

**IN THE DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA
THIRD DISTRICT**

HERMINE RICKETTS and
LAURENCE CARROLL

CASE NO.: 3D16-2212

Appellants,

vs.

L.T. NO.: 13-36012

VILLAGE OF MIAMI SHORES, FLORIDA, et al.

Appellees.

On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for
Miami-Dade County, Florida
Case No. 13-36012
The Honorable Monica Gordo

APPELLANTS' INITIAL BRIEF

Ari Bargil (FL Bar No. 71454)
Allison Daniel (FL Bar No. 118618)
INSTITUTE FOR JUSTICE
2 South Biscayne Boulevard, Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: abargil@ij.org; adaniel@ij.org

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

*Admitted *pro hac vice*

TABLE OF CONTENTS

TABLE OF AUTHORITIESv

I. INTRODUCTION1

II. STATEMENT OF THE CASE AND FACTS3

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE LOWER TRIBUNAL3

B. STATEMENT OF FACTS6

1. For 17 Years, Hermine and Tom Grew Vegetables in the Front Yard of their Miami Shores Home6

(a) The Appellants, Hermine Ricketts and Tom Carroll.....6

(b) Hermine and Tom’s Harmless Garden7

2. Miami Shores Amends its Ordinances and Cracks Down on Hermine and Tom’s (Still Harmless) Garden.....9

3. The Evidence Demonstrates There is No Link Between a Ban on Front-Yard Vegetable Gardens and Aesthetics.....12

(a) There is Nothing Aesthetically Distinct About a Vegetable12

(b) Miami Shores’ Landscaping Ordinances Allow Virtually Everything Else in Front Yards—Just Not Vegetables.....15

(c) The Term “Vegetable” Lacks Any Common Understanding and Results in Enforcement That is Subjective and Arbitrary.....16

(d)	<u> Taken Together, the Unrebutted Evidence Demonstrated That There Is No Connection Between the Ban and Aesthetics</u>	17
4.	The Trial Court Disregarded Hermine and Tom’s Evidence in Ruling On the Parties’ Cross-Motions for Summary Judgment	18
III.	STANDARD OF REVIEW	20
IV.	SUMMARY OF THE ARGUMENTS	21
V.	ARGUMENTS AND AUTHORITIES	23
A.	THE BAN VIOLATES HERMINE AND TOM’S RIGHTS TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS	23
1.	The Trial Court’s Determination That Evidence Does Not Matter in a Reasonable Relationship Analysis Is Incorrect	24
2.	Had the Trial Court Considered the Evidence, It Would Have Concluded that the Ban Has No Connection to Aesthetics and Draws an Arbitrary Distinction Between Vegetables and Everything Else	28
(a)	<u>Both the Florida Supreme Court and This Court Have Held Unequivocally That Regulations Which Draw Legal Distinctions Between Visually Identical Items Are Not Reasonably Related to Aesthetics</u>	29
(b)	<u>The Ban is Both Under- and Over-inclusive</u>	33
3.	The Trial Court Further Erred By Adopting a Novel, “Purpose-Based” Interpretation of the Ban Which Fails to Alleviate—And, In Fact, Only Compounds—the Ban’s Unconstitutionality	37

B.	THE BAN VIOLATES HERMINE AND TOM’S FUNDAMENTAL RIGHTS	42
1.	The Right of a Person to Use Her Property to Feed Herself and Her Family is a Fundamental Right	43
2.	“The right to be let alone and free from governmental intrusion into [a] person’s private life”—Which Includes Decisions Concerning What Foods to Grow and Consume—Is a Fundamental Right.....	48
3.	The Ban Cannot Survive Strict Scrutiny	50
VI.	CONCLUSION	50

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<i>ABC Liquors, Inc. v. Ocala</i> , 366 So. 2d 146 (Fla. 1st DCA 1979)	38
<i>Alvarez v. Cooper Tire & Rubber Co.</i> , 75 So. 3d 789 (Fla. 4th DCA 2011).....	21
<i>Baycol, Inc. v. Downtown Dev. Auth. of Fort Lauderdale</i> , 315 So. 2d 451 (Fla. 1975)	43
<i>Campbell v. Monroe Cty.</i> , 426 So. 2d 1158 (Fla. 3d DCA 1983).....	30
<i>City of Helena v. Dwyer</i> , 42 S.W. 1071 (Ark. 1897)	49
<i>City of Miami v. Save Brickell Ave., Inc.</i> , 426 So. 2d 1100 (Fla. 3d DCA 1983).....	38–39
<i>City of W. Palm Beach v. Chatman</i> , 112 So. 3d 723 (Fla. 4th DCA 2013).....	20
<i>CNL Resort Hotel, L.P. v. City of Doral</i> , 991 So. 2d 417 (Fla. 3d DCA 2008).....	43–44, 45
<i>Commonwealth v. Campbell</i> , 117 S.W. 383 (Ky. Ct. App. 1909).....	49
<i>D’Angelo v. Fitzmaurice</i> , 863 So. 2d 311 (Fla. 2003)	21
<i>Dennis v. City of Key West</i> , 381 So. 2d 312 (Fla. 3d DCA 1980).....	33
<i>Eastern Air Lines, Inc. v. Fla. Dep’t of Revenue</i> , 455 So. 2d 311 (Fla. 1984)	26, 27

