IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

HERMINE RICKETTS and LAURENCE CARROLL, a married couple,

Plaintiffs,

v.

MIAMI SHORES VILLAGE, FLORIDA and MIAMI SHORES CODE ENFORCEMENT BOARD,

Defendants.
_____/

CASE NO.: 13-36012-CA
CIVIL DIVISION: 01

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Hermine Ricketts and Laurence "Tom" Carroll, by and through the undersigned counsel, hereby file this Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment as follows:

I. INTRODUCTION

Plaintiffs Hermine Ricketts and Laurence "Tom" Carroll ("Plaintiffs" or "Hermine and Tom") filed this civil rights lawsuit against the Village of Miami Shores ("Miami Shores" or "Defendants") to vindicate their rights under the Florida Constitution. After over two years in litigation, Defendants now seek summary judgment in their favor, and in support thereof, rely only on a series of repetitive, conclusory assertions and provide almost no factual analysis.[1] In so doing, Defendants disregard Florida Supreme Court precedent—and ask this Court to do the same—by arguing for the misapplication of, or the adoption of several unprecedented exceptions

[1] As an initial matter, this Court has already considered—and rejected—all of these arguments. They were previously raised, almost verbatim, in Defendants' unsuccessful motion to dismiss.

to, these longstanding constitutional doctrines. But these novel and unsupported arguments are plainly negated by both the case law and the *unrebutted* material facts in this case, which are as follows:

- Hermine and Tom are prohibited from growing vegetables in their front yard. Pls.' Mem. Supp. Mot. Summ. J. at 7.
- Hermine and Tom are incapable of growing vegetables in their rear yard. *Id*. at 2–3 (citing Ex. A, Aff. Hermine Ricketts ("Ricketts Aff.") ¶ 6; Ex. B, Aff. Laurence "Tom" Carroll ("Carroll Aff.") ¶ 6).
- There is no scientific or biological definition of the term vegetable. *Id*. at 31 (citing Ex. C, Expert Report of Falon Mihalic, PLA ("Mihalic Report") at 6–7).
- One's understanding of the term "vegetable" is culturally based, and thus conceptions of this term are shifting and subjective. *Id*. (citing Ex. C, Mihalic Report at 7, 12).
- However the term is defined, there is nothing aesthetically unique about "vegetables." *Id*. at 47 (citing Ex. C, Mihalic Report at 12 ("There is nothing aesthetically unique about edible plants, or those culturally referred to as 'vegetables.'"); Ex. E, Tr. Aug. 27, 2015 Dep. Anthony Flores ("Flores Tr.") 157:6–8).
- Things commonly referred to as "vegetables" are indistinguishable from those that are not, including fruit. *Id*. at 47–48 (citing Ex. E, Flores Tr. 112:24–113:6).
- Vegetable gardens are just as attractive as any other type of garden. *Id*. at 3 (citing Ricketts Aff. ¶¶ 14, 16; Carroll Aff. ¶¶ 13, 15); *id*. at 11 (citing Ex. C., Mihalic Report at 10–11).

- Miami Shores' ban on front-yard vegetable gardens results in the prohibition of many attractive types of gardens, while permitting almost any type of unattractive garden. *See, e.g.*, *id*. at 41–42 (citing Ex. C., Mihalic Report at 10, 12; Ex. E, Flores Tr. 188:5–10).

Accordingly, Defendants' Amended Motion for Summary Judgment ("Defendants' Motion") must be denied. Indeed, upon considering these uncontroverted facts in light of the relevant precedent, the conclusion is unavoidable that summary judgment in favor of the Plaintiffs is appropriate.

II. BRIEF BACKGROUND[2]

Plaintiffs' legal challenge to Defendants' ban on front-yard vegetable gardens raises four distinct constitutional arguments.[3] There are no material facts in dispute.[4] Indeed, given the unrebutted facts in this case, Defendants' arguments focus almost entirely on attempting to persuade this Court to (incorrectly) adopt a one-step constitutional analysis, whereby this Court would consider no facts at all and rule in Defendants' favor so long as it agrees with Defendants' naked assertion that the law in question has the goal of furthering aesthetics.

Defendants' positions are completely irreconcilable with Florida's clear constitutional jurisprudence, which Plaintiffs have discussed at length in their memorandum in support of

[2] For a thorough discussion of the case's background and material facts, *see* Pls.' Mem. Supp. Pls.' Mot. Summ. J., at §§ I and II. Plaintiffs hereby incorporate these sections fully herein.

[3] For a thorough description of Plaintiffs' claims in this case, *see* Pls.' Mem. Supp. Pls.' Mot. Summ. J. at § III. Plaintiffs hereby incorporate this section fully herein.

[4] The parties agree that there are no disputed issues of material fact. Discovery in this matter took place in 2014 and 2015. In August of 2015, Plaintiffs took the deposition of the Defendants' Code Enforcement Supervisor, Anthony Flores. In January of 2016, Plaintiffs voluntarily disclosed the identity of their expert and provided a courtesy copy of her report to Defendants. Defendants have not refuted the findings of the expert report, deposed Plaintiffs' expert, or hired a rebuttal expert of their own. Nor have Defendants deposed either plaintiff, Hermine Ricketts or Tom Carroll. Thus, the factual record in this case has been crystallized for several months and there are no outstanding factual matters which might modify it.

summary judgment. None of the cases cited by either party direct this Court to disregard the means/ends fit between the law in question and its purported interest. And there is simply no case law which immunizes all regulations, if passed in the name of aesthetics, from constitutional scrutiny. Yet Defendants' Motion asks this Court to reach its ruling by disregarding *all* of these things. Therefore, Defendants' Motion must be denied.

III. LEGAL ARGUMENT

The Florida Supreme Court "is the ultimate arbiter[] of the meaning and extent of the safeguards provided under Florida's Constitution." *State v. Kelly*, 999 So. 2d 1029, 1042 (Fla. 2008) (alteration in original) (internal quotation marks omitted); *see also Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014). And it is incontrovertible that *both* fundamental rights asserted by the Plaintiffs—the right to "acquire, possess and protect property" and the right of privacy—are fundamental rights and thus subject to strict scrutiny. Fla. Const. art. I, §§ 2, 23.

Rather than argue under the binding precedent of the Florida Supreme Court, however, Defendants' Motion posits several mistaken—and in some instances wholly unprecedented—interpretations of Florida's Constitution. First, Defendants incorrectly argue that Plaintiffs' fundamental rights are not implicated. Specifically, Defendants assert that Plaintiffs' fundamental right to "acquire, possess and protect property" has not been infringed because vegetables are permitted elsewhere and their property has not been completely destroyed. Defs.' Am. Mot. Summ. J. at 6, 8, 10, 13, 16. Defendants further assert that Plaintiffs' fundamental right to privacy is not implicated, based in part on the flawed argument that the right does not protect anything that is open for others to see. Thus, rather than argue that Defendants can survive strict scrutiny, Defendants simply attempt to redirect this Court to a less rigorous standard of review.

