IN THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT, STATE OF FLORIDA

CASE NO. 1D18-0284

JOHN PARSONS,
LIBERTY AMBULANCE SERVICE, INC., a Florida corporation, ROBERT ASSAF, DIAMOND D RANCH, INC., a Florida corporation, and MICHAEL GRIFFIN,

Appellants,

v.

CITY OF JACKSONVILLE, FLORIDA, a municipal corporation and political subdivision of the State of Florida,

Appellee.
_____/

L.T. CASE NO.
16-2017-CA-001263-XXXX-MA

INITIAL BRIEF OF APPELLANTS

On Appeal from a Final Order
of the Fourth Judicial Circuit Court of Florida,
in and for Duval County

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INTRODUCTION

> **Standing to initiate a challenge to the adoption of an ordinance or resolution based on a failure to strictly adhere to the provisions contained in this section shall be limited to a person who was entitled to actual or constructive notice at the time the ordinance . . . was adopted.[1]**

Appellants brought this action to declare null and void Jacksonville's so-called "Human Rights Ordinance" or "HRO," which purported to add the categories of "sexual orientation" and "gender identity" to Jacksonville's existing nondiscrimination laws. But neither the policy nor the politics behind the HRO are involved in this case. Rather, this case is about the fatally flawed process of the HRO's enactment, which violated Florida Statutes, the Jacksonville Ordinance Code, and the Rules of the Jacksonville City Council. The City failed to publish or otherwise give proper notice to the public of any portion of the twenty-eight (28) sections and subsections of the Ordinance Code purportedly amended by the HRO. Appellants, as individual and business residents of Jacksonville, have clear standing to challenge the City's illegal enactment of the HRO, because they indisputably are persons who were entitled to receive proper notice from the City. Because the City broke the law designed to protect Appellants, which law by its plain language

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[1] Fla. Stat. § 166.041(7).

unambiguously secures Appellants' standing to bring their challenge, the trial court's dismissal of Appellants' claims must be reversed.

STATEMENT OF THE CASE AND FACTS

A. The Parties.

Appellants are all residents of Jacksonville. The individual Appellants, John Parsons, Robert Assaf, and Michael Griffin, all reside in Jacksonville. The corporate Appellants, Liberty Ambulance Service, Inc. ("Liberty Ambulance") and Diamond D Ranch, Inc. ("Diamond D"), are both Florida corporations based in Jacksonville. (Am. Compl. ¶¶ 3–7, R. at 245.)

Liberty Ambulance provides medical transportation services, and has over 180 employees. Assaf is an owner and officer of Liberty Ambulance. (Am. Compl. ¶¶ 4–5, R. at 245.)

Diamond D is a working horse and cattle ranch, which also hosts weddings and other special events. Griffin is an owner and operator of Diamond D. (Am. Compl. ¶¶ 6–7, R. at 245.)

Appellee, City of Jacksonville, Florida (hereinafter, the "City" or "Jacksonville"), is a municipal corporation and political subdivision of the State of Florida. (Am. Compl. ¶ 8, R. at 245.)

B. The HRO.

On February 14, 2017, the Jacksonville City Council voted to adopt bill 2017-15, the so-called "Human Rights Ordinance" or "HRO." (Am. Compl. ¶ 9, R. at 246.) The HRO purports to add the categories of "sexual orientation" and "gender identity" to the "protected categories" in the Jacksonville Ordinance Code's existing nondiscrimination laws affecting employment, housing, and public accommodations. (Am. Compl. ¶ 10, R. at 246.)

The final version of the HRO, Ordinance 2017-15-E, ostensibly became law on February 28, 2017, at the conclusion of the regular meeting of the Jacksonville City Council, the Mayor not having signed or vetoed the HRO. (Am. Compl. ¶ 11, R. at 246.)

The enacted HRO provides, in pertinent part:

> **Section 2. Amending Sections 60.105, 400.101, 400.301, 402.102, 402.107(g)(1), 402.107(g)(3), 402.201, 402.202, 402.203, 402.204, 402.206, 402.210, 402.211, 406.102, 406.104(g)(1), 406.104(g)(3), 406.201, 408.102, 408.204, 408.401, 408.402, 408.403, 408.404, 408.406, and 408.407, *Ordinance Code*.**
>
> The foregoing sections of the Ordinance Code are hereby amended as follows: wherever protected categories are listed, that sexual orientation and gender identity, as defined in Section 3 below, shall be added to the list.

Section 3. Amending Sections 402.107, 406.104, and 408.105, *Ordinance Code*.

The foregoing sections of the Ordinance Code are hereby amended as follows:

(a) Wherever definitions are provided, the definition of sexual orientation shall be added and shall mean an individual's actual or perceived orientation as heterosexual, homosexual, or bisexual.

(b) Wherever definitions are provided, the definition of gender identity shall be added and shall mean the gender-related identity, appearance, or expression of a person. Gender identity may be demonstrated by a person's consistent and uniform assertion of a particular gender identity, appearance or expression, or by any other evidence that a person's gender identity is sincerely held, provided, however, that gender identity shall not be asserted for any improper, illegal or criminal purpose.

Section 4. Exemption for Religious Institutions.

Religious organizations, including but not limited to churches, synagogues, mosques, and schools of religious instruction and non-profit institutions or organizations affiliated therewith, are exempt from the provisions contained herein. For the purposes of Ordinance 2017-15-E, the phrase "religious organization" shall include "religious corporation, association or society." The term "religious corporation, association or society" shall be interpreted consistent with Section 2000e-(1)(a), United States Code.

* * *

> **Section 10. Interpretation.**
>
> Any ordinance or Charter provision or part of any Ordinance or Charter provision in conflict with the provisions hereof is repealed to the extent of the conflict.

(Am. Compl. ¶¶ 11, 12, R. at 246-47; HRO, Am. Compl. Ex. A, R. at 262-63, 266.)

None of the twenty-eight (28) sections and subsections of the Jacksonville Ordinance Code purportedly amended by Sections 2 and 3 of the HRO are published in the HRO, either in whole or in part. (Am. Compl. ¶ 13, R. at 247; Am. Compl. Ex. B, R. at 268–300.) Furthermore, none of the religious exemption provisions in Sections 402.209, 402.210(b), 406.302(b), and 408.202(a) of the Jacksonville Ordinance Code, which predate the adoption of the HRO and are different from or in conflict with Section 4 of the HRO, are published in the HRO, either in whole or in part. (Am. Compl. ¶¶ 14, R. at 247–48; Am. Compl. Ex. C, R. at 301–304.)

C. Violations of Applicable Law.

1. Violations of Florida Statutes Which Expressly Recognize Plaintiffs' Injury and Standing to Sue.

The Municipal Home Rule Powers Act, ch. 166, Florida Statutes, governs, *inter alia*, the procedures for adoption of municipal ordinances that amend other ordinances, such as the HRO. Section 166.041 requires, in pertinent part:

> **166.041 Procedures for adoption of ordinances and resolutions.**
>
> . . . .

> (2) . . . . **No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection**.
>
> (3)(a) . . . a proposed ordinance . . . shall, at least 10 days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The notice of proposed enactment shall state the date, time, and place of the meeting; the title or titles of proposed ordinances; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The notice shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance.
>
> . . . .
>
> (6) **The procedure as set forth herein shall constitute a uniform method for the adoption and enactment of municipal ordinances** and resolutions and shall be taken as cumulative to other methods now provided by law for adoption and enactment of municipal ordinances and resolutions. By future ordinance or charter amendment, a municipality may specify additional requirements for the adoption or enactment of ordinances or resolutions or prescribe procedures in greater detail than contained herein. However, **a municipality shall not have the power or authority to lessen or reduce the requirements of this section** or other requirements as provided by general law.

Fla. Stat. § 166.041 (emphasis added).