<i>Easy Way of Lee Cty., Inc. v. Lee Cty.</i> , 674 So. 2d 863 (Fla. 2d DCA 1996).....	37
<i>Eskind v. City of Vero Beach</i> , 159 So. 2d 209 (Fla. 1963)	31, 32, 33
<i>Estate of McCall v. United States</i> , 134 So. 3d 894 (Fla. 2014)	25, 26, 36
<i>Gray v. State</i> , 525 P.2d 524 (Alaska 1974)	49
<i>Henry v. Bd. of Cty. Comm’rs of Putnam Cty.</i> , 509 So. 2d 1221 (Fla. 5th DCA 1987).....	38
<i>In re Browning</i> , 568 So. 2d 4 (Fla. 1990)	48, 49
<i>In re Florida Bar</i> , 349 So. 2d 630 (Fla. 1977)	26, 34–35
<i>Joseph v. Henderson</i> , 834 So. 2d 373 (Fla. 2d DCA 2003).....	33
<i>Kuster Enters., Inc. v. Fla. Dep’t of Transp.</i> , 357 So. 2d 794 (Fla. 1st DCA 1978)	33
<i>Kuvin v. City of Coral Gables</i> , 62 So. 3d 625 (Fla. 3d DCA 2010).....	39, 40, 41, 42
<i>Lane v. Chiles</i> , 698 So. 2d 260 (Fla. 1997)	24, 28
<i>Membreno v. City of Hialeah</i> , 188 So. 3d 13 (Fla. 3d DCA 2016), <i>review denied</i> , No. SC16-616, 2016 WL 3486427 (Fla. June 27, 2016).....	24, 25, 27–28, 37
<i>Moore v. Thompson</i> , 126 So. 2d 543 (Fla. 1960)	26

<i>N. Fla. Women’s Health & Counseling Servs., Inc. v. State</i> , 866 So. 2d 612 (Fla. 2003)	43, 48–49, 50
<i>Palm Beach Mobile Homes, Inc. v. Strong</i> , 300 So. 2d 881 (Fla. 1974)	44
<i>Peavy-Wilson Lumber Co. v. Brevard Cty.</i> , 31 So. 2d 483 (Fla. 1947)	47
<i>Powell v. Pennsylvania</i> , 127 U.S. 678 (1888).....	49
<i>Proctor v. City of Coral Springs</i> , 396 So. 2d 771 (Fla. 4th DCA 1981).....	36, 40
<i>Ramon v. Saenz</i> , 122 S.W. 928 (Tex. Civ. App. 1909).....	44
<i>Ravin v. State</i> , 537 P.2d 494 (Alaska 1975)	49
<i>Shriners Hospitals for Crippled Children v. Zrillic</i> , 563 So. 2d 64 (Fla. 1990)	34, 35, 36, 43, 44, 45
<i>Sierra v. Shevin</i> , 767 So. 2d 524 (Fla. 3d DCA 2000).....	20, 21
<i>Signs, Inc. of Fla. v. Orange Cty.</i> , 592 F. Supp. 693 (M.D. Fla. 1983)	32
<i>Snyder v. Bd. of Cty. Comm’rs of Brevard Cty.</i> , 595 So. 2d 65 (Fla. 5th DCA 1991) (per curiam), <i>quashed on other grounds</i> , 627 So. 2d 469 (Fla. 1993)	44
<i>St. Joseph Abbey v. Castille</i> , 712 F.3d 215 (5th Cir. 2013)	27
<i>Sunshine Key Assocs. v. Monroe Cty.</i> , 684 So. 2d 876 (Fla. 3d DCA 1996).....	32

<i>Weinberger v. Weisenfeld</i> , 420 U.S. 636 (1975).....	27
---	----

Constitutional Provisions

Fla. Const. of 1838, pmb1.....	46–47
Fla. Const. of 1838, art. I, § 1.	46–47
Fla. Const. art. I, § 2.....	4, 42
Fla. Const. art. I, § 23.....	4, 42, 48

Statutes

Miami Shores, Fla., Code of Ordinances Part I, app. A, art. V, div. 17, § 536(e).....	9
Miami Shores, Fla., Code of Ordinances Part I, app. A, art. V, div. 17, § 538	14