Second, even if Florida's reasonable relationship test, rather than strict scrutiny, does apply, that test, as articulated by the Florida Supreme Court, requires this Court to consider whether the law "bear[s] a rational and reasonable relationship to a legitimate state objective," *McCall*, 134 So. 3d at 901 (Fla. 2014) (plurality opinion) and is not "discriminatory, arbitrary, or oppressive," *Chi. Title Ins. Co. v. Butler*, 770 So. 2d 1210, 12115 (Fla. 2000). This inquiry necessarily requires the consideration of facts. *See, e.g.*, *McCall*, 134 So. 3d at 905 (plurality opinion) (explaining that the court must review the evidence, including the "facts and circumstances surrounding the challenged [ban] and the subject matter it addresses.") *id*. at 919 (Pariente, J., concurring) (reaching conclusion based on facts); *see also* Pls.' Mem. Supp. Mot. Summ. J. at 15; *see generally id*. at § IV.B.

The unrebutted facts in this case are devastating to Defendants' position. Confronted with the forcefulness of this evidentiary record, Defendants propose a novel constitutional standard, one which disregards facts altogether and, instead, pares down the inquiry to a single factor: "Has the government articulated a legitimate interest?" Operating under this unprecedented and self-servingly truncated standard, Defendants reassert, ad nauseam, the same purely conclusory statement—that the ban purportedly furthers aesthetics, and therefore, "as a matter of law," Defendants' Motion must be granted. *See, e.g.*, Defs.' Am. Mot. Summ. J. at 14. This fundamental misstatement, regarding a dispositive legal standard, pervades Defendants' Motion.[5] But Defendants' proposed standard is simply irreconcilable with the reasonableness standard articulated by the Florida Supreme Court, and thus Defendants' arguments fail under any proper formulation of Florida's reasonable relationship test.

[5] Indeed, Defendants conclude virtually every argument with some iteration of this doctrinally flawed refrain. *See generally* Defs.' Am. Mot. Summ. J. (the assertion that Defendants must prevail "as a matter of law" appearing approximately 30 times).

Finally, as discussed briefly in Section III.C., Defendants' recycled arguments that Plaintiffs' claims are procedurally improper fail as a matter of law. Accordingly, Defendants' Motion must be denied.

A. MIAMI SHORES' BAN ON FRONT-YARD VEGETABLE GARDENS IMPLICATES PLAINTIFFS' FUNDAMENTAL RIGHTS AND CANNOT SURVIVE STRICT SCRUTINY.

Because Plaintiffs' fundamental rights are implicated, the standard this Court must apply in reviewing the ban's constitutionality "is one of strict scrutiny." *G.P. v. State*, 842 So. 2d 1059, 1062 (Fla. 4th DCA 2003). This standard "imposes a heavy burden of justification upon the [government]," *Fla. Bd. of Bar Examiners re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983), because the ban "is presumptively invalid," *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003), and can survive only if the government "demonstrat[es] that the [ban] serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985). In this case, Defendants have put forward almost no facts at all, and thus they fail to meet their burden as a matter of law. First, Defendants appear to posit the argument—which is unsupported by any analogous case law—that Plaintiffs' right to "acquire, possess and protect property" has not been infringed because the Defendants do not extend the ban to prohibit vegetable gardens elsewhere. *See* Defs.' Am. Mot. Summ. J. at 6, 8, 10, 13, 15. Second, Defendants similarly argue that Plaintiffs' right of privacy has not been implicated, a position which is based entirely on Defendants' erroneous understanding of the right of privacy as a doctrine which merely protects the right to keep a secret. Both arguments fail.

1. The Fundamental Right to "Acquire, Possess and Protect Property" Includes the Right to Grow Food in a Front-yard Garden.

In hopes of avoiding meaningful constitutional scrutiny, Defendants insist that the right to use one's property, including for the most basic purpose of feeding one's self and family, is not a fundamental right. Defs.' Am. Mot. Summ. J. at 7. It is.

The Florida Supreme Court has held that "[t]he right . . . . to use one's property as one wills [is a] fundamental right[] guaranteed by . . . the constitution of Florida." *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 884 (Fla. 1974). In fact, Florida courts have repeatedly held that to use one's property is the *most important* component of property rights: "The most valuable aspect of the ownership of property is the right to use it." *Duvall v. Fair Lane Acres, Inc.*, 50 So. 3d 668, 671 (Fla. 2d DCA 2010) (quoting *Snyder v. Bd. of CntyCty. Comm'rs*, 595 So. 2d 65, 70 (Fla. 5th DCA 1991), *quashed on other grounds*, 627 So. 2d 469 (Fla. 1993)).)). Accordingly, the right to use property falls squarely within the protection of Article I, section 2, as the Florida Supreme Court has again held: "[T]he phrase 'acquire, possess and protect property' in article I, section 2, includes the . . . rights to use and enjoy property. . . ." *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (internal quotation marks omitted).

Moreover, while the Florida courts appear to not yet have had occasion to address the *specific* use of property to grow food for one's self and family, there can be no question that this is the *most* fundamental aspect of property rights. In assessing the fundamentality and extent of property rights, after all, Florida courts, including *Zrillic*, have looked first and foremost to the "intent of the framers," with a specific eye toward the "natural law" philosophy that inspired them. *Id*. at 67. And there can be no doubt that the Framers viewed the right to use one's property as encompassing the specific use of growing food to feed one's self and family. In fact,

John Locke, the greatest natural law influence on the Framers, explained that the very origins of property lay in the productive use of land—specifically, in "Till[ing], Plant[ing], Improv[ing], Cultivat[ing], and . . . us[ing] the Product" of land for the enjoyment of one's self and family. John Locke, *Of Property*, Second Treatise of Civil Government ch. V § 32 (1690); *see id.* ("*As much land* as a man tills, plants, improves, cultivates, and can use the product of, so much is his *property*.") (emphasis added). Thus, there is no merit to the Defendants' suggestion that the right to use one's property to produce food for one's self and family is not part of the "fundamental right[]" to "use one's property as one wills." *Palm Beach Mobile Homes*, 300 So. 2d at 884.

In light of these cases, Defendants' only defense to strict scrutiny is to say that it does not apply. In the Defendants' view, even if property rights are fundamental, Florida's reasonableness analysis applies unless there is an "absolute destruction of property." Defs.' Am. Mot. Summ. J. at 7. This simply is not so. To the contrary, the Florida Supreme Court has applied strict scrutiny to regulations that "restrain," not only those that destroy, private property. The Court did so, for example, in *Department of Law Enforcement v. Real Property*, explaining:

> Property rights are among the basic substantive rights expressly protected by the Florida Constitution. Those property rights are particularly sensitive where residential property is at stake . . . . [Thus] the means by which the state can protect its interests must be narrowly tailored to achieve its objective through the least restrictive alternative where such basic rights are at stake.

588 So. 2d 957, 964 (Fla. 1991) (citations omitted).

The Florida courts of appeal have likewise rejected the assertion that meaningful constitutional scrutiny only attaches when there is an "absolute destruction" of property:

> *Any infringement* on the owner's full and free use of privately owned property, whether the result of physical limitations or governmentally enacted restrictions, is a direct limitation on, and diminution of, the value of the property and the value of its ownership and accordingly triggers constitutional protections.

