio App.3d 684, 627 N.E.2d 570. Compare with Article I, Section 20 (residual rights). (Emphasis added).

justified by the clear needs of the community living under a government of law."[113] Further, "[a] right of privacy is derived from natural law, * * * is embraced within the absolute rights of personal security and personal liberty, * * * and includes not only freedom from physical restraint, but also the right 'to be let alone'; to determine one's mode of life, whether it shall be a life of publicity or of privacy; and to order one's life and manage one's affairs in a manner that may be most agreeable to him so long as he does not violate the rights of others or of the public."[114]

Consequently, Ohio law features a truculent historic recognition of natural rights. One need not stretch the imagination to conclude that these natural rights embrace the right to privately[115] cooperate with one's friends and neighbors to obtain agricultural products to provide for one's family.

**b. Property Rights in Ohio**

Meanwhile, Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."[116] In aggregating this provision with Section 1, Article I, "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces."[117]

In Ohio, these "venerable rights associated with property" are not confined to the mere ownership of property. Rather, the Supreme Court of Ohio recently acknowledged that "[t]he rights

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[113] *State v. Williams (2000),* 88 Ohio St.3d 7, 722 N.E.2d 1018. See also *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343 (noting, "[t]his right has had an interesting history. Its basic concept in various forms is not new, but in this country its chief impetus as an independent right seems to have originated in an article by Samuel D. Warren and Louis D. Brandeis in the year 1890 in 4 Harvard Law Review, 193. The first recognition of the right by a court of *dernier ressort* apparently was in the case of *Pavesich v. New England Life Ins.* Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am.St. Rep. 104, 2 Ann.Cas. 561).

[114] *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343.

[115] Please see above for a thorough discussion of the private nature of John, Jackie, and Manna's conduct.

[116] Section 19, Art. I, Ohio Constitution.

[117] *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1129 (internal citations omitted).

related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions."[118]

**c. The Right to contract, do business, and earn a living in Ohio**

Further, "[t]he right to labor or earn one's livelihood in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgement of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution."[119] To this end, the Supreme Court of Ohio acknowledges that, in Ohio, "the right to do business" is a right "equally sacred" to "free speech."[120] These rights include "strands in an owner's bundle of property rights" such as "the right to exclude," and the right to use the property.[121] Six years after *Eastwood Mall's* affirmation of the right to do business, the Supreme Court of Ohio, in *State v. Williams*, reaffirmed the right, explaining that Section 1, Article I can and should be applied so as to guarantee not only a right of privacy, but also a "right to pursue a lawful occupation free from government interference"[122]

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[118] *Norwood v. Horney* (2006), 110 Ohio St.3d 353,361-62, 853 N.E.2d 1115, 1128 (internal citations omitted).

[119] *Yee Gee v. City and County of San Francisco* (D. C.) 235 F. 757, 759,'

[120] *Eastwood Mall v. Slanco* (1994), 68 Ohio St.3d 221, citing *Crosby v. Rath* (1940), 136 Ohio St. 352, 355-356, 16 O.O. 496, 497, 25 N.E.2d 934, 935.

[121] *Eastwood Mall*, supra, citing *Bresnick v. Beulah Park Ltd. Partnership* (1993), 67 Ohio St.3d 302, 303, 617 N.E.2d 1096, 1097 (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 419, 435, 102 S.Ct. 3164, 3176, 73 L.Ed.2d 868, 882).

[122] Williams, supra, noting the following: "*The right to privacy* has been described as "the right to be let alone; to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of the community living under a government of law." *Time, Inc. v. Hill* (1967), 385 U.S. 374, 413, 87 S.Ct. 534, 555, 17 L.Ed.2d 456, 481 (Fortas, J., dissenting); see, also, *Housh v. Peth* (1956), 165 Ohio St. 35, 39, 59 O.O. 60, 62, 133 N.E.2d 340, 343. As Justice Brandeis observed, the right to privacy is "the most comprehensive of rights and the right most valued by civilized men." Olmstead v. United States (1928), 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944, 956 (Brandeis, J., dissenting). Yet the right to privacy is not absolute. See **356 State ex rel. Beacon Journal Publishing Co. v. Akron (1994), 70 Ohio St.3d 605, 608, 640 N.E.2d 164, 167. Privacy of the individual will yield when required by public necessity. See also *Time, Inc*., 385 U.S. at 413, 87 S.Ct. at 555, 17 L.Ed.2d at 481. "*Every individual has the right to pursue a lawful occupation free from government interference*

Thus, Ohio Courts heed the hallowed principles articulated by in *Meyer v. Nebraska,* i.e. that the right to earn a living is a substantive right with meaning and vitality:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to * * * engage in any of the common occupations of life, * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' (citing numerous cases) and further: 'The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.[123]

The fundamental natures of these rights, the natural rights including the right to privacy, the right to use private property and the right to do business within the state, are further reinforced by the Supreme Court of Ohio's emphasis on the right to contract. After all, "[c]ontract rights are a form of property,"[124] and "[t]he right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to speak without restraint."[125] As the Ohio Constitution has compelled the Supreme Court of Ohio to conclude, freedom of property, the right to earn a living, and the right to be left alone all mean little if they don't include the rights of two adults to freely exchange goods and services:

> Contracts and compacts have been entered into between men, tribes, and nations during all time from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common, public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, in the face of popular clamor, or the pressure of

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*unless the public good so requires".* See Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock, Landing & Slaughter-House Co. (1884), 111 U.S. 746, 757, 4 S.Ct. 652, 660, 28 L.Ed. 585, 591.