Other Authorities

Fla. Dep’t Env’tl. Prot. & Univ. of Fla., <i>The Florida Yards and Neighborhoods Handbook</i> (2009), http://ffl.ifas.ufl.edu/materials/FYN_Handbook_2015_web.pdf	14, 36
Michael Gannon, <i>The New History of Florida</i> (1996)	47
<i>Going Green Residential</i> , Miami Shores Vill., http://www.miamishoresvillage.com/miami-shores-village/how-can-i-go-green.html (last visited Feb. 28, 2017)	36
Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), in <i>Words of the Founding Fathers</i> (Steve Coffman ed. 2012).....	46
John Locke, <i>Second Treatise of Civil Government</i> (1690)	45–46

Frank Oppel, *Tales of Old Florida*
(Castle Books 1987)47

Charlton W. Tebeau,
A History of Florida (1971).....47

Andrea Wulf,
*Founding Gardeners: The Revolutionary Generation, Nature,
and the Shaping of the American Nation* (2011).....46

I. INTRODUCTION

Miami Shores homeowners may have virtually anything in their front yard. They may decorate with garden gnomes, pink flamingos and trolls. They may park their boats and jetskis. And they are free to grow whatever trees, flowers, shrubs, grasses, fruits and berries they desire. There is, however, one thing forbidden:

Vegetables.

In Miami Shores, maintaining a vegetable garden in your own front yard is illegal and punishable by fines of \$50 per day. But Americans have been growing vegetables on their property since precolonial times. This appeal seeks to vindicate the constitutional rights of Floridians to continue to do so today.

Appellants, Hermine Ricketts and Tom Carroll (“Hermine and Tom”), a married Miami Shores couple in their 60s, designed and maintained a vegetable garden, peacefully and without incident, in the front yard of their modest Miami Shores home for over 17 years. After nearly two decades without a complaint (but quite a few compliments), they were abruptly ordered to stop. Facing the threat of fines of \$50 per day, Hermine and Tom destroyed their beloved garden and, along with it, uprooted a significant source of both material sustenance and personal joy. Today, where flowers and colorful plants once abounded, there sits a decidedly less vibrant (but fully compliant) patch of land. All of this, according to Miami Shores, in the name of aesthetics.

Hermine and Tom desire to once again grow vegetables for their own consumption, methodically and attractively as before, in their own front yard. But the ordinance at issue in this case prohibits this historically recognized, productive use of property. And despite Miami Shores' purported interest in promoting aesthetics, the ordinance bans *only* vegetable gardens—thus allowing virtually any other type of landscape, regardless of how it looks. As a result, Hermine and Tom filed this lawsuit, challenging the ban on front-yard vegetable gardens as a violation of the Florida Constitution's Due Process and Equal Protection Clauses. In its analysis, the trial court committed several errors, as it disregarded evidence and incorrectly applied an unprecedented version of Florida's reasonable relationship test on its way to finding in favor of Miami Shores. The trial court's novel formulation of the reasonable relationship test—which effectively rendered it unwinnable—has no basis in Florida's constitutional jurisprudence. In fact, it is flatly irreconcilable with the decisions of the appellate courts of Florida, including this one.

Hermine and Tom also challenged the ban on front-yard vegetable gardens as a violation of two of their fundamental rights under the Florida Constitution—the right to acquire, possess and protect property and the right of privacy. Yet, despite extensive briefing from both parties on the fundamentality of these rights, the trial court cursorily dispensed with them both in a single sentence, without any

analysis or explanation. Accordingly, this Court should reverse the grant of summary judgment against Hermine and Tom and instruct the trial court to grant summary judgment in their favor.

II. STATEMENT OF THE CASE AND FACTS

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN THE LOWER TRIBUNAL

This is an appeal from three final orders of the Eleventh Judicial Circuit in and for Miami-Dade County: (1) an Order Denying Hermine and Tom’s Motion to Compel Answers and Overrule Objections (R. 885-88); (2) an Order Denying Hermine and Tom’s Motion for Clarification or Reconsideration (R. 889-90); and (3) an Order on Cross-Motions for Summary Judgment (denying Hermine and Tom’s motion for summary judgment and granting Miami Shores’ motion for summary judgment) (R. 891-901).

Hermine and Tom filed a Complaint seeking declaratory relief, a permanent injunction, and other relief against Miami Shores on November 18, 2013. (R. 10-26). Hermine and Tom challenged a single provision of Miami Shores’ code of ordinances, which provides that “[v]egetable gardens are permitted in rear yards only.” (R. 11, 16). Hermine and Tom’s complaint alleged that the ordinance violated their constitutional rights as protected under four separate clauses of the Florida Constitution.