To hold municipalities accountable for compliance with the foregoing provisions, the Florida Legislature unambiguously recognized and protected standing for citizens to challenge ordinances enacted in violation of § 166.041:

> (7) Five years after the adoption of any ordinance or resolution adopted after the effective date of this act, no cause of action shall be commenced as to the validity of an ordinance or resolution based on the failure to strictly adhere to the provisions contained in this section. . . . **Standing to initiate a challenge to the adoption of an ordinance or resolution based on a failure to strictly adhere to the provisions contained in this section shall be limited to a person who was entitled to actual or constructive notice at the time the ordinance or resolution was adopted**. . . .

Id. (emphasis added).

Sections 2 and 3 of the HRO, which purport to amend twenty-eight (28) sections and subsections of the Jacksonville Ordinance Code, violate the amendatory language requirements of Fla. Stat. § 166.041(2). None of the amended sections or subsections, or paragraphs of any section or subsection, is set out in full (or even in part, or even by mere title) in the HRO. (Am. Compl. ¶ 16, R. at 249.)

Section 4 of the HRO—which purports to enact religious exemptions to the HRO that are different from or in conflict with the existing religious exemption provisions of Ordinance Code Sections 402.209, 402.210(b), 406.302(b), and 408.202(a)—violates the amendatory language requirements of Fla. Stat. § 166.041(2), because the HRO does not set out in full (or even in part, or even by mere title) any Ordinance Code section or subsection, or paragraph of any section or subsection, so affected. (Am. Compl. ¶ 17, R. at 249.)

Section 10 of the HRO, to the extent it purports to repeal the existing religious exemption provisions of Ordinance Code Sections 402.209, 402.210(b), 406.302(b), and 408.202(a) as being in conflict with HRO Section 4, violates the amendatory language requirements of Fla. Stat. § 166.041(2), because the HRO does not set out in full (or even in part, or even by mere title) any Ordinance Code section or subsection, or paragraph of any section or subsection, so affected. (Am. Compl. ¶ 18, R. at 249–250.)

The HRO also violates the constructive notice requirements of Fla. Stat. § 166.041(3)(a), because the version of the HRO made available for inspection to the public pursuant to the notice of the HRO's proposed enactment was deficient due to the violations of the amendatory language requirements of Fla. Stat. § 166.041(2) set forth above. (Am. Compl. ¶ 19, R. at 250.) Thus, neither the publicly noticed nor the enacted versions of the HRO adhered to the requirements of Fla. Stat. § 166.041, either strictly or otherwise. (Am. Compl. ¶ 19, R. at 250.)

2. Violations of Jacksonville Ordinance Code.

In accordance with Fla. Stat. § 166.041(6), the Jacksonville Ordinance Code specifies additional requirements, and prescribes procedures in greater detail, for the adoption of ordinances that amend existing ordinances, such as the HRO:

> **Sec. 3.105. - Ordinances effective subsequent to effective date of Ordinance Code.**
>
> (a) An amendment to an existing provision of the Ordinance Code **shall** be made in the following language: "Section [or other subdivision] [here indicate number or letter, as the case may be], Ordinance Code is amended to read as follows:," with the amended provisions set out in full.
>
> (b) The addition of a new provision to the Ordinance Code **shall** be made in the following language: "Title [or "Chapter," with appropriate subdivision, if necessary], Ordinance Code is amended by adding the following new section [or other subdivision] to read as follows:", with the new provision set out in full.
>
> (c) The repeal of a provision of the Ordinance Code **shall** specifically refer to the subsection, section, part and chapter number.

§ 3.105, Jacksonville Ordinance Code (emphasis added).

Sections 2 and 3 of the HRO, which purport to amend twenty-eight (28) sections and subsections of the Jacksonville Ordinance Code, violate the heightened amendatory language requirements of Ordinance Code § 3.105(a). The HRO sections do not use the prescribed Ordinance Code language to introduce the amended provisions, and they do not set out in full (or even in part, or even by mere title) the amended provisions. (Am. Compl. ¶ 22, R. at 251.)

Section 3 of the HRO, which purports to add new definition provisions to §§ 402.107, 406.104, and 408.105 of the Ordinance Code, also violates Ordinance Code § 3.105(b). Section 3 does not use the prescribed Ordinance Code language to

introduce the additional provisions, and it does not set out in full (or even in part, or even by mere title) the additional provisions. (Am. Compl. ¶ 23, R. at 251.)

Section 10 of the HRO, to the extent it purports to repeal the existing religious exemption provisions of Ordinance Code §§ 402.209, 402.210(b), 406.302(b), and 408.202(a) as being in conflict with HRO § 4, violates Ordinance Code § 3.105(c), because neither § 4 nor § 10 of the HRO specifically refers to any subsection, section, part, or chapter number being repealed. (Am. Compl. ¶ 24, R. at 251.)

3. Violations of Jacksonville City Council Rules.

Whereas Ordinance Code § 3.105 specifies requirements in addition to, and prescribes procedures in greater detail than, Fla. Stat. § 166.041 for the adoption of ordinances that amend existing ordinances, the Rules of the Council of the City of Jacksonville prescribe even more detailed procedures than the Ordinance Code:

> **RULE 3.102 PREPARATION OF BILLS**
>
> . . . .
>
> (c) Language. In preparing bills for introduction, the following rules regarding language **shall** be followed:
>
> (1) In all bills amending current and effective legislation, new words **shall** be underlined and words to be deleted **shall** be lined through with strikeout. When a new codified ordinance section or subsection is created, the proposed language will not be underlined. Any ordinance repealing an existing *Ordinance Code* chapter, section or subsection, without the use of strikeouts, **shall** include language which states that the

> repealed chapter, section or subsection is placed on file with the Legislative Services Division . . . .
>
> . . . .
>
> (3) Each section of the bill **shall** be numbered and contain but one proposition of enactment. Section headings may be provided where necessary to prevent confusion or provide information, but such headings shall be considered for information purposes only and not to constitute a part of the section.
>
> . . . .

City Council Rule 3.102 (emphasis added).

Sections 2 and 3 of the HRO, which purport to amend twenty-eight (28) sections and subsections of the Jacksonville Ordinance Code, violate the further heightened amendatory language requirements of Council Rule 3.102(c)(1). The HRO sections do not set forth the amended provisions of the Ordinance Code (in whole or in part) with new words underlined. (Am. Compl. ¶ 26, R. at 252.)

Sections 2 and 3 of the HRO also violate Council Rule 3.102(c)(3) because the only references to the twenty-eight (28) purportedly amended Ordinance Code sections and subsections appear in the headings of HRO §§ 2 and 3, and the headings do not constitute substantive parts of the sections. (Am. Compl. ¶ 27, R. at 252.)

Section 10 of the HRO, to the extent it purports to repeal the existing religious exemption provisions of Ordinance Code §§ 402.209, 402.210(b), 406.302(b), and 408.202(a) as being in conflict with HRO Section 4, violates Council Rule

3.102(c)(1), because neither Section 4 nor Section 10 of the HRO sets forth the repealed provisions with underlining or strikeout, and neither section includes the required language regarding the filing of repealed provisions. (Am. Compl. ¶ 28, R. at 252–53.)

D. The City's Failure to Comply with Florida Statutes, City Ordinances, and Council Rules Was Not an Accidental Oversight but a Purposeful Attempt to Enact a Controversial Measure with Minimal Public Scrutiny.

As alleged in the Amended Complaint (Am. Compl. ¶ 2, R. at 244–45),[2] whatever the political and policy considerations behind the HRO, it was intentionally drafted to hide its effects for the sake of messaging, making it exactly the kind of deceptive legislation the amendatory language rules are designed to prevent. (*See infra* Argument § I.A.2.a.) As the principal author of the HRO confessed, "I did write a new version of the bill that was **only five pages long** and worked with some of the top lawyers and law firms in the city to get it into a form that was the product of what we'd learned since 2012 about **how to message** . . . ." *Jimmy Midyette shares ups and downs of emotional five-year journey to HRO victory*, Financial News and Daily Record (Feb. 16, 2017, 10:43 AM), http://www.jaxdailyrecord.com/

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[2] The Court must accept Appellants' Amended Complaint allegations as true for purposes of its review of the circuit court's dismissal order. (*See infra* Argument § I (Standard of Review).)

showstory.php?Story_id=549363 (emphasis added). (Am. Compl. ¶ 2, R. at 244–45.)