[123] *Meyer v. Nebraska*, 262 U. S. 390, 43 S. Ct. 625, 626, 67 L. Ed. 1042, 1045, 29 A. L. R. 1446, *Lawton v. Steele*, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385, 388.

[124] *U.S. Trust Co. of New York v. New Jersey* (1977), 431 U.S. 1, 97 S.Ct. 1505 at FN16.

[125] *Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust* (App. 4 Dist. 2004), 156 Ohio App.3d 65, 95, 804 N.E.2d 979, 1002 (citing *Nottingdale Homeowner's Assn., Inc. v. Darby* (1987), 33 Ohio St.3d 32, 36, 514 N.E.2d 702).

> the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people* * *[126]

In addition to the law that supplies the causes of action above, it is worth noting that Ohio has adopted non-binding public policy prescriptions for how regulatory agencies such are to regulate John, Jackie, Manna, and others attempting to earn an honest living in the state. On February 12, 2008, Governor Ted Strickland signed into law Executive Order 2008 – 04S ("the Executive Order"), an order for the "implementation of common sense business regulation." The Executive Order affirms Ohio's commitment "to fostering an environment that facilitates and promotes business growth" and "explains that "[i]n order for Ohio to remain an attractive venue for entities…to do business in the State, Ohio must ensure that its regulations create an atmosphere in which individuals and businesses affected by those regulations are treated as partners in identifying and achieving regulatory goals."[127] In addition, the Executive Order establishes that "[a]gency rules are expected to impose the least burden and costs to business…necessary to achieve the underlying objective." These preservations of the fundamental rights to property, business, and contract should read as preserving a liberty interest against which any usurpation should be judged with exacting scrutiny.

**d. Applicable evidence demonstrates that application of R.C. 3717 to John, Jackie, and Manna interferes with their natural, privacy, property, business, and contract rights.**

If John, Jackie, and Manna are subjected to Retail Food Establishment regulations, they will no longer be permitted to operate Manna Storehouse because they will be subject to regulations that will have the effect of uprooting Manna. Manna would be subject to OAC 3717-1-06.1(S), which

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[126] *Palmer*, supra. Despite such strong language, the right to contract in Ohio is perpetually under fire. Ohio legislators routinely pass laws that limit legitimate economic activity. Meanwhile, courts continuously find reasons to nullify plainly written contracts between consenting adults—be it an unjustified finding that the contact is "ambiguous," "unconscionable," or "void by public policy." Just last year, the Ohio Supreme Court was one Justice away from nullifying a surrogacy contact, even though all Justices conceded that no law prevented it. The ostensible effect of such policies, unsurprisingly, is to drive up costs and prices, to limit participation in Ohio's economy, and to drive employers out of the state.

[127] Executive Order 2008 – 04S.

prohibits a retail food establishment from operating in or adjacent to a private home. Manna is currently operated out of a room adjacent to, and effectively, within the Stowers family home.[128] Thus, its operation would be uprooted. And because the operation is not strictly commercial, it is not profitable enough to warrant the renting or purchasing of retail space.[129] Consequently, if this Court were to impose the retail food establishment designation upon Manna, John, Jackie and Manna would be deprived of their fundamental right to use property, and their fundamental right to earn a living, rendering the designation unconstitutional as applied.

The cessation of Manna Storehouse would also mean that John and Jackie would no longer be able to cooperate with their neighbors to acquire food for their families, and to engage in the attendant acts of picking up the food, and temporarily storing it.[130] This would infringe on John and Jackie's liberty interests in privacy, i.e. being left alone, and in contract.

By the same token, labeling Manna a retail food establishment would force John and Jackie to open up their personal home and records to government agents[131] for routine inspections. R.C. 3717.27(B) states that "a person holding a retail food establishment license shall permit the licensor to inspect the retail food establishment for purposes of determining compliance with this chapter and the rules adopted under it * * *. On request of the licensor, the license holder shall permit the licensor to examine the records * * *." R.C. 3717.27(B) further states, "the issuing licensor may use the inspection report to suspend or revoke the license * * *." Thus, labeling Manna a retail food establishment forces John and Jackie to choose between preserving the fundamental rights to privacy, and to use and enjoy

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[128] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

[129] Id.

[130] Id.

[131] In this instance, these would be the same government agents that precipitated the aggressive December 1, 2008 raid on John and Jackie's home.

their home, with their fundamental rights to earn an honest living. Such a choice cannot withstand constitutional muster.

However, even this is a false choice. Pursuant to R.C. 3717.21, “no person * * * shall operate a retail food establishment without a license [and] no person shall fail to comply with any other requirement of this chapter * * *.” Meanwhile, R.C. 3717.29(B) permits the board of health to “suspend or revoke a retail food establishment license on determining that the license holder is in violation of any requirement of this chapter or the rules adopted under it * * *.” Application of retail food establishment laws would place Manna in constant imperilment of being arbitrarily closed by state action: If labeled a retail food establishment, John and Jackie would be charged with a host of irrelevant responsibilities, which, if they failed to adhere to, could result in the loss of their license, and therefore, in the cessation of Manna Storehouse.