Duvall, 50 So. 3d at 671 (quoting *Snyder*, 595 So. 2d at 70) (emphasis added). In *Duvall*, the restriction at issue was not an "absolute destruction," yet the court still invalidated it.

Moreover, *Haire v. Florida Department of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004), the primary Florida Supreme Court case on which the Village relies for its supposed "absolute destruction" threshold, has no bearing here. That case concerned the appropriate level of scrutiny in situations where the government provides compensation for a property owner affected by the regulation at issue. *Id*. at 780–82. The Court rejected the plaintiff's argument that strict scrutiny applied and instead applied rational basis review, but it did so precisely because the statute at issue provided compensation to the affected property owner. *Id*. at 782 (holding that "[b]ecause the Fourth District concluded that the Citrus Canker Law is a valid exercise of the State's police power *and provides for compensation for the destruction of trees having value*, the court determined that the reasonable relationship test applied. We agree with this determination.") (emphasis added) (citation omitted). The Court discussed at length "the State's obligation to pay compensation for the destruction of exposed citrus trees" and only then, "[w]ith this important clarification of the challenged statute," held that "the Fourth District properly applied the reasonable relationship test." *Id*. at 786.

In the same vein, Defendants argue that Plaintiffs' right to "acquire, possess and protect property" has not been "completely destroyed" because it is not illegal in Miami Shores to grow vegetables elsewhere. *See* Defs.' Am. Mot. Summ. J. at 7–8, 16. But it is simply no justification for government's banishment of the exercise of a fundamental right in one location that citizens are still free to exercise it in another location. There is simply no support, anywhere in constitutional law, for the argument that fundamental rights of this nature may be arbitrarily

violated if one can exercise them somewhere else.[6] Moreover, Plaintiffs have not merely "chosen" to not grow their food in their rear yard, as Defendants contend—they cannot, and the unrebutted evidence in the record establishes that they cannot.[7]

Finally, even on occasions where courts have deemed it unnecessary to apply strict scrutiny because the challenged statute could not even satisfy a less stringent level of review, the courts have applied a test more stringent than rational basis. *See Zrillic*, 563 So. 2d at 68 (applying a "reasonably necessary" standard—not "reasonable relationship"); *see also id.* (requiring that the regulation be "reasonably necessary to secure the health, safety, good order, [and] general welfare") (alteration in original); *see also Jacobson v. Se. Pers. Leasing, Inc.*, 113 So. 3d 1042, 1050–51 (Fla. 1st DCA 2013) (noting property rights are "a fundamental right, implicating strict scrutiny," but opining that there is an "exception" to strict scrutiny in property rights cases that allows "'reasonable restraint' under the police power . . . when *necessary* to

[6] The only area of constitutional law which recognizes anything remotely similar to this position involve so-called "time, place, and manner" restrictions. However, restrictions of this sort lack any recognized permissibility beyond the realm of First Amendment doctrine. And even if this Court were take the wholly unprecedented step of applying this rationale here, it would still have to consider the ban under (at least) intermediate scrutiny, and Plaintiffs would prevail. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[7] Defendants further seem to take the position that Plaintiffs are ultimately at fault for the harm caused by Miami Shores' ban on front-yard vegetable gardens, because they chose to put a pool in their rear yard. *See* Defs.' Am. Mot. Summ. J. at 10 n.5. As the record in this case clearly establishes, however, Plaintiffs cannot grow vegetables in their rear yard because there is insufficient sunlight. *See, e.g.*, Pls.' Mem. Supp. Summ. J. at 2–3 (citing Ricketts Aff. ¶ 6; Carroll Aff. ¶ 6); *see also* Defs.' Am. Mot. Summ. J., Ex. C, Pls.' Resp. to Interrog. (answering in response to Defendants' Interrogatory request 6(b), that "[Plaintiffs] do not admit that the portion of our property occupied by the pool could be viably used as a vegetable garden. As noted in response to [Defendants' Interrogatory asking whether Plaintiffs could grow vegetables elsewhere on the property] our back yard is covered by shadows during South Florida's peak growing season of September to April."). And contrary to Defendants' position, Plaintiffs learned that they could not grow vegetables in their rear yard *before* they built their pool. *Compare* Defs.' Am. Mot. Summ. J., Ex. C, Pls.' Resp. to Interrog. ("The pool was constructed in 1995.") *with* Pls.' Mem. Supp. Summ. J., Ricketts Aff. ¶¶ 2, 6-7 (explaining that they have lived in the home "[s]ince 1993" and "[i]n 1996, after several failed attempts to grow vegetables in our back yard, we relocated our vegetable garden to our front yard."); Carroll Aff. ¶¶ 2, 6-7 (same). Thus any reference to Plaintiffs' pool is irrelevant.

secure the comfort, health, welfare, safety and prosperity of the people.'") (emphasis added) (quoting *Golden v. McCarty*, 337 So. 2d 388, 390 (Fla. 1976)).

Thus Defendants' effort to recast Plaintiffs' fundamental property rights claims as standard due process (and thus "reasonable relationship") claims finds no support in Florida Supreme Court precedent. And the Defendants simply make no effort to show the front-yard vegetable ban satisfies the reasonably necessary standard—much less strict scrutiny. Defendants' summary judgment motion should therefore be denied and the Plaintiffs' granted.

2. The Florida Supreme Court Has Held that the Fundamental Right "to Be Let Alone and Free From Governmental Intrusion" Includes the Right to Make Basic Decisions About Food and Nutrition.

Florida's right of privacy applies to matters regarding personal choice, a "constitutional right . . . [that] extends to all relevant decisions concerning one's health," *In re Browning*, 568 So. 2d 4, 11 (Fla. 1990), something that the Defendants' ban on front-yard vegetable gardens undoubtedly infringes upon. Pls.' Mem. Supp. Summ. J. at 23–27. Indeed, the ban also directly impacts the items Plaintiffs put into their own bodies, something which has been ruled unconstitutional both in Florida and beyond. *See, e.g.*, *Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (holding that the right to privacy "clearly . . . shields the ingestion of food, beverages or other substances"); *Ravin v. State*, 537 P.2d 494, 515 (Alaska 1975) (Boochever, J., concurring) ("Thus, the decision whether to ingest food, beverages or other substances comes within the purview of that right to privacy.").

Yet Defendants claim there is no privacy right at stake because the right of privacy is merely a right against governmental "observation" and Plaintiffs' "vegetable garden in their front yard [wa]s open and notorious for all to see." Defs.' Am. Mot. Summ. J. at 11–12. Because "Plaintiffs reveal every day whether they have a front yard vegetable garden," Defendants argue,

they "have no reasonable expectation of privacy with regard to a front yard vegetable garden." *Id*. at 13.