E. Appellants' Lawsuit and the City's Ineffective Attempt to Moot Legal Challenges and Shield Its Violations from Review.

1. The Initial Complaint.

Plaintiff–Appellant John Parsons filed the initial Complaint for Declaratory and Injunctive Relief on March 1, 2017, as the sole Plaintiff. (Compl., R. at 3–57.) In the initial Complaint, Parsons sought a declaration that the HRO is null and void, and an injunction barring enforcement of the HRO, due to the violations of the amendatory language requirements of the Florida Statutes, Jacksonville Ordinance Code, and Jacksonville City Council Rules. (Compl., R. at 11–12.)

2. The City's Attempt to Moot and Dismiss the Case by "Recodification."

On April 27, 2017 the City enacted Ordinance 2017-236-E (the "Recodification Ordinance"), to "recodif[y] the Jacksonville Ordinance Code with all supplements since 1990 by simultaneously repealing all previously-enacted, separate ordinances and re-codifying the Jacksonville Ordinance Code in its entirety," which purportedly "cure[d] any defects in title, single subject defects or other procedural defects (such as failure to strictly comply with section 166.041, Florida Statutes . . .) in previously enacted ordinances, including the HRO . . . ."

(Mot. Dismiss Am. Compl. ¶¶ 11–15, R. at 309–311; Am. Mot. Dismiss Compl., Ex. A, R. at 193, 196–234.[3])

The Recodification Ordinance was drafted on March 22, 2017—**just 21 days after the filing of this lawsuit**—and introduced in the City Council on March 24, 2017, leading to its eventual adoption by the Mayor's signature on April 27, 2017. (R. at 197–234; City of Jacksonville Bill Information, Bill 2017-0236 (Original Text), http://cityclts.coj.net/coj/COJBillList.asp?Bill=2017-0236 (last visited June 15, 2018). According to the ordinance, it was the **first such "recodification" in 27 years**, but the City had just decided to start doing it regularly again. (R. at 198 ("**WHEREAS**, in 1990 the City last adopted a complete revision of the City's Official Ordinance Code; and . . . **WHEREAS**, the City Council seeks to return to its process of codification on a regular basis . . . .").)

The City moved to dismiss the initial Complaint on standing and mootness grounds, asserting that Parsons lacked standing to challenge the enactment of the HRO, and that his injunctive relief claims were made moot by the Recodification Ordinance. (Am. Mot. Dismiss, R. at 191–234.) Following a hearing on June 9,

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[3] Apparently due to transposition error, the City attached Ordinance 2017-**263**-E as Exhibit A to its motion to dismiss the Amended Complaint (R. at 309, 313–327), instead of the actual Recodification Ordinance, 2017-**236**-E, which was attached as Exhibit A to the City's amended motion to dismiss the initial Complaint (R. at 193, 196–234). The two ordinances have equal effect on Appellants' claims—*i.e.*, none at all. (*See infra* Argument § I.B.)

2017, the trial court dismissed the initial Complaint, without prejudice, and granted Parsons leave to amend. (Order Granting Am. Mot. Dismiss, R. at 235–238.) The court did not address the City's mootness argument, concluding instead that Parsons either lacked standing or failed to state a cause of action for declaratory relief, and failed to state a cause of action for injunctive relief. (Order Granting Am. Mot. Dismiss, R. at 235–238.)

3. The Amended Complaint.

Appellants Liberty Ambulance, Assaf, Diamond D, and Griffin joined Parsons in filing the Amended Complaint on July 25, 2017. (Am. Compl., R. at 244–304.) In the Amended Complaint, Appellants seek a declaration that the City's enactment of the HRO violated applicable law, including the amendatory language requirements of Fla. Stat. § 166.041(2) and the constructive notice requirements of Fla. Stat. § 166.041(3)(a), by failing to disclose or otherwise provide notice to the public of the extent of the HRO's purported amendment of twenty-eight (28) sections and subsections of the Jacksonville Ordinance Code. (Am. Compl. ¶¶ 30, 33–39, R. at 253, 257–58.)

Appellants alleged that each is a person within the municipality of Jacksonville, Florida "who was entitled to . . . constructive notice at the time the [HRO] . . . was adopted," and each is within the standing limitations established by Fla. Stat. § 166.041(7) and therefore eligible "to initiate a challenge to the adoption

of [the HRO] . . . based on a failure to strictly adhere to the provisions contained in [Fla. Stat. § 166.041].” (Am. Compl. ¶ 31, R. at 254.)

Because of the trial court’s prior dismissal of the initial Complaint, in part on standing grounds, Appellants also alleged specific injuries resulting from the City’s illegal enactment of the HRO:[4]

> a. Parsons is a Christian. In accordance with his Christian faith, it is his sincere religious belief that male (man) and female (woman) refer to distinct and immutable biological sexes that are determinable by anatomy and genetics by time of birth. The HRO, among other things, subjects Parsons to violations of his personal bodily privacy, modesty, and dignity, as informed by his religious conscience, by compelling businesses and places of public accommodation which Parsons calls on or patronizes to allow persons who are biologically female, but who identify as male as a matter of “gender identity” or “gender-related identity, appearance, or expression,” to enter and use men’s bathrooms and other private facilities while Parsons is also using such facilities. The HRO likewise will subject Parsons’ wife and young daughters to violations of their personal bodily privacy, modesty, and dignity, as informed by their religious consciences, by compelling businesses and places of public accommodation which they call on or patronize to allow persons who are biologically male, but who identify as female as a matter of “gender identity” or “gender-related identity, appearance, or expression,” to enter and use women’s bathrooms and other private facilities while they are also using such facilities.

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[4] As shown in Argument § I.A.2, *infra*, Appellants dispute that their declaratory relief claim depends on any showing of particularized or “special” injury.

b. Assaf is a Christian, and he seeks to operate his company, Liberty Ambulance, in accordance with his Christian faith, and to respect the sincere religious beliefs of all other employees of Liberty Ambulance. Assaf's Christian faith includes the sincere belief that male (man) and female (woman) refer to distinct and immutable biological sexes that are determinable by anatomy and genetics by time of birth. The HRO purports to require Assaf and Liberty Ambulance, as employers, to disregard Assaf's and other Liberty Ambulance employees' sincere religious beliefs regarding the nature of men and women in order to accommodate and affirm any "gender identity" or "gender-related identity, appearance, or expression" asserted by an employee, even if inconsistent with that employee's biological sex, thus violating the religious conscience rights of Assaf and other Liberty Ambulance employees.

c. Griffin is a Christian, and he seeks to operate his company, Diamond D, in accordance with his Christian faith, and to respect the sincere religious beliefs of all other employees of Diamond D. Griffin's Christian faith includes the sincere belief that God created marriage and has defined it exclusively as the union of one man and one woman. Griffin and Diamond D consider the natural setting of the ranch property as a beautiful part of God's creation, and a particularly appropriate setting for celebrating God's good design for marriage, so they host wedding ceremonies and receptions on the ranch property as part of Diamond D's operations, which hosting requires substantial participation by Diamond D and its employees in the wedding event. Because Griffin seeks to honor God—including God's design for marriage—in his operation of Diamond D, Griffin and Diamond D will host only wedding ceremonies and receptions which celebrate the marriage of one man and one woman. The HRO purports to require Griffin and Diamond D to host and participate in, and to compel other Diamond D employees to participate in, same-sex wedding events, which

participation would violate the religious conscience rights of Griffin and other Diamond D employees.

d. Griffin's Christian faith also includes the sincere belief that male (man) and female (woman) refer to distinct and immutable biological sexes that are determinable by anatomy and genetics by time of birth. The HRO purports to require Griffin and Diamond D to disregard the sincere religious beliefs of Griffin and other Diamond D employees regarding the nature of men and women in order to accommodate and affirm any "gender identity" or "gender-related identity, appearance, or expression" asserted by any customer, even if inconsistent with that customer's biological sex, thus violating the religious conscience rights of Griffin and other Diamond D employees. Furthermore, the HRO compels Griffin and Diamond D to violate the personal bodily privacy, modesty, and dignity of Diamond D employees and customers, including children, as informed by their religious consciences, by purporting to require Diamond D to allow persons who are biologically male, but who identify as female as a matter of "gender identity" or "gender-related identity, appearance, or expression," to enter and use women's bathrooms while female employees and customers are also using such facilities, and vice versa.

e. Under the coercive provisions of the HRO, a Plaintiff's refusal to violate his conscience or compel an employee of the Plaintiff to violate his or her conscience, as set forth herein, subjects the Plaintiff to enforcement proceedings under the HRO and potential monetary liability, including without limitation liability for fines, penalties, damages, punitive damages, and attorney's fees.