As a “license holder,” OAC 3717-1-02.4(B) would apply to Manna, and require that, on-the-spot, “during inspections,” they “demonstrate knowledge” of the following:

- The relationship between the prevention of foodborne disease and the personal hygiene of a food employee, even though Manna does not handle food.
- The “significance of the relationship between maintaining the time and temperature of time/temperature controlled for safety food and the prevention of foodborne illness” even though Manna does not heat, cool, or serve food to the public.
- The “hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish,” even though Manna does not serve such things.
- “[T]he required food temperatures and times for safe cooking of time/temperature controlled for safety food including eggs, fish, meat, and poultry,” even though Manna does not cook food.
- “[T]he required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of time/temperature controlled for safety food,” even though Manna does not heat food, hold hot food, cool food, or reheat food.
- The “relationship between the prevention of foodborne illness and the management and control of the following: * * * Hand contact with ready-to-eat foods,” even though Manna does not serve or distribute ready-to-eat foods or have hand contact with them.
- “major food allergens including milk, egg, fish, tree nuts, wheat, peanuts, and soybeans,” even though Manna does not serve food to its members or select food for is members.

- "the source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross connections," even though Manna does not serve water to its members or otherwise use water in storing or transporting food for members.

For the simple reason that John, Jackie and Manna do not engage in these activities, there is a high likelihood, if not a certainly, that they would not be able to "demonstrate knowledge," when put to them on-the-spot by a health department inspector.[132]

Finally, if John and Jackie were to engage in the harmless but beneficial conduct of continuing to cooperate with the friends and neighbors, all private members, to acquire food for their families, after having their retail food establishment license terminated under R.C. 3717.29, they would be subjected to criminal prosecution that carries with it imprisonment and economic ruin. Under R.C. 3717.99 provide that anyone who operates a retail food establishment without a license is guilty of a second degree misdemeanor, an offense carrying imprisonment, and subject to the maximum fine for a second degree misdemeanor for each day that they engage in such cooperative behavior. These prohibitions clearly run afoul of John and Jackie's right to privacy, and right to engage in contracts that do not harm others.

Consequently, if labeled a retail food establishment, there is a high likelihood, if not an ostensible certainty, that Manna would lose its license and then cease to be able to operate. This would destroy John and Jackie's fundamental rights to use and acquire property, earn a living, contract, and retain privacy. As such, given the evidence before this Court, a reasonable mind could come to only one conclusion: the retail food establishment designation, and its attendant regulations deprive John, Jackie, and Manna of their fundamental natural, property, business, and contract rights when it is applied to them.

[132] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

## v. THE POLICE POWER DOES NOT PERMIT INTERFERENCE WITH THE PLAINTIFFS' PROPERTY, BUSINESS, CONTRACT AND NATURAL RIGHTS.

> *"To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."*[133]

If the police power is found to empower the legislature to reach, regulate, control, and eviscerate the very basic and private activity of the Stowers, then the power has no limits, and Ohioans constitutional rights have no efficacy. No reasonable mind could conclude that the regulation of John, Jackie, and Manna is *necessary* to protect *the general public*. Accordingly, the police power does not permit infringement upon their constitutionally protected rights.

As an initial matter, this Court should entertain no consternation in striking down unconstitutional applications of state statutes: when applying state constitutional law and delineating the boundaries of state police power, Ohio, like many other states, rejects the deferential rational basis test analysis that federal courts apply in 14th Amendment economic liberties cases. This understanding was best articulated by the Minnesota Supreme Court, not long after the United States Supreme Court articulated a diminished standard for *federal* scrutiny in *Nebbia v. New York*:

> Appellant contends, however, that since the recent case of *Nebbia v. People of New York*, 291 U. S. 502, 54 S. Ct. 505, 510, 78 L. Ed. 940, 89 A. L. R. 1469, the courts no longer have a right to inquire into the reasonableness of a legislative enactment and that there is no limit to the power of the Legislature to regulate business. Such a contention, if upheld, would necessitate discarding the principles set forth above, exalt the police power above all constitutional restraints, relegate the judicial branch to a position entirely subordinate to the legislative will, and ultimately put an end to American constitutional government. A careful study of the case warrants no such conclusion.[134]

Note that this is different than a court second-guessing the legislature as to the *wisdom* of the law. "[W]hile the courts repeatedly have said that they should not decide as to the expediency of a measure, it has come to be settled by the high court whose decisions establish the rules limiting the exercise of the

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133 *Adkins v. Children's Hospital*, 261 U. S. 525, 561, 43 S. Ct. 394, 402, 67 L. Ed. 785, 24 A. L. R. 1238.

134 *State ex rel. Pavlik v. Johannes* (1935), 194 Minn. 10, 259 N.W. 537.

police power, that a court should and does determine whether, in its judgment, the law has a real or substantial relation to objects and purposes recognized as legitimate."[135]

By the same token, the Supreme Court of Washington has characterized police power analysis in the following helpful manner:

> While the interest of the public may be likened unto an irresistible force which compels where it requires, it nevertheless must, under constitutional provisions, both federal and state, respect the rights of the individual. While the latter may not occupy the fixity of an immovable object, they nevertheless have the protection and sanction of the fundamental law of the land, and they recede before no less a force than that of *public necessity*.[136]

**a. In Ohio, the Police Power has Limits.**

Similarly in Ohio, the police power is not plenary - - it may only be exercised to interfere with fundamental rights when *necessar*y to protect the *public*.[137] This analysis embraces two components: (1) an application of law must be absolutely necessary to achieve the desired result; and (2) an application of law must be for the welfare of the general public. This test has proven to be anything but a rubber stamping of all legislative acts and applications thereof.