Contrary to Defendants' arguments, however, the right to privacy is not just a right against governmental observation; it also includes "the right to liberty and self-determination," *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004), matters which the court in *Browning* held to *explicitly* include the right to make basic determinations about food and nutrition. *See* Pls.' Mem. Supp. Summ. J. at 25–26 & n.14 (citing *Browning*, 568 So. 2d at 11 & n.6). Thus, Defendants' attempt to analogize Hermine and Tom's case to *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995), falls flat. In *Kurtz*, the plaintiff challenged a requirement that she sign, as part of a job application, an affidavit stating that she did not smoke. *Id.* at 1026. She alleged that this requirement violated her right to privacy, and the court held that it did not, because she "ha[d] no legitimate expectation of privacy in revealing that she is a smoker under the Florida constitution." *Id.* at 1028. But the court carefully qualified its holding:

> In reaching the conclusion that the right to privacy is not implicated in this case, . . . we emphasize that our holding is limited to the narrow issue presented. *Notably, we are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking.*

Id. at 1028 (emphasis added). The issue in Hermine and Tom's case is akin to the issue that the court *declined* to resolve in *Kurtz*. Specifically, it is whether the government can prohibit a property owner from growing vegetables in her front yard, for her own consumption—not whether the government can ask her to reveal whether she grows vegetables in her front yard. *Kurtz*, therefore, has nothing to say on this case.

Moreover, Defendants claim that even if there were a legitimate expectation of privacy, the front-yard vegetable garden ban, for two reasons, does not infringe it. First, Defendants insist that any right of privacy or self-determination is not infringed because the ban "does not

prohibit Plaintiffs from deciding what foods to grow and consume" and "does not deprive [them] of their 'preferred' source of sustenance and the ability to choose the foods they eat." Defs.' Am. Mot. Summ. J. at 13 (emphasis removed). Yet the unrebutted evidence is that before they were ordered to destroy their front-yard garden, Hermine and Tom derived more than half of their overall diet and the entirety of their vegetable intake from it. Pls.' Mem. Supp. Summ. J. at 5 (citing Ricketts Aff. ¶ 14; Carroll Aff. ¶ 13). Now, it is gone, and it cannot be replicated elsewhere on their property. *See id.* at 2–3 (citing Ricketts Aff. ¶ 6; Carroll Aff. ¶ 6). To suggest that the vegetable ban does not dictate the foods Hermine and Tom consume is to ignore the unrebutted evidence in this case—and reality.

Second, Defendants insist that any right of privacy or self-determination is not infringed because "Plaintiffs *are* [still] allowed to grow vegetables on their residential property—in their rear yard," and "[t]he fact that Plaintiffs do not . . . grow a garden in their rear yard is of their own choosing." Defs.' Am.at 10 (emphasis removed). As Plaintiffs have explained above, this argument is completely unpersuasive. *See* § III.A.1, *supra*.

Defendants' arguments utterly fail to demonstrate how a ban on front-yard vegetables is narrowly tailored to a compelling governmental interest. Instead, just as with Defendants' response to Plaintiffs' arguments regarding Plaintiffs' fundamental right to "acquire, possess and protect property," Defendants do not attempt to argue that the ban survives strict scrutiny; rather Defendants merely assert that the fundamental right in question simply is not implicated, and thus strict scrutiny does not apply. Defs.' Am. Mot. Summ. J. at 13–14 ("Plaintiffs simply have no privacy right in a vegetable garden in their front yard. Thus, Defendants are entitled to summary judgment on Count II of Plaintiffs' Complaint as a matter of law."). To reach this conclusion, Defendants posit a woefully erroneous interpretation of the doctrine which, if

adopted by this Court, would effectively reduce Florida's unique—and purposefully expansive—right of privacy to a virtual legal nullity protecting only the right to keep a secret. *Id*. at 12–14 (relying, incorrectly, on *Kurtz*, 653 So. 2d at 1026, 1028). Contrary to Defendants' arguments, however, this is a complete misstatement of both the constitutional protections the right affords and the standard that applies when it is implicated. *See* § III.A.2, *supra*. Therefore, Defendants' Motion fails as a matter of law.

B. MIAMI SHORES' BAN ON FRONT-YARD VEGETABLE GARDENS IS UNREASONABLE, ARBITRARY, AND BEARS NO REASONABLE RELATIONSHIP TO A LEGITIMATE GOVERNMENTAL INTEREST.[8]

Even if this Court declines to apply strict scrutiny and instead applies the reasonable relationship test, Plaintiffs still prevail. The evidence in this case is unrebutted. *See* Pls.' Mem. Supp. Summ. J. at § II. And that evidence is essential to this Court's inquiry under Florida's reasonable relationship test. *Id.* at 14–15 (citing *McCall*, 134 So. 3d at 905) (plurality opinion). This Court must consider whether the law, in light of the evidence, "bears a reasonable and substantial relationship to a legitimate state objective," *McCall*, 134 So. 3d at 901 (plurality opinion), and is not "capriciously imposed," *id*., or "discriminatory, arbitrary, or oppressive." *Chi. Title*, 770 So. 2d at 1215). In this case, the unrebutted testimony establishes that there is simply no connection between a ban on front-yard vegetable gardens and aesthetics. *See, e.g.*, Pls.' Mem. Supp. Summ. J. at 44 ("First, '[r]esidential properties planted with edible plants are not aesthetically degrading nor do they present a threat to a community's visual character.'") (quoting Ex. C, Mihalic Report at 14).

[8] Plaintiffs' claims regarding due process and equal protection are briefed extensively in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, which Plaintiffs incorporate fully herein.

Knowing this, Defendants argue for an *even more deferential*—and wholly unprecedented—application of the standard, one which disregards the facts altogether. *See, e.g.*, Defs.' Am. Mot. Summ. J. at 14. In fact, Defendants insist that so long as they assert a legitimate governmental interest in aesthetics, any regulation passed in that name is valid "as a matter of law." *Id*. ("[M]easures designed to enhance or maintain the aesthetic appeal of a community, such as the Ordinance at issue here, are a valid exercise of a local government's police power and . . . as a matter of law, these measures bear a rational relationship to a legitimate purpose.") (internal quotation marks omitted).