(Am. Compl. ¶ 32, R. at 254–57.)

F. The Order on Appeal.

The City moved to dismiss the Amended Complaint. (Mot. Dismiss Am. Compl., R. at 305–327.) As before, the City argued Appellants lack standing to challenge the enactment of the HRO because Appellants failed to allege any specific or "special" injury. (Mot. Dismiss Am. Compl. ¶¶ 2–9, R. at 306–309.) Also as before, the City argued in the alternative that Appellants' claims were made moot by the Jacksonville City Council's "recodification" of the Jacksonville Ordinance Code after enactment of the HRO, "simultaneously repealing all previously-enacted, separate ordinances and re-codifying the Jacksonville Ordinance Code in its entirety" which purportedly cured the HRO's defects. (Mot. Dismiss Am. Compl. ¶¶ 11–15, R. at 309–311.)

Following a hearing on November 3, 2017, the circuit court entered an order dismissing the Amended Complaint, with prejudice. (Order Granting Mot. Dismiss Am. Compl., R. at 328–331 (hereinafter, the "Dismissal Order").) Once again, the Dismissal Order did not address the City's mootness argument. Rather, citing to a case addressing taxpayer standing, the court ultimately concluded,

> Plaintiffs allege no basis on which this Court could find the existence of "a bona fide, actual, present practical need for [a] declaration" on the validity of the HRO. Because of the speculative nature of their alleged injuries, including those of the newly-joined Plaintiffs, it appears that Plaintiffs are unable to allege any such basis in this action.

(Dismissal Order, R. at 330 (citing *Rosenhouse v. 1950 Spring Term Grand Jury, in and for Dade Cnty.*, 56 So. 2d 445, 447–48 (Fla. 1952).)

Appellants timely filed their Notice of Appeal from the Dismissal Order on January 18, 2018. (Not. Appeal, R. at 332–37.)

SUMMARY OF THE ARGUMENT

The Dismissal Order should be reversed because Appellants have standing to bring an action to declare the HRO null and void. The intentionally vague and abbreviated language of the HRO violated the amendatory language and notice provisions of Fla. Stat § 166.041, along with several Jacksonville Ordinance Code sections and City Council Rules, by failing to give statutorily mandated notice to the public of any portion of the twenty-eight (28) sections and subsections of the existing Jacksonville Ordinance Code purportedly amended by the HRO. Appellants, under binding case precedent and the plain language of Fla. Stat. § 166.041(7), have standing to challenge the City's illegal enactment of the HRO, as individual and business residents of Jacksonville who were entitled to receive proper notice from the City of the HRO's full effects on existing ordinances, and without the need to allege any special injury.

The City's attempt to moot Appellants' legal challenges and shield its illegal enactment of the HRO from review, through a sudden, wholesale "recodification" of the entire Jacksonville Ordinance Code, accomplished neither. Under binding

case precedent, amendatory language violations in the enactment of ordinances cannot be cured through the novel "recodification" gambit deployed by the City in response to Appellants' lawsuit.

Finally, even if Appellants did not allege sufficient facts in the Amended Complaint to support their standing to challenge the HRO, the trial court abused its discretion in not granting Appellants leave to amend to allege such facts. Under well-settled and binding standards, leave to amend should be liberally granted unless the right has been abused or amendment would be futile, and must be granted to a plaintiff who has not received at least one opportunity to amend. No Appellant has abused the right to amend, and there is nothing in the Amended Complaint or the record before the trial court compelling the conclusion that amendment is not possible. Furthermore, four of five Appellants have never had the opportunity to amend.

The Dismissal Order should be reversed, and the case remanded to the circuit court with instructions to deny the City's motion to dismiss Appellants' Amended Complaint, or alternatively, to grant Appellants leave to amend.

ARGUMENT

I. THE DISMISSAL ORDER SHOULD BE REVERSED BECAUSE APPELLANTS HAVE STANDING TO SUE FOR A DECLARATION THAT THE CITY'S ENACTMENT OF THE HRO VIOLATED FLORIDA STATUTES AND IS VOID.

Standard of Review. This Court reviews *de novo* the circuit court's conclusion that Appellants lacked standing to sue. *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 116 (Fla. 2011); *Delgado v. Agency for Health Care Admin.*, 237 So. 3d 432, 438 (Fla. 1st DCA 2018); *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001) ("The de novo standard of review also applies to review an order of dismissal based on lack of standing.") In determining whether Appellants have standing, the Court must accept their allegations as true. *See Hospice of Palm Beach Cnty., Inc. v. State of Florida, Agency for Health Care Admin.*, 876 So. 2d 4, 7 (Fla. 1st DCA 2004).

A. Appellants Have Standing to Challenge the Invalid Enactment of the HRO in Violation of the Amendatory Language and Notice Provisions of Fla. Stat. § 166.041.

1. Appellants Satisfy the Requirements to Bring a Declaratory Action to Challenge the Validity of the HRO Under Florida's Liberally Administered and Construed Declaratory Judgments Act.

The declaratory judgment action brought by Appellants is the proper vehicle to challenge the validity of the HRO. *See Bd. of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 100 So. 2d 67, 69 (Fla. 1st DCA 1958); *see also*

Reinish v. Clark, 765 So. 2d 197, 203 (Fla. 1st DCA 2000) ("Individuals can challenge the validity of a statute in a declaratory action."). The propriety of their action is found in the text of the Declaratory Judgments Act itself:

> Any person . . . whose rights . . . or other equitable or legal relations are affected . . . by municipal ordinance . . . may have determined any question of . . . validity arising under such . . . ordinance. . . or any part thereof, and obtain a declaration of rights . . . or other equitable or legal relations thereunder.

Fla. Stat. § 86.021. Furthermore, the Act's "purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be **liberally administered and construed**." Fla. Stat. § 86.101 (emphasis added). Appellants have more than sufficiently pleaded the requirements for a declaratory action challenging the validity of the HRO.

This Court noted in *Reinish* that Florida does not observe any kind of rigid standing doctrine for declaratory actions. 765 So. 2d at 202. "Rather, the general requirement for standing in Florida posits that 'every case must involve a real controversy as to the issue or issues presented,' so that 'the parties must not be requesting an advisory opinion.'" *Id.* at 202 (quoting *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720–21 (Fla. 1994). Thus, to have standing a party must "demonstrate a direct and articulable stake in the outcome of a controversy," even if that stake "rests on an extremely slender reed." *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980). Ultimately, the issue is "whether the plaintiff has a sufficient interest

at stake in the controversy which will be affected by the outcome of the litigation." *Alachua Cnty. v. Scharps*, 855 So. 2d 195, 198 (2003).

In some (but not all) cases challenging governmental action, a sufficient stake in the outcome of a controversy must be shown by allegation of special injury, "distinct from other members of the community at large." *See McCall v. Scott*, 199 So. 3d 359, 364 (Fla. 1st DCA 2016). One example is so-called "taxpayer standing" suits challenging governmental expenditures.