Instead, Ohio courts must consider the burdens that statutes and their applications impose upon the parties' rights, and whether they are justified in light of the benefits: "[t]o be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be *reasonable, not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property*."[138] Put another way, again by the Supreme Court of Ohio:

> It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are

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135 *Amitrano v. Barbaro* (1938), 61 R.I. 424, 1 A.2d 109, citing 21 Harv.L.Rev. 499; 40 Harv.L.Rev. 953.

136 *Patton v. City of Bellingham*, 38 P.(2d) 364, 366, filed December 6, 1934.

137 *Palmer v. Tingle* (1896), 55 Ohio St. 423, 36 W.L.B. 315, 45 N.E. 313.

138 *Direct Plumbing Supply Co. v. City of Dayton* (1941), 138 Ohio St. 540, 547, 38 N.E.2d 70, 73. See, more recently, *Norwood*, supra, and *Sogg v. Zurz*, 2009 Ohio 1526.

> unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation, and *not unduly oppressive upon individuals*, must have a real and substantial relation to their purpose, and *must not interfere with private rights beyond the necessities of the situation*.[139]

Thus, in determining whether an interference with property rights is unduly burdensome or beyond the necessities of the situation, Ohio courts should be "extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power."[140] And for good reason: "the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were *per se* valid."[141]

Ohio Supreme Court precedent is replete with examples of appropriate invalidations of the police power. In *City of Cincinnati v. Correll*, the Supreme Court of Ohio held that a regulation unduly interfered with property rights and small business. The Court began by noting the proper standard for police power analysis:

> *Legislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.*[142]

In other words, "the judgment of the general assembly in such cases is not conclusive."[143]

The Court struck down a restriction on barber shop hours. The Court "observed that the business of barbering is a lawful business, and that the right to carry on such business is a property right constitutionally protected against unwarranted and arbitrary interference by legislative bodies."[144] "The burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private

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139 *Id.*, quoting *Froelich v. City of Cleveland* (1919), 99 Ohio St. 376, 391, 124 N.E. 212, 216, emphasis added.

140 *City of Cincinnati v. Correll* (1943), 141 Ohio St. 535, 539, 49 N.E.2d 412, 414.

141 Id., at 546.

142 Id. (emphasis added).

143 Id.

144 Id., at 540.

property and the freedom to contract beyond the necessities of the situation."[145] "The ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio."[146]

Similarly, in *Olds v. Klotz*, the Court struck down a statute regulating the hours of retail grocery stores as an invalid exercise of the police power. The Court observed that the regulation of business is only within the police power when "*the relation to the public interest and the common good is substantial* and the terms of the law or ordinance are reasonable and not arbitrary in character."[147] In striking the regulation the Court articulated a concern about the right to be left alone being "frittered away" by virtue of the police power:

> This court cannot protect the rights of property and liberty of contract if it allows the passage of an ordinance of the character involved here. Constitutional rights cannot be frittered away little by little until the substance is gone and only the shadow remains. Such a regulation would open the way to the extension of government regulation and control to businesses of all kinds and could only result in restrictions on the right of private property and liberty of contract contrary to the principles of constitutional government as they have been interpreted by the courts of the states and nation from the inception of free government in America.[148]

Further, in *Direct Plumbing Supply, Inc. v City of Dayton*, the Court struck down the a regulation requiring the labeling, registration, and licensing of plumbing equipment and inventory, noting that the burden imposed by the regulation was "unduly oppressive upon individuals and in excess of the benefits conferred upon the public," and "unreasonably interfere[d] with rights of private property and freedom of contract beyond the necessities of the situation.

Here, the Court is confronted with a similarly injurious and unnecessary regulation of private behavior. First, the reason for the regulations, as articulated by the state's expert, are as follows:

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145 Id., at 549.

146 Id. (the ordinance "bears no real and substantial relation to the health, safety, morals or general welfare of the public, that it is not a valid exercise of the police power, that the ordinance is arbitrary, discriminatory and unreasonable and upon reason and authority must be condemned.").

147 *Olds v. Klotz* (1936), 131 Ohio St. 447, 451, 3 N.E.2d 371, 373.