However, Florida's reasonable relationship analysis is not a rubber stamp of legislative action, *see* Pls.' Mem. Supp. Summ. J. at 15 (citing *McCall*, 134 So. 3d at 905) (plurality opinion)), and the mere "invocation of aesthetic objectives" does not carry with it "some talismanic quality" that "legitimizes" every regulation, *Pagan v. Fruchey*, 492 F.3d 766, 776 (6th Cir. 2007) (en banc). *See also McCall*, 134 So. 3d at 919 ("This Court's role is not to simply 'rubber stamp' the Legislature's actions.") (Pariente, J., concurring). Nor is the Court allowed to disregard every aspect of the analysis other than determining whether the government has come into court and stated a legitimate government interest.[9] Rather, asserting a legitimate governmental interest is the first of several steps—not the only step—in reasonable relationship review. The government still must show that the law bears a reasonable relationship to that

[9] Defendants rely on this Court's prior ruling denying Plaintiffs' motion to compel in this case, in which this Court indicated that it was not inclined to consider the "motives and reasons" behind Defendants' ban on front-yard vegetable gardens. *See* Defs.' Am. Mot. Summ. J., at 3 (citing Ex. B, Order Den. Pls.' Mot. Compel). In so doing, Defendants ignore a critical distinction: There is a legally significant difference between a court which *second guesses* the objectives of the legislature and a court which may *accept* those objectives, but then engages in the wholly separate analysis of determining whether the law adopted reasonably furthers those objectives. Yet Defendants seemingly disregard this distinction, and in so doing, endeavor to have this Court apply the sort of "rubber stamp" analysis that is plainly at odds with *McCall*. In any case, given that this Court previously barred Plaintiffs from discovery regarding the purpose of the ban, no such evidence can even be said to have made its way into the record, thus preempting this concern altogether.

interest and is not arbitrary, oppressive, or unreasonable. *Id*. Under any proper application of the test, as opposed to Defendants' version of it, Defendants' Motion must be denied.

1. Under Any Application of the Rational Basis Test, the Court Must Consider the Law's Means/Ends Fit, and "Aesthetics" Is Not a Magic Word That Spares Defendants from This Analysis.

Florida's reasonable relationship test cannot be correctly applied without considering the law's means/ends fit. *See, e.g.*, *McCall*, 134 So. 3d at 901 (plurarlity opinion). This means that this Court is not a "rubber stamp." *See id*. at 919 (Pariente, J., concurring). Rather, it must determine whether the means used to accomplish the law's purported purpose actually accomplish it. In this case, the unrebutted evidence conclusively establishes that there is simply no connection between the Defendants' purported interest, aesthetics, and a law which prohibits residents from growing vegetables in their front yard. *See, e.g.*, Pls.' Mem. Supp. Summ. J. at 44 ("First, '[r]esidential properties planted with edible plants are not aesthetically degrading nor do they present a threat to a community's visual character.'") (quoting Ex. C, Mihalic Report at 14); *id*. at 39 (citing Ex. E, Flores Tr. 169:3–7). And any consideration of the effects of the ban—which is not the same as questioning the legislative motivations behind it—illustrates the presence of the same "critical missing link" that proved fatal in *McCall*. 134 So. 3d at 920 (Pariente, J., concurring). Indeed, the ban operates not as a ban on growing things that are unattractive—because, as the testimony also establishes, it fails to do even that—but as a ban on growing some edible items for one's own sustenance. Pls.' Mem. Supp. Summ. J. at 39, 44. Mr. Flores' own testimony confirms this:

> Q: [D]oes substituting an ornamental plant with a plant that bears a vegetable render the garden unattractive?
>
> A: No.

Id. at 39 (citing Ex. E, Flores Tr. 169:3–7). Under a plain reading of *McCall*, such a disconnect establishes that the ban "not only fails the smell test, but the rational basis test as well." *McCall,* 134 So. 3d at 920 (Pariente, J., concurring).

Ultimately, to overcome this factual record, Defendants misstate Florida's reasonable relationship test as one which forbids any consideration of the outcome-determinative question of whether the law is reasonably related to aesthetics. Florida Supreme Court precedent, however, as articulated in cases like *McCall*, cannot be reconciled with the breezy path to victory pushed by Defendants here: Step one, claim to be acting under a legitimate government interest. Step two, win. Finding a legitimate government interest does not end the inquiry; it only *begins* it. *See, e.g.*, *Miami v. Haigley*, 143 So. 3d 1025, 1034 ("[T]he *first step* is to identify a legitimate government purpose.") (emphasis added) (internal quotation marks omitted).[10] Florida's reasonable relationship test requires two additional considerations—that the law be reasonably related to aesthetics, and that it not be arbitrary or oppressive. Defendants' position completely discards *both*, and in their place, substitutes the novel policy that any regulation, if touted as an aesthetics measure, is *per se* constitutional. *See, e.g.*, Defs.' Am. Mot. Summ. J. at 9 ("[M]easures designed to enhance or maintain the aesthetic appeal of a community . . . are a valid exercise of police power and that, as a matter of law, these measures bear a rational relationship to a legitimate purpose.") (citation and internal quotation marks omitted); *id*. at 5 ("The landscaping measures of the Ordinance, designed to enhance or maintain the aesthetic appeal of a community, are a valid exercise of the Village's police power, and bear a rational relationship to a legitimate purpose, as a matter of law."); *id.* at 14 ("Plaintiffs' Complaint for

[10] As an initial matter, Plaintiffs have already stipulated that aesthetics is a legitimate government purpose. *See* Pls.' Mem. Supp. Summ. J. 52–-53 (preserving this issue for appellate review).

violation of substantive due process fails as a matter of law since an ordinance based on aesthetic grounds alone is a valid exercise of a city's police power."). This Court should not allow Defendants to evade two-thirds of the relevant test.

Finally, Defendants also rely on inapposite federal case law to support their position. *Id.* at 9–10. Specifically, Defendants argue that this Court should rule in Defendants' favor as long as this Court can somehow hypothesize a way in which a ban on vegetables *could* operate to make Miami Shores more beautiful—even though the record demonstrates that it flatly does not do so. *See, e.g.*, Pls.' Mem. Supp. Summ. J. at 44 ("First, '[r]esidential properties planted with edible plants are not aesthetically degrading nor do they present a threat to a community's visual character.'") (quoting Ex. C, Mihalic Report at 14); *id.* at 39 (citing Ex. E, Flores Tr. 169:3–7). This position is wrong for two reasons: First, Florida's reasonable relationship test is, according to the Florida Supreme Court, intended to be more exacting than its federal counterpart, the rational basis test. *See, e.g.*, *McCall*, 134 So. 3d at 897, 899 (ruling a statute unconstitutional under Florida's rational basis test after the Eleventh Circuit ruled that the very same law survived the federal rational basis test); *Armstrong v. Harris*, 773 So. 2d 7, 17 (Fla. 2000) ("Our state constitutional rights thus provide greater freedom from government intrusion into the lives of citizens than do our federal counterparts . . . In short: '[T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling.'") (quoting *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992)). Second, even under the more deferential federal rational basis test—a test under which, despite its deference, plaintiffs can and do win—Defendants' ban on front-yard vegetable gardens still fails to satisfy constitutional muster.[11]

[11] In fact, just in front of the Supreme Court alone, plaintiffs regularly prevail in rational basis cases. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *id.* at 2706 (Scalia, J., dissenting) (noting Court relied on

In sum, as the discussion below makes clear, there is simply no level of constitutional analysis which requires this Court to "rubber stamp" legislation which, like the law in question here, is arbitrary, unreasonable, and wholly disconnected from its purported objective. Thus, even though Florida's reasonable relationship test affords deference to legislative *findings*, it does not follow that there exists such a thing as a legislative free hand, whereby all legislative action is immunized from review upon the utterance of a single incantation: Aesthetics. *See Pagan*, 492 F.3d at 776.