The special injury rule for taxpayer standing suits is traditionally associated with the 1917 Florida Supreme Court case *Rickman v. Whitehurst*, in which a "citizen and taxpayer" challenged a county commission's expenditure of public funds in hiring day laborers to build roads and bridges instead of putting the work out for bid as required by statute. 74 So. 205, 206 (Fla. 1917). Holding the taxpayer without standing to challenge the expenditures, the *Rickman* Court explained,

> The right of a citizen and taxpayer to maintain a suit to prevent the unlawful expenditure by public officials of public moneys, unless otherwise provided by legislative enactment, is generally recognized. . . . The principle on which the right rests is that the taxpayer is necessarily affected and his burdens of taxation increased by any unlawful act of the county commissioners which may increase the burden to be borne by the taxpayers of the county, and no relief from such injury is obtainable elsewhere than in a court of equity. The right of the complainant to maintain this suit therefore would seem to depend upon the peculiar injury which may result to him from the expenditure of the funds . . . . The taxpayer's injury specially induced by the unlawful act is the basis of

> his equity, and unless it is alleged and proved, there can be no equitable relief. His position is not contradistinguished from that of all other taxpayers, or citizens who are not taxpayers, and therefore cannot invoke the aid of equity merely to prevent an unlawful corporate act however much the act may shame his sense of pride in the faithful observance by public officials of the obligations of their public duties.

74 So. 205 at 207.

Taxpayer standing, however, does not always depend on special injury. As this Court explained in *Scharps*,

> The special injury requirement, or the "*Rickman* rule," has an exception where there is an attack upon *constitutional* grounds based directly upon the Legislature's *taxing and spending* power. When such constitutional grounds exist there is standing to sue without the *Rickman* requirement of special injury. . . . Thus, taxpayer standing is available if the taxpayer can show that a government taxing measure or expenditure violates specific constitutional limitations on the taxing and spending power.

855 So. 2d at 198 (internal quotation marks and citations omitted).[5]

Thus, standing does not depend on special injury in all taxpayer suits challenging governmental expenditures. Nor does standing depend on special injury

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[5] The recognized origin of the exception to the *Rickman* special injury rule is the Florida Supreme Court's decision in *Department of Administration v. Horne*, in which the Court counseled, "Despite our reluctance to open the door to possible multiple suits by 'ordinary citizens', nonetheless, it is the 'ordinary citizen' and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause." 269 So. 2d 659, 663 (Fla. 1972).

in other contexts where citizens challenge governmental action. For example, in *City of Hialeah v. Delgado*, the Third District held that a citizen and voter has standing, without special injury, to challenge the language used by a city in a straw ballot question, for violating the Florida statute requiring the language to be "clear and unambiguous." 963 So. 2d 754, 755–56 (Fla. 3d DCA 2007). The *Delgado* court distinguished the taxpayer standing doctrine in rejecting the city's argument that the citizen lacked standing for failure to allege special injury:

> The City argues that Delgado does not have standing to bring this suit against it because he does not allege any special injury to himself as a result of the straw ballot. The City is referring to the taxpayer standing doctrine: the principle that a taxpayer has no standing to sue the government for allegedly misspending the public's tax money unless that taxpayer can demonstrate a personal stake and show some direct injury. The City misapprehends the difference between taxpayer standing and standing in election law cases. The present case is a challenge by a voter to ballot language, not a challenge by a taxpayer to a governmental spending decision. The trial court was entirely correct in ruling that Delgado had standing as a citizen and voter.

Id. at 756 (internal quotation marks, citation, and footnote omitted).

Thus, both within and without the taxpayer standing context, special injury is only sometimes a condition for standing. As discussed in detail below, challenges to city ordinances enacted in violation of Fla. Stat. § 166.041, such as the HRO, do not require allegation of special injury. (*See infra* Argument § I.A.2.b.) The City and the

trial court below, like the city in *Delgado*, misapprehended the difference between taxpayer standing and standing to challenge void ordinances.

2. Appellants Do Not Need to Allege Any Special Injury for Standing to Challenge the Illegal Enactment of the HRO in Violation of the Amendatory Language and Notice Provisions of Fla. Stat. § 166.041.

a. Ordinances Enacted in Violation of the Amendatory Language and Notice Provisions of Fla. Stat. § 166.41 Are Void.

Appellants seek a declaration that the HRO is void because it was enacted in violation of the amendatory language and notice requirements of Fla. Stat. § 166.041. Florida precedents, including from this Court and the Florida Supreme Court, show that no special injury is needed for standing to challenge as void an ordinance enacted in violation of these requirements. (*See infra* Argument § I.A.2.b.) As a preliminary matter, however, the cases holding that such ordinances are void merit discussion.

"**Florida follows the majority view whereby measures passed in contravention of notice requirements are invalid (null and void if not strictly enacted pursuant to the requirement of section 166.041)**." *Daytona Leisure Corp. v. City of Daytona Beach*, 539 So. 2d 597, 599 (Fla. 5th DCA 1989) (emphasis added) (citing *Fountain v. City of Jacksonville*, 447 So. 2d 353, 355 n.2 (Fla. 1st DCA 1984)).

> The notices are mandated in order to protect interested persons, who are thus given the opportunity to learn of proposed ordinances; given the time to study the proposals for any negative or positive effects they might have if enacted; and given notice so that they can attend the hearings and speak out to inform the city commissioners prior to ordinance enactment. Noncompliance with the notice provisions takes away or reduces these opportunities.

Coleman v. City of Key West, 807 So. 2d 84, 85 (Fla. 3d DCA 2001).

Referring specifically to the constructive notice requirements for proposed ordinances in § 166.041(3), this Court held, in *White v. Town of Inglis*, "It is clear that the action by the Town is an ordinance as defined under section 166.041(1)(a). . . . Because the Town enacted [the ordinance] without following the requirements of 166.041(3)(a) (notice in newspaper at least 10 days prior to adoption) the ordinance is void." 988 So. 2d 163, 164 (Fla. 1st DCA 2008). Likewise, the Third District held, in *Healthsouth Doctors' Hospital, Inc. v. Hartnett*,

> Such notice is clearly mandatory and constitutes a jurisdictional condition precedent to the activation of the City's power to adopt the ordinance at issue. In the instant case, there was no newspaper publication of notice of the city commission meeting at which adoption the ordinance took place. Accordingly, the ordinance is null and void because the City failed to follow the mandatory notice requirements of section 166.041(3)(a).

622 So. 2d 146, 148 (Fla. 3d DCA 1993) (citations omitted). And again, in *Coleman*, the Third District confirmed, "The courts have consistently held that ordinances which fall within the ambit of section 166.041(3), Florida Statutes (1997) must be

strictly enacted pursuant to the statute's notice provisions or they are null and void." 807 So. 2d at 85. These cases demonstrate that the notice requirements of Fla. Stat. § 166.041 are not only important for protecting and informing citizens and lawmakers, but also jurisdictional, such that noncompliance renders an ordinance void.

Appellants specifically challenge the City's noncompliance with the amendatory language requirements of § 166.041(2). Under the plain language of the statute, amendatory ordinances must, at a minimum, republish the paragraph of the ordinance section or sub-section being amended. *See City of Hallandale v. State ex rel. Zachar*, 371 So. 2d 186, 188 (Fla. 4th DCA 1979) ("'"The explicit terms of the . . . provision contemplate that in a proper case reenactment of a single paragraph of a sub-section is sufficient."'" (quoting *Jackson v. Consol. Gov't of City of Jacksonville*, 225 So. 2d 497, 507 (Fla. 1969)). In addition to the minimum requirement to republish the paragraph being amended, "enough of the act being amended must be republished to make the meaning of the provision published intelligible from its language and to insure that no unexpected meaning results from the combination of that language and other language in the Act." *Jackson*, 225 So. 2d at 508 (internal quotation marks omitted).

Courts interpreting the requirements of Fla. Stat. § 166.041(2), governing amendatory city ordinances, look to cases interpreting the counterpart language of

the Florida Constitution governing amendatory state statutes, Art. III, § 6, Fla. Const. (formerly Art. III, § 16, Fla. Const.).[6] *See City of Hallandale*, 371 So. 2d at 188 ("Subsection 2, which specifies procedural requirements for the enactment of municipal ordinances, actually embodies Article III, [§ 6], of the Florida Constitution as it pertains to state statutes."). Thus, this Court's and the Florida Supreme Court's decisions construing the equivalent amendatory language provisions in the Florida Constitution weigh heavily in this case.