148 *Id.* at 452, 3 N.E.2d at 374

the main purpose of the prohibition on retail food establishments in private homes is that private property such as private homes are not readily available for inspection. "You're really not allowed to just go into somebody's private home. So therefore they've come up with the regulations that you can't have it in your home."[149]

> Q: "The only purpose of this rule is to facilitate easier inspections because of the private property issue?"
> A: "Right."[150]

**b. Regulation of John, Jackie, and Manna is not necessary.**

Meanwhile, all evidence before the Court demonstrates that Manna storehouse is not necessary: there has never been a complaint about the health or safety of food acquired through Manna.[151] Manna does not produce or prepare food, but instead only engages in the relatively nonthreatening activities of transporting and temporarily storing food for its members - - activities that the average mother or grandmother engages in on a regular basis.[152] Finally, licensing will add no value to the health or safety of the food, since the food is already perfectly safe. Manna already stores refrigerated and frozen goods at the proper temperatures, does not need a license to understand how to do so, and would do the same if licensed (but for the fact that the regulations attendant with licensure would destroy the operation entirely).[153]

c. **Regulation of John, Jackie, and Manna is not necessary *to protect the public*.**

Next, all evidence indicates that imposition of regulation upon John, Jackie, and Manna would not advance the interests of *the general public*. "[T]o be subject to regulation by the police power,

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[149] October 27, 2009 Deposition of Charles Kirchner, p. 47.

[150] Id., at p. 47.

[151] Id.

[152] Id.

[153] December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

*the business regulated must be clothed with a public interest*.[154] Certainly, to be subject to regulation, the features of a business sought to be regulated must be *vital to a substantial section of the public* and be of such a character as to require protection for the public from the standpoint of health or general welfare. The relationship between the regulated feature of the business and the public must be such that the public welfare demands that the business be reasonable in its conduct *as it affects the public*. As stated by Chief Justice Taft in *Wolff Packing Company v. Court of Industrial Relations:*

> The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a *peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public*. * * * It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.'* * * *It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared.* * * * If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground * * *."[155]

Here, Manna is anything but "clothed with a public interest;" no feature "touches the public;" and imposition of the retail food establishment regulations would be a quintessential example of "running the public interest argument into the ground." The evidence in support of this conclusion, *inter alia* that Manna only deals with private members, does not transact with the public, and does not advertise to the public, is incontrovertible. It is well documented in an earlier section of this brief explaining why Manna does not distribute food to the public, and the Court is respectfully referred to that section.[156]

The same evidence demonstrating that regulation of Manna is not necessary, nor for the public interest, demonstrates that regulation of Manna "goes beyond the necessities of the situation."

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[154] *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

[155] *Wolff Packing Company v. Court of Industrial Relations,* 262 U. S. 522, 43 S. Ct. 630, 633, 67 L. Ed. 1103, 27 A. L. R. 1280.

[156] Please see above, pp. 17-20.

Applying the police power to John, Jackie, and Manna merely has the effect of destroying a livelihood and a way of life, and in doing so, it adds no value to society, since food distributed through Manna is already safe. In the same light, the "burden" imposed upon Manna is clearly "undue." In summation, if the police power is found to empower the legislature to reach, regulate, control, and eviscerate this basic, private activity, then the power knows no limits, and Ohioans constitutional rights have no efficacy.

Thus, all evidence demonstrates that the police power should not be imposed so as to interfere with and destroy John, Jackie, and Manna's fundamental rights. As such, in light of the evidence, reasonable minds could arrive at only one conclusion, that conclusion being that there is no genuine as to any material fact, and Plaintiffs are entitled to summary judgment, as a matter of law, on the issue of whether the retail food establishment designation and regulations may constitutionally be imposed upon them.

### iv. APPLICATON OF R.C. 3717 TO PLAINTIFFS VIOLATES THEIR DUE PROCESS AND EQUAL PROTECTION RIGHTS

Imposition of the retail food establishment designation and regulations upon John, Jackie, and Manna Storehouse violates their due process and equal protection rights because it treats them as though they are either a commercial grocery store or a commercial restaurant, when, in fact, they are neither. Section 2, Article I of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." Meanwhile, Section 16, Article I guarantees that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law * * *." These are the Ohio Constitution's equal protection due process guarantees, and they incorporate federal precedent on due process and equal protection.[157] This Court is also free to provide greater protection for the Plaintiffs.[158]

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[157] *Bd. of Lucas Cty. Commrs. v. Waterville Twp. Bd. of Trustees* (2007), 171 Ohio App.3d 354, 870 N.E.2d 791 (acknowledging that "[t]he Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and of Section 2, Article I, Ohio Constitution, are functional equivalents,"); and *State v. Gardner* (2008), 118 Ohio St.3d 420, 889 N.E.2d 995 (recognizing "We have held that '[t]he 'due course of law' clause of

Even Federal Courts, applying mere rational basis review, have intervened to invalidate statutes like R.C. 3717 when applied heavy-handedly to individuals such as the Stowers and Manna Storehouse. As just a few examples, in *Craigmiles v. Giles*, *Cornwell v. Hamilton*, and *Merrifield v. Lockyer*, federal courts ruled that regulations of very basic human activities, engaged in pursuant to the earning of an honest living, went too far, and therefore violated equal protection and due process rights when applied to the particular plaintiffs. The topics address by each of these cases warrants special mention because of its high degree of similarity to the regulatory matter before the Court.

**a. Applications of regulations may not fail to classify, treat differently-situated parties similarly, or create arbitrary distinctions.**

In *Cornwell,* the Court confronted the attempted regulation of an "African hair braider" who engaged in "natural hair care" and asserted that she should be permitted to braid hair without fulfilling California's cosmetology licensing requirement.[159] The Court observed that under the Equal Protection Clause "'sometimes the grossest discrimination can lie in *treating things that are different as though they were exactly alike*.'"[160] This comports with the common constitutional understanding that "equality can be denied when government fails to classify, with the result that its rules or programs do not

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Section 16, Article I of the Ohio Constitution , has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment.'").