2. Miami Shores' Ban on Front-yard Vegetable Gardens Violates Plaintiffs' Right to Substantive Due Process Because It Is Demonstrably Discriminatory Arbitrary, and Oppressive.[12]

A ban on front-yard vegetable gardens violates Plaintiffs' right to substantive due process, which "protects the full panoply of individual rights from unwarranted encroachment by the government." *Dep't of Law Enf't.*, 588 So. 2d at 960. Miami Shores' ban is arbitrary and irrational.

First, it is undisputed that the term "vegetable" has no biological or scientific definition. Pls.' Mem. Supp. Summ. J. at 31 (citing Ex. C, Mihalic Report at 6–7). This alone renders the law unconstitutionally arbitrary. *See Henry v. Bd. of Cnty. Comm'rs of Putnam Cnty.*, 509 So.

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rational basis review); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995); *Quinn v. Millsap*, 491 U.S. 95, 109 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345-46 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985); *Williams v. Vermont*, 472 U.S. 14, 24-27 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Plyler v. Doe*, 457 U.S. 202, 230 (1982); *Zobel v. Williams*, 457 U.S. 55, 64 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159, 159 (1977) (per curiam); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973); *James v. Strange*, 407 U.S. 128, 141-42 (1972); *Lindsey v. Normet*, 405 U.S. 56, 78-79 (1972); *Mayer v. City of Chicago*, 404 U.S. 189, 195-96 (1971); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971); *Turner v. Fouche*, 396 U.S. 346, 362-64 (1970).

[12] As referenced in § III.A.1, *supra*, Defendants' arguments regarding the application of Florida's reasonable relationship test, to the extent they arise in the context of due process, are addressed in this section of Plaintiffs' brief. Contrary to Defendants' assertions, fundamental rights are not subject to reasonable relationship analysis. They are subject to strict scrutiny. *See, e.g., N. Fla. Women's Health*, 866 So. 2d at 635.

2d 1221, 1222 (Fla. 5th DCA 1987) (holding that where a ban on "heavy vehicles" was "not further defined in the zoning ordinance . . . . [it must] contain[] sufficient guiding criteria to pass constitutional muster."). The ban on "vegetables" lacks the requisite "sufficient guiding criteria," leaving its ultimate meaning to the discretion of code enforcement officers, like Mr. Flores. The meaning of the term "vegetable," in Miami Shores, is merely a reflection of whatever thoughts and personal memories are triggered when Mr. Flores sees a given yard. Pls.' Mem. Supp. Summ. J. at 31–33 (citing Ex. C, Mihalic Report at 6–9, 12; Ex. E, Flores Tr. 110:7–111:24, 122:22–25).

Moreover, because the term "vegetable" escapes any common understanding, the practical effect of the law is to prohibit items that are actually types of fruit, flowers, or seeds. Pls.' Mem. Supp. Summ. J. at 9–10 (citing Ex. C, Mihalic Report at 6–7); *id*. at 31–32 n. 18. In the end, the ban on "vegetables" is a standard-less ban on whatever items Miami Shores' code enforcement staff deem offensive—a classification which essentially turns on an item's edibility. *Id*. at 32–33 (citing Ex. E, Flores Tr. 110:7–111:24). This interpretation has no basis either in science or the code itself. *Id*.; *see also id*. at 35 (citing Ex. E, Flores Tr. 80:4–18). This fact alone renders the ordinance unconstitutional because, as it relates to the enforcement of zoning codes, "[a]ny standards, criteria or requirements which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality." *ABC Liquors, Inc. v. Ocala*, 366 So. 2d 146, 149 (Fla. 1st DCA 1979); *see id.* (striking down a zoning ordinance on equal protection grounds because "the constitutional guaranty of equality before the law assures that every citizen[] . . . be treated equally."); *Miami v. Save Brickell Ave., Inc.*, 426 So. 2d 1100, 1104 (Fla. 3d DCA 1983) (same, and noting that "we need not consider whether the governing body has in fact acted capriciously or arbitrarily, because it is the opportunity, not the fact itself,

which will render an ordinance vulnerable.") (footnote omitted) (internal quotation marks omitted). "In other words, if definite standards are not included in the ordinance, it must be deemed unconstitutional." *Id*. Indeed, "[n]o legislative body (County Commission) can delegate to an administrator arbitrary discretion," *Henry*, 509 So. 2d at 1222, as the Miami Shores Commission does here, "to determine the meaning of a zoning code. If such standards or criteria do not exist, the zoning provision is a nullity." *Id*.

To insulate itself from this arbitrariness, Defendants rely, quite heavily, on the Third District's *en banc* opinion in *Kuvin v. Coral Gables*, 62 So. 3d 625 (Fla. 3d DCA 2010). But *Kuvin* is a First Amendment case and, as such, presented the Court with a completely different type of analysis. In that case, the plaintiff challenged Coral Gables' ban making it illegal to park a pickup truck outdoors overnight. *Id*. at 628–29. Having first determined that the plaintiff's right of association was not implicated, the court next grappled with the question of whether the law was reasonably related to a legitimate government interest. *Id*. at 632–33. (The court in *Kuvin* did *not*, contrary to Defendants' citation for the proposition, determine that the law was *per se* constitutional purely because it was related to aesthetics.) Ultimately, after several opinions, and admittedly lacking the benefit of a comprehensive legal and evidentiary record like the one in this case, the court in *Kuvin* held that the law survived Florida's reasonable relationship test.[13] Even in doing so, the Third District noted that if the City of Coral Gables had drawn a distinction like the one drawn by Miami Shores here—where an item's legality hinges on the perceived intent of the property owner—the outcome would be different. *See Kuvin*, 62 So. 3d at 635 (explaining that "[t]o base the constitutionality of these ordinances solely on

[13] In fact, the majority in *Kuvin* indicated that the lack of a record was a significant factor in why the plaintiff was unable to prevail. *See Kuvin*, 62 So. 3d at 638–39 (devoting an entire section of the opinion to discuss that "[t]he as-applied arguments raised and relied on by the dissent were not raised by Kuvin.").

whether a person uses his vehicle for personal or commercial purposes would create an irrational classification, lead to absurd results, and be impractical, if not impossible, to enforce."). That is exactly the type of distinction drawn by Miami Shores here. It is also precisely the sort of classification that, as *Kuvin* noted, was *struck down as unconstitutional* in *Proctor v. City of Coral Springs*, 396 So. 2d 771 (Fla. 4th DCA 1981). *See Kuvin*, 62 So. 3d at 637 (noting that the *Proctor* "analysis dealt with the reasonableness of the City of Coral Springs' inclusion of personal-use trucks in its definition of a 'commercial vehicle'") (emphasis omitted).