Just as the cases cited above show that the constructive notice provisions of § 166.041(3) must be strictly complied with, or else an ordinance is void, this Court and the Florida Supreme Court have held that the amendatory language rules are mandatory and must be strictly complied with. In *Massachusetts Bonding & Insurance Co. v. Bryant*, this Court examined Florida Supreme Court precedent construing the constitutional amendatory language rules, and concluded that their requirements "must be strictly complied with." 175 So. 2d 88, 92 (Fla. 1st DCA 1965). One of the Supreme Court cases cited, *Lipe v. City of Miami*, explored deeply the "paramount purposes underlying the mandatory constitutional requirement in question," instructing,

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[6] Article III, § 6 (formerly § 16) of the Florida Constitution provides, in pertinent part: "No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection, or paragraph of a subsection."

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another, in an act or section which was only referred to, but not republished, was well calculated to mislead the careless as to its effect and was perhaps sometimes drawn * * * for that express purpose. Endless confusion was thus introduced into the law and the Constitution wisely prohibits such legislation.

141 So. 2d 738, 742 (Fla. 1962).[7] The Court subsequently summarized the purpose of the mandatory amendatory language rules in *Auto Owners Insurance Co. v. Hillsborough County Aviation Authority*, explaining,

> We have also held that the constitutional provision was **designed to inform both the legislature and the public** of the nature and extent of proposed changes in existing laws. For this reason it is required that when a specific section or subsection is being amended it should be republished with the proposed amendment so that an examination of the act itself will reflect the changes contemplated, as well as their impact on the amended statute.

153 So. 2d 722, 725 (Fla. 1963) (emphasis added).

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[7] Although the City's intent is not relevant to Appellants' claims that the City violated § 166.041(2), the HRO author's deliberate avoidance of the statute's amendatory language requirements (*see supra* Statement of the Case and Facts § D) brings into sharp focus both the need for the statute and the wisdom of the Legislature in preserving citizen standing to enforce it (*see supra* Statement of the Case and Facts § C.1; *infra* Argument § I.A.3).

To reiterate, the amendatory language provisions of Fla. Stat. § 166.041(2), applicable to city ordinances, are equivalent in purpose and effect to the amendatory language provisions of the Florida Constitution, applicable to statutes, which must be "strictly complied with." *Mass. Bonding*, 175 So. 2d at 93; *City of Hallandale*, 371 So. 2d at 188. This places the amendatory language provisions of § 166.041(2), designed to protect and inform both citizens and lawmakers, and requiring strict compliance, on the same footing as the constructive notice provisions of § 166.041(3), also designed to protect and inform citizens and lawmakers, and also requiring strict compliance. The corollary of the requirement for strict compliance with the amendatory language rules (and constructive notice rules) is that measures enacted without compliance are void—statutes enacted in violation of the constitutional amendatory language rules are unconstitutional; city ordinances enacted in violation of the statutory amendatory language rules are void.

To be sure, strict compliance with the constructive notice provisions of § 166.041(3), for amending ordinances, necessarily requires strict compliance with the amendatory language requirements of § 166.041(2). Otherwise, a city's published notice of a proposed amending ordinance could point the public to a proposed ordinance that omits or obscures the language of the existing ordinance being amended, rendering the published notice ineffective to serve its purpose of fully informing citizens and lawmakers as to the effect of the amendment. Thus,

violation of the amendatory language rule necessarily violates the constructive notice rule, rendering void any following enactment.

b. No Special Injury Is Required to Challenge as Void an Ordinance Enacted in Violation of Fla. Stat. § 166.041.

Having established that ordinances enacted in violation of § 166.041 are void, the standing question can be easily answered. In *Safer v. City of Jacksonville*, this Court held that the special injury rule for standing "has no application . . . in actions seeking to enjoin a City from enforcing an ordinance enacted without legislative authority, or in excess of its police power . . . ." 212 So. 2d 785, 787 (Fla. 1st DCA 1968). Then, in *Renard v. Dade County*, the Florida Supreme Court answered several certified questions regarding standing, including, "The standing necessary for a plaintiff to . . . attack a void ordinance, i.e., one enacted without proper notice required under the enabling statute . . . ." 261 So. 2d 832, 833–34 (Fla. 1972) (internal quotation marks omitted). The Court answered the question as follows:

> Part (3) of the question certified deals with standing to attack a zoning **ordinance which is void because not properly enacted, as where required notice was not given. Any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an ordinance**.

Id. at 838 (emphasis added). The court distinguished the persons who are not required to allege special damages—"any affected resident, citizen or property owner" who challenges an ordinance as void for lack of notice—from those who are

required to allege special damages, such as persons suing to enforce a valid ordinance. *Id.*

Finally, in *David v. City of Dunedin*, the Second District cited *Renard* in holding that plaintiffs may make a general attack on the validity of an ordinance, for failure to comply with the notice provisions of Fla. Stat. § 166,041(3), without alleging special injury. 473 So. 2d 304, 306 (Fla. 2d DCA 1985). These cases show that no special injury is required for standing to challenge the validity of a city ordinance enacted illegally or outside of the city's power, such as an ordinance enacted in violation of the notice requirements of § 166.041. Accordingly, Appellants have standing to challenge the validity of the HRO without alleging any special injury.

3. The Plain Language of Fla. Stat. § 166.041 Confirms Appellants' Standing Because Appellants Are Persons Who Were Entitled to Statutory Constructive Notice of the Proposed HRO with Compliant Amendatory Language.

Section 166.041 itself plainly confirms Appellants' standing to challenge the validity of the HRO, for it clearly evidences a legislative intent to protect the standing of citizens to challenge illegally enacted ordinances. The statute provides, in pertinent part,

> Standing to initiate a challenge to the adoption of an ordinance or resolution based on a failure to strictly adhere to the provisions contained in this section shall be limited

> to **a person who was entitled to actual or constructive notice** at the time the ordinance . . . was adopted.

Fla. Stat. § 166.041(7) (emphasis added). This provision was added to § 166.041 in 1995. Ch. 95-310, § 5, at 2774–75, Laws of Fla. ("providing a limitation on certain challenges to an ordinance's . . . validity and providing requirements with respect thereto"), *id.* at 2781–83. Thus, whereas the rule announced by the Florida Supreme Court in *Renard* allowed for "[a]ny affected resident, citizen or property owner of the governmental unit in question" to challenge, without special injury, an "ordinance which is void because not properly enacted, as where required notice was not given," 261 So. 2d at 838, the 1995 amendment to § 166.041 limited standing for such a challenge to "a person who was entitled to actual or constructive notice at the time the ordinance . . . was adopted." Fla. Stat. § 166.041(7); Ch. 95-310, § 5, at 2781–83, Laws of Fla.

As alleged in the Amended Complaint, all Appellants, as Jacksonville residents, were entitled to constructive notice of the HRO under Fla. Stat. § 166.041(3) (with compliant amendatory language under § 166.041(2)). (Am. Compl. ¶¶ 3–7, 29–31, R. at 245, 253–54.) Accordingly, all Appellants are indisputably within the express standing provision of Fla. Stat. § 166.041(7), indicating they were intended by the legislature to retain standing to challenge as void ordinances like the HRO.

4. The Standing Requirements for Challenging an Ordinance Enacted in Violation of Fla. Stat. § 166.041 Are Not Different for Zoning Ordinances.

The City may argue, as it did below (Tr. Hr'g June 19, 2017, R. at 396:13–25, 399:24–400:6; Tr. Hr'g Nov. 3, 2017, R. at 453:19–455:1), that the standing decisions in *Safer*, *Renard*, and *David* (*see supra* § I.A.2.b) do not apply here because they involve zoning ordinances affecting property rights. This argument has no merit because a distinction between zoning and other ordinances would make no sense for purposes of standing to challenge an ordinance enacted in violation of Fla. Stat. § 166.041.