158 *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35, 616 N.E.2d 163, citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293, 102 S.Ct. 1070, 1077, 71 L.Ed.2d 152, 162 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43, 108 S.Ct. 1625, 1630, 100 L.Ed.2d 30, 39 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). See, also, *Pruneyard Shopping Ctr. v. Robins* (1980), 447 U.S. 74, 81, 100 S.Ct. 2035, 2040, 64 L.Ed.2d 741, 752.

159 *Cornwell*, 80 F.Supp.2d at 1102, 1104-05.

160 *Cornwell,Id.* at 1103 & n. 2 (quoting *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971)).

distinguish between persons who, for equal protection purposes, should be regarded as differently situated."[161]

Applying these principles, The court concluded that Cornwell could not "reasonably be classified as a cosmetologist as it is defined and regulated presently," and "[e]ven if [she] were defined to be a cosmetologist, *the licensing regimen would be irrational as applied to her because of her limited range of activities*," which over-lapped only minimally with the types of activities covered by the statute.[162] Specifically, the plaintiffs in that case were not engaged in "cosmetology" because "they only engaged in simple manipulation of hair, i.e. twisting, braiding, or otherwise physically manipulating the hair, and without the use of chemicals that alter the physical characteristics of the hair."[163] And when confronted with evidence that some would-be hairbraiders actually did *some* cosmetology-like activities, the Court observed that "the overlap is both minimal and irrelevant,"[164] concluding that *"[e]ven if Cornwell were defined to be a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities.*"[165]

The *Cornwell* court posited the following example: "[a]n illustration of Plaintiffs' argument would be if the State were to require that all professionals-be they budding architects, lawyers, or cosmetologists-attend a cosmetology training program. This statutory requirement would treat all individuals in an equal manner. The constitutional violation would be in drawing the classification so broadly that the requirement for such a license is irrational because the professions are different."[166] The rationality of a state's licensing requirements is "thus dependent on determining the range of Plaintiffs'

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[161] Lawrence H. Tribe, American Constitutional Law 1438 (2d ed. 1988)

[162] *See id.* at 1108, 1110, 1115.

[163] Id.

[164] Id.

[165] Id.

[166] Id.

activities."[167] Thus, due to the limited range of "cosmetology" activities performed by the plaintiff, Court concluded that force-fitting her and other African hair-braiders into the cosmetology designation and licensing requirements violated Cornwell's due process and equal protection rights.

In *Craigmiles,* the Sixth Circuit Court of Appeals confronted an analogous situation in a different context, and concluded that the inclusion of casket merchants within the licensing requirement for funeral directors violated equal protection and due process.[168] The casket retailers in *Craigmiles* argued that their business was so *different* from funeral directors that the government's interest in public health and safety in regulating funeral directors was not implicated.[169]

The court cited the district court's findings that requiring casket sellers to learn the skills of funeral directors did not further health and safety, because casket sellers did not engage in funeral activities, such as cleaning and embalming corpses. The court did discern one possible reason for regulating casket merchants: "The quality of the caskets used potentially threatens public health."[170] However, the court rejected this rationale for lack of a relationship to the licensing requirement, which ensured that "the only difference between the caskets [sold by licensed and unlicensed persons] is that those sold by licensed funeral directors were systematically more expensive."[171]

Similarly, in *Merrifield v. Lockyer*,[172] a pest control professional argued that California's pest-control licensing statutes, which required all persons engaged in structural pest control to obtain

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167 Id.

168 312 F.3d at 222.

169 *Id.*

170 *Id.* at 225 (emphasis omitted)

171 *Id.* at 225-26.

172 *Merrifield v. Lockyer* (9th Cir., 2008), 547 F.3d 978.

licenses, with certain statutory exemptions, were intended for pesticide-based pest control, and that he should be exempt from such requirements because he did not use pesticides.[173]

The Court drew significance from the finding that some of "those *exempted* under the current scheme are more likely to be exposed to pesticides than [the regulated plaintiff]."[174] The Court found that the irrational exemptions undercut the rationale for requiring licensure of the plaintiff, and were inherent evidence of the arbitrariness of the licensing requirement. "Needless to say, while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive rational basis review by resorting to irrationality."[175] "Here, however, when applying the state's own rationale for requiring pest controllers such as Merrifield to [be subject to regulation], the exemption scheme cannot be said to rest on a rational basis. * * * [t]he government has undercut its own rational basis for the licensing scheme by [regulating the plaintiff and not others who are similarly situated]."[176]

In other words, the exemption from a license was given to those who were likely to interact with public health and safety risks while those who were less likely to pose such a risk were required to remain part of the scheme.[177] In light of this, the Court concluded that "the exemption scheme is not supported by a rational basis review."[178]

In all three cases, federal courts could have simply rubber-stamped the respective state legislatures and regulators actions as in the name of "public health," and therefore, beyond constitutional critique. After all, cosmetology dealing with hair care, funeral arrangements dealing with dead bodies, and pest control dealing with the trapping of animals in residential areas ("structural pest control

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173 Id..