Nonetheless, in support of their argument that *Kuvin*—and its deferential reasonable relationship analysis—carries the day here, Defendants reproduce a lengthy string cite from *Kuvin* to support their conclusory argument that all aesthetics-based regulations are constitutional. *See* Defs.' Am. Mot. Summ. J. at 8–9. Yet none of those cases dealt with the actual use of a property owner's soil. And conspicuously omitted from that string cite was one case, *Campbell v. Monroe County*, 426 So. 2d 1158 (Fla. 3d DCA 1983), which is virtually identical in all material respects to the case before the Court here. As this Court should do, the court in *Campbell* considered "the undisputed. . . [and] candid testimony of the county's official" to determine that a purportedly aesthetics-based regulation was "arbitrary and discriminatory," and thus unconstitutional, because it involved a wholly arbitrary regulation that demonstrably had no connection to aesthetics. *Id*. at 1160–61. Similar to this ban, which prohibits items based on edibility, the Court in *Campbell* determined that aesthetics was merely a pretense for a separate, unstated government interest. In fact, the testimony of the city official cited by the court in *Campbell* is virtually indistinguishable from the testimony provided by Mr. Flores in this case:

> Q: And in fact if the work is well done, you can stand twenty feet away and not tell the difference . . . ?

A: That's right.

Q: Then from an aesthetic point of view it doesn't make any difference because they both look the same?

A: Yes, they will both appear as a masonry constructed house, that is correct.

Id. at 1161. Thus, the court held that the regulation was void as arbitrary and discriminatory because there was "no showing of a relationship of that requirement to aesthetic uniformity or safety." The same is true here:

Q: And isn't it true that ornamental plants and edible plants can often be confused with one another?

….

THE WITNESS: To the naked eye, yes.

Pls.'s Mem. Supp. Summ. J. at 42 (citing Ex. E, Flores Tr. at 188:5–10). In fact, it is unrebutted that "[m]any of the edible plants used in [Plaintiffs'] property have ornamental properties." Pls.'s Mem. Supp. Summ. J. at 45 (citing Ex. C, Mihalic Report at 11). As such, a ban on front-yard vegetable gardens is demonstrably arbitrary.

As the Florida Supreme Court has made clear, zoning regulations that are passed in the name of "community attractiveness" do not categorically survive if they single out specific activities for "discriminatory treatment." *Eskind v. City of Vero Beach*, 159 So. 2d 209, 211 (Fla. 1963). The Florida Supreme Court's rationale in *Eskind* is compelling here:

> It seems obvious to us that a rate sign in front of a motel is *no more offensive to the aesthetic sensibilities* of the traveler or the community than would be a rate sign in the same immediate area advertising the charges of the other business activities. Similarly, a sign advertising rates *is not aesthetically distinguishable* from a sign advertising various aspects of a motel's services or conveniences.

Id. (emphasis added). Like the ban in *Eskind*, the unrebutted testimony in this case is that there is no discernable difference between a vegetable and many other attractive items. *See* Pls.' Mem. Supp. Summ. J. at 45 ("Clearly '[m]any of the edible plants used in [Hermine and Tom's] property have ornamental properties.'") (quoting Ex. C, Mihalic Report at 11); *id*. (citing Ex. E, Flores Tr. 169:3–7). Thus, just as the Florida Supreme Court ruled in reference to the zoning code at issue in *Eskind*, there is "no justification from an aesthetic viewpoint to prohibit [vegetables] but permit[] every other type of [plant] imaginable." 159 So. 2d at 211. As a result, the regulation is discriminatory and lacks a reasonable relationship to its purported interest.

3. Miami Shores' Ban on Front-yard Vegetable Gardens Violates Plaintiffs' Right to Equal Protection of the Law Because It Draws an Irrational Distinction Between Those Who Wish to Grow Vegetables and Virtually Everyone Else.

A ban on front-yard vegetable gardens violates Plaintiffs' guarantee of Equal Protection of the law because it treats those who wish to grow vegetables differently from those who wish to grow anything else. The Florida Supreme Court has repeatedly held that the classification drawn by a law must "be based at a minimum on a rational distinction having a just and reasonable relation to a legitimate state objective." *Zrillic*, 563 So. 2d at 69 (citations omitted); *McCall*, 134 So. 3d at 901.

As discussed at length in Plaintiffs' memo of law in support of summary judgment, *Zrillic* and *McCall*'s equal protection analyses control the outcome here. But rather than argue that the ban on front-yard vegetable gardens survives under a *Zrillic* and *McCall* equal protection analysis, Defendants simply state that equal protection does not apply to the Plaintiffs in this case. Defendants' arguments rest primarily on their incorrect assertion that Miami Shores' ban merely regulates yards and conduct, not people. Defs.' Am. Mot. Summ. J. at 15–17. This is sophistry. In *Proctor*, for example, the Fourth DCA struck down an ordinance that classified

pick-up trucks as "commercial vehicles" and restricted them to garages and carports during certain times of the day. *Proctor*, 396 So. 2d at 771–72. The court held the law unconstitutional because it "restrict[ed] *drivers* of pickup trucks from visiting with friends or family by making it illegal to be parked in a residential driveway, or on the hosts' lawn." *Id.* at 772 (emphasis added).

The legal question in *Proctor*, which involved an overinclusive *distinction* banning "commercial vehicles," is far more analogous to the one at issue here than in *Kuvin*, which involved a ban on all trucks, regardless of use. In *Proctor*, as here, the ban arbitrarily singled out a specific thing while ignoring all others. *Id*. The court then held that it was "unreasonable and unconstitutional" to classify a vehicle that had no outward appearance as having any commercial use as a "commercial vehicle." *Id*. In other words, like the issue before the Court in this case, which involves an overbroad prohibition on "vegetables," the ban in *Proctor* was unconstitutional because it "ha[d] no foundation in reason and [wa]s a mere arbitrary exercise of power without reference to . . . the aesthetic appeal of [the] community.") *Id*. at 771–72 (citation omitted). And even though the ordinance distinguished between types of vehicles, and between garages and driveways, the effect of those distinctions was on *people*. *Id.*; *see also State v. Stewart*, 529 N.W.2d 493, 497 (Minn. Ct. App. 1995) ("[T]he location specific application of the statute unreasonably treats similarly situated persons differently and thus violates equal protection rights").

Similarly, in *Jacksonville v. Goodbread*, the court considered zoning restrictions dictating the location where a business could sell alcohol. 331 So. 2d 350, 350–51 (Fla. 1st DCA 1976). Presumably, this is the sort of regulation that Defendants in this case would characterize as governing conduct and location, not people. However, the plaintiffs in *Goodbread* argued,

correctly, that the law was "discriminatory against [them] and does not operate equally upon all persons." *Id*. at 351. The court agreed, holding that this unequal treatment amounted to a "classification [that] is arbitrary and discriminatory and, therefore, void." *Id*. at 352.[14] This case is no different. As *Goodbread* makes clear, a restriction that arbitrarily dictates where someone may do something necessarily affects people and is thus subject to constitutional review.

Ultimately, Defendants once again conclude by reasserting their refrain that, "as a matter of law, zoning regulations that tend to preserve the residential character of a neighborhood and/or enhance the aesthetic appeal of a community are constitutional." Defs.' Am. Mot. Summ. J. at 17. Because Defendants repeatedly misstate the appropriate constitutional analysis, Defendants' Motion must be denied.