First, the plain language of § 166.041 does not allow for any distinction between zoning and other ordinances for purposes of standing. The amendatory language provisions of § 166.041(2) apply to **all** ordinances, zoning or otherwise, by their plain language. The notice provisions of § 166.041(3) do differentiate among different kinds of zoning ordinances, but only to the extent that some zoning ordinances are subject to the constructive notice provisions of § 166.041(3)(a), and some are subject to more specific actual notice provisions in § 166.041(3)(c). This is powerful evidence that the Florida Legislature knew how to distinguish between zoning and other ordinances where it intended to, and chose not to make any such distinction in the amendatory language provisions of § 166.041(2).

Moreover, the standing provision in § 166.041(7) reserves standing "to initiate a challenge to the adoption of an ordinance . . . based on a failure to strictly adhere to the provisions contained in this section . . . to a person who was entitled to **actual or constructive notice** at the time the ordinance . . . was adopted" (emphasis added). Thus, actual or constructive notice is a distinction without a difference for standing purposes. Further, the standing provision contemplates challenges "based on a failure to strictly adhere to **the provisions contained in this section**" (emphasis added), meaning **all of § 166.041**, not merely the provisions specific to zoning. And, further still, § 166.041(6) expressly provides that the requirements of § 166.041 "shall constitute a uniform method for the adoption and enactment of municipal ordinances . . . ." The Legislature, when it enacted § 166.041 in 1973, and certainly when it amended the section in 1995, must be presumed to have known that *Safer* and *Renard* (and *David* by the time of the 1995 amendment) involved zoning ordinances, but nonetheless expressly made the enactment requirements of § 166.041 uniform for **all** ordinances. Fla. Stat. § 166.041(6); *see Williams v. Jones*, 326 So. 2d 425, 435 (Fla. 1975) ("[T]he Legislature is presumed to know the existing law when it enacts a statute and is also presumed to be acquainted with the judicial construction of former laws on the subject concerning which a later statute is

enacted.").[8] Thus, the enacted and amended plain language of § 166.041 forecloses the argument that challenges to the enactment of zoning ordinances and other ordinances for violation of the strict requirements of § 166.041 are subject to different standing rules.

Second, the police power that permits the City to regulate zoning is the same police power that permits the City to regulate businesses with nondiscrimination ordinances like the HRO. *See generally Ellison v. City of Fort Lauderdale*, 183 So. 2d 193, 195 (Fla. 1966) ("It is true that zoning power is justified only as an exercise of the general police power . . . ."); *City of Miami Beach v. Texas Co.*, 194 So. 368, 375 (Fla. 1940) (explaining municipal police power to subject persons and property, including businesses, "to restraints and burdens necessary to secure the comfort, health, welfare, safety and prosperity of the people.") As this Court held in *Safer*, the special injury rule for standing "has no application . . . in actions seeking to enjoin a City from enforcing an ordinance enacted without legislative authority, or in excess of its police power . . . ." 212 So. at 787. For both zoning and

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[8] *See also Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181, 1189 (Fla. 2017) ("In giving effect to the text of a statute, courts may not extend, modify, or limit the statute's express terms or its reasonable or obvious implications because to do so would be an abrogation of legislative power. . . . All parts of the statute must be given effect, and the Court should avoid a reading of the statute that renders any part meaningless. Moreover, all parts of a statute must be read together in order to achieve a consistent whole." (internal quotation marks and citations omitted)).

nondiscrimination ordinances, § 166.041(2) and (3) impose specific limitations on the City's police power, and the rules for standing to mount a challenge to either kind of ordinance must be the same.

5. To the Extent Standing to Challenge the HRO Requires an Affected Property Interest or Special Injury, Appellants Qualify.

To the extent that only citizens whose property interests are affected by an ordinance may rely on *Safer*, *Renard*, and *David* for standing, despite those decisions' clear rejection of special injury as a prerequisite, Appellants obviously qualify. Appellants Liberty Ambulance, Assaf, Diamond D, and Griffin have all alleged encumbrances on their property interests—their businesses—as a result of the enactment of the HRO, which are analogous to encumbrances on real property imposed by zoning regulations. (Am. Compl. ¶ 32, R. at 254–257.)

Liberty Ambulance, by virtue of its over 180 employees (Am. Compl. ¶ 4, R. at 245) is subject to the employment nondiscrimination provisions of the Jacksonville Ordinance Code purportedly amended by the HRO. (§§ 402.107(i), 402.201, Jacksonville Ordinance Code; HRO §§ 2, 3, 5, R. at 262–63.) Thus, the HRO imposed police-power regulations on Liberty Ambulance's employment policies and decisions immediately upon its enactment, and continues to so impose, substantially affecting the property rights of Liberty Ambulance and its owner Assaf.

Diamond D, by virtue of its serving members of the public (Am. Compl. ¶¶ 6, 32.c–d, R. at 245, 255–57), is subject to the public accommodations nondiscrimination provisions of the Jacksonville Ordinance Code purportedly amended by the HRO. (§§ 406.201, 406.301, Jacksonville Ordinance Code; HRO §§ 2, 3, 5, R. at 262–63.) Thus, the HRO imposed police-power regulations on Diamond D's public accommodation policies and decisions immediately upon its enactment, including Diamond D's policy at the time of the HRO's enactment not to participate in same-sex wedding events so as not to violate the consciences and sincerely held religious beliefs of Griffin or other Diamond D employees. (Am. Compl. ¶ 32.c, R. at 255–56.) The HRO continues to impose police-power regulations on Diamond D's public accommodation policies and decisions, substantially affecting the property rights of Diamond D and its owner Griffin.

Furthermore, the same interests of Liberty Ambulance, Assaf, Diamond D, and Griffin highlighted above (and as detailed in the Amended Complaint, *see supra* Statement of the Case and Facts § E.3), would supply sufficient standing to these Appellants to bring a pre-enforcement, facial challenge to the HRO as being unconstitutionally overbroad for regulating their Free Speech and Free Exercise rights protected by the First Amendment. *See Wyche v. State*, 619 So. 2d 231, 235 (Fla. 1993).

> When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said

> to be unconstitutionally overbroad. This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected expression.

Id. (internal quotation marks and citations omitted); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (holding Free Exercise rights may be asserted by for-profit corporations).

Although Appellants do not seek adjudication of their First Amendment rights in this case, these rights are sufficiently implicated by the HRO to give the four Appellants with business interests regulated by the HRO standing to challenge the HRO on First Amendment grounds, without first violating it or waiting for a complaint against them to be filed under it. In short, the HRO sufficiently regulates the conduct of these four Appellants—requiring them, right now, to alter their conduct in violation of their consciences and beliefs—to give them a concrete stake in the outcome of their challenge to the HRO. This stake satisfies any "special injury" inquiry, even though there is no such requirement for standing to challenge ordinances enacted in violation of § 166.041.

B. Mootness Does Not Provide Alternative Grounds to Affirm the Dismissal Order Because Statutory Amendatory Language Defects in Ordinances Cannot Be Cured by "Recodification."

The City will likely argue again that Appellants claims are moot because the City effected a "recodification" of the Jacksonville Ordinance Code, thereby curing the HRO's violations of the amendatory language and notice provisions of § 166.041. The lower court ignored, and presumably rejected this argument, and this Court should do the same, because the argument is contrary to Florida law.

The basis for the City's argument is the recognition by Florida courts that the Legislature's biennial "adoption" or "codification" of the laws of Florida as the Florida Statutes cures **minor** defects in laws passed since the last biennial adoption, such as title or single subject violations. *See, e.g.*, *Salters v. State*, 758 So. 2d 667, 669 (Fla. 2000) ("[W]hen laws passed by the legislature are adopted and codified in this manner, the restrictions of article III, section 6, pertaining to one subject matter and notice in the title no longer apply." (internal quotation marks and citations omitted)).