174 Id.

175 Id., at 991, 992.

176 Id.

177 Id., 992.

178 Id.

implicates a state's health and public safety interest.") all arguably impact public health. Instead, however, the courts performed their constitutional duty, and determined that the licensing schemes failed to classify, and were more heavy-handed than was appropriate. In doing so, the courts articulated clear equal protection and due process limitations on regulatory power: (1) regulations may not treat different-situated parties the same; (2) regulations may not fail to classify; and (3) regulations may not promulgate arbitrary exemptions. These same tests demonstrate that John, Jackie, and Manna cannot be constitutionally characterized as a retail food establishment.

**b. R.C. 3717 and OAC 3717 fail to classify, and instead treat Manna Storehouse like a commercial grocery store and/or restaurant.**

Defendants attempt to superimpose the retail food establishment designation and regulations on to John, Jackie, and Manna is unconstitutional because it (1) treat them the same as a commercial grocery store or restaurant; and (2) therefore fails to classify; and (3) creates arbitrary exemptions that do not include Manna. The retail food establishment licensing scheme is intended to govern large commercial grocery stores who sell to the general public, rather than small private membership cooperatives that only acquire food with private members, who specifically approve of acquisition, retention, and distribution practices. This much is confirmed by the regulations that would apply to John, Jackie, and Manna were Manna to be categorized as a retail food establishment.

For instance, Manna Storehouse would lose its retail food establishment license if it failed to answer, on the spot during an inspection, any one of a number of inquiries that could be posed by an inspector, even though Manna does not engage in the potentially threatening activities that the inquiries are designed to guard against. As a "license holder," OAC 3717-1-02.4(B) would apply to Manna, and require that, on the spot "during inspections," John or Jackie "demonstrate knowledge" of the following:

- The relationship between the prevention of foodborne disease and the personal hygiene of a food employee, even though Manna does not handle food.

- The "significance of the relationship between maintaining the time and temperature of time/temperature controlled for safety food and the prevention of foodborne illness" even though Manna does not heat, cool, or serve food to the public.

- The "hazards involved in the consumption of raw or undercooked meat, poultry, eggs, and fish," even though Manna does not serve such things.

- "[T]he required food temperatures and times for safe cooking of time/temperature controlled for safety food including eggs, fish, meat, and poultry," even though Manna does not cook food.

- "[T]he required temperatures and times for the safe refrigerated storage, hot holding, cooling, and reheating of time/temperature controlled for safety food," even though Manna does not heat food, hold hot food, cool food, or reheat food.

- The "relationship between the prevention of foodborne illness and the management and control of the following: * * * Hand contact with ready-to-eat foods," even though Manna does not serve or distribute ready-to-eat foods or have hand contact with them.

- "Major food allergens including milk, egg, fish, tree nuts, wheat, peanuts, and soybeans," even though Manna does not serve food to its members or select food for is members.

- "The source of water used and measures taken to ensure that it remains protected from contamination such as providing protection from backflow and precluding the creation of cross connections," even though Manna does not serve water to its members or otherwise use water in storing or transporting food for members.

This regulatory scheme was clearly crafted to apply to (1) large commercial operations that engage in arms-length transactions with the general public; and (2) establishments that serve food to the general public. Most of it does not apply to Manna. Just ask the Department of Agriculture's own expert, who acknowledged the following: "Not everything applies to every - - like you said, it depends on what you're doing and how you're handling it whether or not certain things apply, [but under the law it applies]."[179]

However, the evidence before the Court demonstrates that Manna's activities only "minimally overlap" with those of the aforesaid establishments: Manna picks up food for its members and temporarily stores that food for the members.[180] Otherwise, it does not engage in the type of

179 October 27, 2009 Deposition of Charles Kirchner, pp. 67-68.

180 December 16, 2009 Affidavits of Jacqueline and Kathryn Stowers.

activities that R.C. 3717 and OAC 3717 are intended to regulate: the state's own expert Mr. Kirchner concedes in his deposition that these regulations would bind John, Jackie, and Manna, but are all really intended for entities that serve food to the general public, such as commercial grocery stores and restaurants.[181] In fact, Manna's activities are more akin to those of a head of household getting groceries and putting them in the freezer then they are to the activities of a commercial grocer or restaurant.

Consequently, Manna is analogous to the African hair braider in *Cornwell* who only braided hair and was not a cosmetologist, the casket merchants in *Craigmiles* who were not funeral directors, and the pest controller in *Merrifield* who did not use chemical pesticides. Manna simply picks up and temporarily stores food for its private members. Thus it is not the same as a commercial grocer or restaurant, and its activities only minimally overlap, and it should not and cannot be regulated as a retail food establishment.

c. **The State undermines its own rationale for attempting to regulate Manna Storehouse.**

Further, just as in Merrified, the government's very rationale for attempting to regulate John, Jackie, and Manna, here the risk of danger to the general public's health, is undermined by the statute's exemption of activities that are more potentially hazardous than those of John, Jackie, and Manna.[182] As noted above, the court drew significance from the finding that, "*those exempted* under the current scheme are more likely to be exposed to pesticides than [the plaintiff]." The Court found that the irrational exemptions undercut the rationale for requiring licensure of the plaintiff, and was inherent evidence of the arbitrariness of the licensing requirement. Remarkably, expert from both the Lorain County General Health District and the Ohio Department of Agriculture concede that R.C. 3717 exempts

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181 Deposition of Charles Kirchner, throughout, but for instance, p. 18, 27, 28, 31.