C. PLAINTIFFS ARE NOT PROCEDURALLY BARRED.

Finally, there is no merit to Defendants' procedural arguments—which failed the first time Defendants raised them in their motion to dismiss—that Hermine and Tom's claims are barred by res judicata or are internally inconsistent and thus a nullity. *See, e.g.*, Defs.' Am. Mot. Summ. J. at 6–7; *id*. at 17–18. This Court has seen (and rejected) these arguments before. *See* Defs.' Mot. Dismiss at 7–4, 8 (referring to Plaintiffs' allegations as "inconsistent" and thus "repugnan[t]" and "a nullity."); Defs.' Mot. Summ. J. ; 15–16.at 17-18 (reincorporating, verbatim, Defendants' failed arguments raised in Defendants' Motion to Dismiss). According to Defendants, res judicata applies because Hermine and Tom's constitutional claims could have been raised in their appeal from the Miami Shores Code Enforcement Board decision. Defs.' Am. Mot. Summ. J. at 17–18.*Id*. However, *res judicata* will only bar a subsequent suit where,

[14] Although *Goodbread* did not explicitly describe its review as an equal protection analysis, the case has since been cited uniformly as an equal protection case. *See, e.g.*, *ABC Liquors*, 366 So. 2d at 149 (citing *Goodbread*; *Effie, Inc. v. Ocala*, 438 So. 2d 506, 508–09 (Fla. 5th DCA 1983) (same).

among other things, there is an identity of causes of action between the prior and subsequent action. Here, there is none. *See Wilson v. County. of Orange*, 881 So. 2d 625, 632 (Fla. 5th DCA 2004) ("In the second action, the Wilsons sued Orange County for deprivation of rights under 42 U.S.C. § 1983 and also challenged the facial constitutionality of the applicable statutes and ordinances. These are different actions and the facts necessary to support them are different.").

There is likewise no basis for Defendants' argument that Hermine and Tom's claims should be dismissed because of supposedly inconsistent allegations in their complaint. *See, e.g.*, Defs.' Am. Mot. Summ. J. at 6–7. An inconsistency within a complaint may defeat a claim for relief if it involves material allegations that are "[c]ontradictory" and therefore "neutralize each other." *Peacock v. Gen. Motors Acceptance Corp.*, 432 So. 2d 142, 146 (Fla. 1st DCA 1983) (affirming dismissal where plaintiffs asserted a defamation claim while simultaneously alleging "that the statements relied on as defamatory were true"); *see also Brocato v. Health Options, Inc.*, 811 So. 2d 827, 829 (Fla. 2d DCA 2002) ("Brocato cannot state a cause of action . . . by asserting that Watson is an eligible plan participant, while at the same time asserting that she is ineligible to participate in the plan."). Here, there is no inconsistency in Hermine and Tom's complaint, much less one rising to that level. The fact that they "admit" they are not forbidden from growing vegetables in their rear yard, *see* Defs.' Am. Mot. Summ. J. at 5–6, does not contradict any of the harms Plaintiffs have suffered as a result of not being able to do so in the front.

Finally, there is no merit to the Defendants' continued assertion—in this instance, incorrectly described as an "undisputed fact"—that the law Defendants enforced against

Hermine and Tom somehow means something other than what it very obviously says it means.[15] Accordingly, both of Defendants' renewed (and previously rejected) efforts to bar Plaintiffs from finally getting their day in court fail as a matter of law.

IV. CONCLUSION

Defendants' Motion suffers from three major failings. First, Defendants' ban on front-yard vegetable gardens implicates Plaintiffs' fundamental rights, and Defendants have failed to meet their burden to show that the law is narrowly tailored to a compelling governmental interest. Second, even if this Court disagrees with Plaintiffs' fundamental rights arguments, Defendants' repeated—but never more than cursory—discussion of Florida's reasonable relationship test is doctrinally flawed in several respects, particularly in its lack of any reference to, or analysis of, the law's means/ends fit. Finally, Defendants' arguments that Plaintiffs' claims are procedurally barred are flatly contradicted by the case law. Therefore, in light of the foregoing, Defendants' Motion for Summary Judgment must be denied. Moreover, in light of the controlling precedent of the Florida Supreme Court, along with the unrebutted testimony of

[15] Defendants take the position that the ban on front-yard vegetable gardens is somehow an exception to a wholly separate regulation requiring ground cover—a regulation that was never applied to Plaintiffs and that Plaintiffs do not challenge. Defs.' Am. Mot. Summ. J. at 2, 4. First, this position reflects an interpretation of the ordinance that is refuted by the plain, conjunctive structure of the ordinance itself (subpart "e" simply cannot be read as an "exception" to subpart "a." They are obviously each elements of a single, broader segment of the ordinance). Second, the terms of that separate and inapplicable subsection are irrelevant in this case, which involves a lawsuit challenging subpart (e), not subpart (a). Third, Defendants admit that this position is something that the attorneys only conjured up for purposes of this litigation. Pls.' Mem. Supp. Summ. J. at 36 (citing Ex. E, Flores Tr. 142:25–143:8). And finally, courts simply "cannot amend local ordinances 'as the town would have liked it to read' by ignoring the language of the code 'in favor of after-the-fact . . . testimony as to legislative intent to fill in the cracks' because property owners and residents have every right to depend on the wording of the code." *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) (citation omitted); *see also Ocean's Edge Dev. Corp. v. Town of Juno Beach*, 430 So. 2d 472, 474–75 (Fla. 4th DCA 1983) (same) (citation omitted)). Thus, Defendants' assertion in this regard is more akin to a disputed matter of law than an "unrebutted fact." But in either case, it is not material, because the meaning of an unrelated provision has no bearing on the outcome of this case.

both Plaintiffs' expert landscape architect and Defendants' Code Enforcement Supervisor, summary judgment in favor of Plaintiffs is appropriate.

Accordingly, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment and enter an order declaring the Village of Miami Shores' ordinance, which prohibits front-yard vegetable gardens, unconstitutional under the Florida Constitution, along with whatever other relief this Court deems just and proper.

RESPECTFULLY SUBMITTED this 28th day of April, 2016.

By: /s/ Ari Bargil
Ari Bargil (FL Bar No. 71454)
INSTITUTE FOR JUSTICE
999 Brickell Avenue, Suite 720
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: abargil@ij.org

Michael Bindas (WA Bar No. 31590)*
INSTITUTE FOR JUSTICE
10500 Northeast 8th Street, #1760
Bellevue, WA 98004
Tel: (425) 646-9300
Fax: (425) 990-6500
Email: mbindas@ij.org

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of April, 2016, a true and correct copy of the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was served via eservice@myfloridaaccess.com on the following counsel of record:

Richard Sarafan, Esq.
Nina Greene, Esq.
Genovese Joblove & Battista, P.A.
Miami Tower, 100 Southeast 2nd St., Ste. 4400
Miami, Florida 33131-2118

Attorneys for Defendants

/s/ Ari Bargil
Ari Bargil (FL Bar No. 71454)
INSTITUTE FOR JUSTICE