The City, however, overstates the rule, because the defects cured by the biennial process are limited. As this Court and the Florida Supreme Court have admonished, the biennial codification of the Florida Statutes **cannot cure violations of the amendatory language rules of the Florida Constitution**:

> **That contention must be rejected**. While certain defects, such as defects in titles, errors of spelling and punctuation, obvious misprints, and the like, may be remedied by the biennial act revising the Florida Statutes, this type of legislation cannot be used as a device by which to create new statutory law, vary the existing law, or cure any unconstitutionality of content . . . .

Mass. Bonding, 175 So. 2d at 92 (emphasis added) (citing *State ex rel. Badgett v. Lee*, 22 So. 2d 804, 807 (Fla. 1945) ("What we have said relates only to the invalidity of acts because of deficient titles. Incorporation in a general revision of the statutes would not cure a particular act of any unconstitutionality of content.")).

Nonetheless, the City gets one thing right: The codification principles applicable to constitutional requirements for the enactment of state statutes must be applied conformably to the parallel and equivalent statutory requirements for the enactment of city ordinances. Thus, whereas "recodification" of the Florida Statutes cannot cure a violation of the constitutional amendatory language rules, "recodification" of the Jacksonville Ordinance Code likewise cannot cure a violation of the statutory amendatory language rules of § 166.041(2).

The City's argument also proves too much for another reason: This Court's recognition in *Mass. Bonding* that the constitutional amendatory language rules must be strictly applied to statutes, 175 So. 2d at 92, means that the statutory amendatory language rules of § 166.041(2) must be strictly applied to city ordinances. This requirement of strict compliance supplies citizens subject to, and entitled to notice

of, a proposed ordinance a sufficient stake in the outcome of a challenge to the ordinance for violating § 166.041(2) to satisfy the requirements of standing under the precedential decisions from this Court and the Florida Supreme Court (*e.g.*, *Safer* and *Renard*, *supra*), even as codified by § 166.041(7).

The City's "recodification" argument is dubious for still another reason: The City's purported "recodification" of the Jacksonville Ordinance Code in 2017, for the first time in twenty-seven (27) years, and initiated just twenty-one (21) days after this lawsuit was commenced (*see supra* Statement of the Case and Facts § E.2), does not supply the same level of reliable notice to the public as the Legislature's regular, consistent, biennial codification of the Florida Statutes. *See State v. Rothauser*, 934 So. 2d 17, 20 (Fla. 2d DCA 2006) ("'Codification' rules or exceptions, like the one adopted in *Badgett*, delay the effective enactment of a law and give the public more time to discover the law and abide by it."). First, no matter how much time passes, the public will never discover the information omitted from an amendatory ordinance that violates § 166.041(2) because the information never existed in the ordinance. Second, the only "recodification" apart from the regular biennial codification of the Florida Statutes effective to cure a single subject or title defect is a specific reenactment of the defective law addressing the specific defect. *See, e.g.*, *Salters*, 758 So. 2d at 670 (recognizing "the Legislature's separation and reenactment of the dissimilar provisions originally contained" in a statute violating

the single subject rule as effective "exception" to general rule of "biennial adoption process"). The City's all-of-a-sudden, obviously reactive "recodification" invokes neither the regularity nor the specificity recognized by Florida courts as sufficient to cure minor defects in enactment. Thus, even if "recodification" could cure amendatory language defects (which it cannot), the City's "recodification" would fall far short.[9]

II. THE DISMISSAL ORDER SHOULD BE REVERSED BECAUSE THE CIRCUIT COURT'S DISMISSAL WITHOUT LEAVE TO AMEND WAS AN ABUSE OF DISCRETION.

Standard of Review. This Court reviews for an abuse of discretion the circuit court's dismissal for lack of standing without leave to amend. *See Webb v. Town Council of Town of Hilliard*, 766 So. 2d 1241, 1245 (Fla. 1st DCA 2000) (holding trial court abused its discretion in dismissing complaint based on Fla. Stat. § 166.041 without "leave to amend to correct the deficiencies as to standing"); *McAlpin v. Roberts*, 195 So. 3d 1197, 1199 (Fla. 1st DCA 2016); *Obenschain v. Williams*, 750 So. 2d 771, 772–73 (Fla. 1st DCA 2000).

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[9] To be sure, it would be illogical to conclude that the "mischief" caused by the "blind" enactment of laws in violation of amendatory language rules—*i.e.*, amendment without disclosing the changes to existing laws—could be cured by a similarly blind, wholesale reenactment of the entire code. *See Lipe*, 141 So. 2d at 742; *see also Rothauser*, 934 So. 2d at 20 (lamenting that "the wholesale reenactment of the laws of Florida . . . is undeniably the ultimate act of logrolling; thus, it cannot serve as a remedy to cure logrolling.")

As shown in § I, *supra*, Appellants have sufficiently alleged standing to challenge the HRO. Even if they had not, however, as this Court held in an action for violation of § 166.041, "the trial court abused its discretion in failing to treat the complaint for declaratory judgment as a proper remedy, and in failing to make the dismissal without prejudice to amend the complaint to allege standing to challenge the council action." *Webb* 766 So. 2d at 1245. Even more recently this Court held, "even if the complaint alleged insufficient facts to establish standing, the court should have granted the opportunity to amend." *McAlpin*, 195 So. 3d at 1199.

To be sure, this Court has adopted liberal principles for amendment of pleadings:

> Dismissal of a complaint with prejudice is a severe sanction which should be granted only when the pleader has failed to state a cause of action, and it conclusively appears that there is no possible way to amend the complaint to state a cause of action. Instead, the pleader should be given an opportunity to amend the defective pleading. A court should not dismiss a complaint with prejudice if it is actionable on any ground. **Dismissal with prejudice is an abuse of discretion where a pleader may be able to allege additional facts to support its cause of action** or support another cause of action under a different legal theory. **The opportunity to amend a complaint should be liberally given and should not be denied unless the privilege has been abused**.

Obenschain, 750 So. 2d at 772–73 (emphasis added). Furthermore, "dismissing a complaint without granting **at least one opportunity to amend** is considered an

abuse of discretion unless the complaint is not amendable." *Bryant v. State*, 901 So.2d 810, 818 (Fla. 2005) (emphasis added).

The trial court gave no rationale for withholding leave for Appellants to amend their complaint other than that Appellants, in the court's view, had alleged only "speculative" injuries. (Dismissal Order ¶ 7, R. at 330.) The trial court made no finding, however, that Appellants had abused the right to amend (nor could it), and gave no other reason for departing from the liberal amendment policies espoused by this Court.

Moreover, the **four Appellants** who joined the case for the first time in the Amended Complaint, Liberty Ambulance, Assaf, Diamond D, and Griffin, have **never** been given the opportunity to amend. Finally, there was nothing in the Amended Complaint, or any other record before the trial court, from which it could conclude that Appellants could **never** allege sufficient facts in support of standing or otherwise in support of their cause of action for declaratory relief. "In this case, it is not clear that any amendment would be futile." *McAlpin*, 195 So. 3d at 1199.

Given the liberal amendment policies adopted by this Court, and that four of five Appellants have never had the opportunity to amend their claims, it was an abuse of discretion for the trial court to dismiss the Amended Complaint with prejudice. Accordingly, the Dismissal Order should be reversed.

CONCLUSION

As shown above, Appellants have standing to sue for a declaration that the City's enactment of the HRO is void for violation of the Florida Statutes' amendatory language and notice rules, and the City's ostensible "recodification" of its Ordinance Code can neither cure the violation nor render Appellants' claims moot. Accordingly, the Dismissal Order should be reversed, and the case remanded to the circuit court with instructions to deny the City's motion to dismiss the Amended Complaint. Alternatively, the Dismissal Order should be reversed, and the case remanded to the circuit court with instructions to grant Appellants leave to amend.

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy hereof was filed electronically through the Court's eDCA system on this June 15, 2018. In addition to any electronic service provided to parties or counsel of record by the eDCA system, I also furnished this same day a true and correct copy by e-mail to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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