182 See *Merrifield*. ("The possibility that non-pesticide-using pest controllers might interact with pesticides or will need the skill to suggest pesticide use when it would be more effective is the very rationale that government's counsel proffered, and we relied upon, in upholding the requirement that Merrifield obtain a license under due process grounds. We cannot simultaneously uphold the licensing requirement under due process based on one rationale and then uphold Merrifield's exclusion from the exemption based on a completely contradictory rationale. Needless to say, while a government need not provide a perfectly logically solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality.")

a host of activities that potentially pose a greater threat to public health than John, Jackie, and Manna's limited activities,[183] including the following:

- nonprofit organizations.[184]
- Persons who "annually maintains five hundred or fewer birds;" and "offers the eggs from those birds directly to the consumer from the location where the chickens are raised and slaughtered or at a farm product auction."[185]
- Persons who raise, slaughter, and process up to 1,000 chickens and sells the meat directly to consumers from place where it is processed or at a farm auction.[186]
- Persons who raise, slaughter, and process meat and sells it directly to consumers.[187]
- Persons who sell food at a registered Farm product auction.[188]
- Persons who sell food at a "cottage food production operation."[189]
- Persons who sell food at a festival or celebration that is organized by the state or a political subdivision, that is fruits or vegetables: from a cottage food operation; fruit butter; eggs; or chicken meat.[190]

The state's expert, Mr. Kirchner, concedes that each of these exemptions potentially poses a threat equal to or greater than any threat poses by the Stowers.[191] James Boddy, Director of the Lorain County

183 Depositions of James Boddy, Charles Kirschner.

184 R.C. 3717.22(B)(4).

185 (B)(8).

186 (B)(9).

187 (B)(10).

188 (B)(11).

189 (B)(11).

190 (B)(15).

191 October 27, 2009 Deposition of Charles Kirchner, pp. 78-86.

General Health District, makes the same concessions.[192] And it does not take much imagination to understand how this may be true: as just one example, R.C. 3717(B)(10) exempts someone who raises, slaughters, processes, and sell meat, but does not exempt the Stowers, who raise meat, and then have it slaughtered and processed at government-approved facilities.[193]

Drawing a distinction between the two that is clearly inversely proportionate to the public health risks posed is both arbitrary and irrational. Put in the terms of *Merrifield*, when applying the state's own rationale for requiring small private membership cooperatives such as Manna to be regulated, the exemption scheme cannot be said to rest on a rational basis - - " [t]he government has undercut its own rational basis for the licensing scheme by [regulating the plaintiff and not others who are similarly situated]."[194]

Meanwhile, this Court is further confronted with another staggering evidentiary reality: no food distributed through Manna Storehouse has ever caused harm to any member.[195] The Court in *Cornwell* found it significant that the supposedly potentially-dangerous activities had never caused harm or garnered complaints:

> Although use of chemicals, or lack of proper sanitary, disinfection, and sterilization procedures could cause injury to consumers, the actual incidence of this problem appears to be extremely rare.... [T]here is no evidence provided that even one case involving the spread of a parasite, or contracting AIDS or some other highly communicable disease, has occurred in a cosmetology salon or barbershop setting." ( *Id.* at 34.) This lack of real life physical harm is reflected in the paucity of complaints regarding hairbraiding (*see* Perry Supp. Decl. ¶ 7) and is admitted to by Defendants.[196]

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192 Deposition of James Boddy.

193 December 16, 2009 Depositions of Jacqueline and Kathryn Stowers.

194 Id.

195 Id.

196 *Cornwell*, supra.

Here, the evidence is clear: No food distributed through Manna has ever been unsafe, caused harm, or resulted in safety-related complaints.[197]

One these bases, the Court must apply the due process and equal protection tests set forth in *Cornwell*, *Craigmiles*, and *Merrified*. In applying these tests to the evidence, reasonable minds could arrive at only one conclusion, that conclusion being that there is no genuine as to any material fact, and Plaintiffs are entitled to summary judgment, as a matter of law, on the issue of whether the retail food establishment designation and regulations may constitutionally be imposed upon them.

## V. CONCLUSION

Manna Storehouse is not a "retail food establishment" because all relevant evidence demonstrates that it is not "public" and does not transact with or "to the general public." If initially characterized as a retail food establishment, whether rightfully or wrongfully, that characterization is unconstitutional as applied to John, Jackie, and Manna. All applicable law and evidence demonstrates that the designation and its attendant regulations would deprive John, Jackie, and Manna of their property, livelihood, privacy, contract, natural, and due process and equal protection rights. Concomitantly, applicable law and evidence confirm that the police power cannot justify the type of infringements on these rights that Defendants seek, because such regulations are not necessary to protect the general public.

Consequently, there is no genuine issue as to any material fact, Plaintiffs are entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion on the issues of whether (1) Manna Storehouse is a retail food establishment; and (2) that classification is constitution as applied, and that conclusion is that John Stowers, Jacqueline Stowers, and Manna Storehouse are not operating a "retail food establishment," and if they are, imposing R.C. 3717 and OAC 3717 regulations upon the utterly basic and private activities is unconstitutional.

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[197] December 16, 2009 Affidavits of Jackie Stowers, Katie Stowers.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served upon the following this 17th day of December, 2009:

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