Hermine and Tom’s four claims fall into two separate categories under the Florida Constitution: so-called “non-fundamental” rights claims and fundamental rights claims. In the former category, Hermine and Tom argued that the ban violates their substantive due process and equal protection rights because it is arbitrary, irrational, discriminatory, oppressive, and is not reasonably related to a legitimate government interest. (R. 23-25). In the latter category, Hermine and Tom argued that Miami Shores’ ban on front-yard vegetable gardens violates their fundamental right “to acquire, possess and protect property,” Fla. Const. art. I, § 2, and “to be let alone and free from governmental intrusion into the[ir] . . . private li[ves],” Fla. Const. art. I, § 23. (R. 20-22).

Hermine and Tom defeated Miami Shores’ motion to dismiss and subsequent motion for reconsideration. (R. 229; 234) (hearing before the Honorable Spencer Eig). In its rulings, the trial court instructed that Hermine and Tom would be permitted to take discovery necessary for them to substantiate their claims. (R. 277; 295). In light of that instruction, Hermine and Tom’s propounded modest discovery—eleven interrogatories and six requests for production—aimed at obtaining information necessary to litigate this case.¹

¹ The discovery requests fell into three categories concerning: (1) the governmental interest(s) purportedly advanced by the provision of the Village Code that states, “Vegetable gardens are permitted in rear yards only”; (2) the Village’s interpretation of this provision, including its definition of the term “vegetable”; and (3) the Village’s investigation and enforcement of violations or alleged violations

Miami Shores objected to the discovery requests almost in full. (R. 266-71). Hermine and Tom, in turn, filed a motion to compel, (R. 272-364), which Miami Shores opposed. (R. 409-37). A new judge, to whom the case had been divisionally reassigned, denied the motion to compel, rejecting Hermine and Tom's assertion that the previous judge had already spoken to these issues. (R. 885-88). Instead, the trial court held that the discovery requests improperly sought evidence of "the motives and reasons behind a legislative body's adoption or enactment," and thus "[could not] be reasonably calculated to lead to admissible evidence as it is clear they cannot be the subject of judicial review upon a constitutional challenge." (R. 875-76) (hearing before the Honorable Monica Gordo following divisional reassignment).² Hermine and Tom sought reconsideration or clarification, (R. 456-60), and it was denied. (R. 889-90). In light of the trial court's order, Hermine and Tom engaged in only minimal discovery. Thereafter, the parties moved for summary judgment and the trial court heard oral argument on June 8, 2016. (R. 891). On August 25, 2016, the lower court entered its Order on Cross-Motions for Summary Judgment, denying Hermine and Tom's motion and granting that of Miami Shores. (R. 891-901).

of the provision, both generally and with respect to Hermine and Tom specifically. (R. 272-364; 456-60).

² Judge Gordo further ruled that the remaining interrogatories, regarding prior violations and enforcement, were "overbroad and unduly burdensome." (R. 509).

Hermine and Tom timely noticed this Appeal. (R. 858-82). In addition to the trial court's order on summary judgment, Hermine and Tom appeal the trial court's order denying their motion to compel, as well as its order denying their motion for reconsideration or clarification of the order denying the motion to compel.

B. STATEMENT OF FACTS

1. For 17 Years, Hermine and Tom Grew Vegetables in the Front Yard of their Miami Shores Home.

(a) The Appellants, Hermine Ricketts and Tom Carroll:

Hermine and Tom are a married couple in their 60s who have resided at their modest Miami Shores home for nearly 25 years. (R. 523; 580; 649). Shortly after Hermine and Tom purchased their home, ongoing medical problems caused them to begin paying closer attention to the source and nutritional content of the foods they consumed. (R. 523; 581; 649-51). As a result, Hermine and Tom came to prefer fresh, organic, and nutritionally-dense products. (R. 523; 581; 582-83; 650). They concluded that there was only one way to ensure that their food was grown and processed in accordance with their desires: growing it themselves. (R. 523; 583; 652).

Hermine and Tom first attempted to grow vegetables in their back yard. (R. 523; 581; 650). But they soon discovered that their back yard received too little sunlight during Florida's fall/winter planting season for a viable back-yard garden.

(R. 523-24; 581; 650). So in 1996, three years after moving into their home, Hermine and Tom planted a garden in the front yard. (R. 524; 581; 650).

(b) Hermine and Tom's Harmless Garden:

The front-yard garden thrived. For the next 17 years, Hermine and Tom continuously maintained a decorative array of edible plants—such as herbs, greens, and fruit—along with other ornamental plants. (R. 524; 581; 650). Hermine, a retired architect, channeled her professional energies into her garden, carefully planning and planting throughout the year. (R. 524; 580-82; 584). Even as she was beset with severe medical issues, Hermine always took care to make sure that the garden was carefully maintained. (R. 524; 581-82; 584). In her recovery, the garden was a valuable source of mild exercise, helping her to revitalize her body and relax her mind. (R. 524; 581-582; 584).

Hermine and Tom's gardening involved a mix of edible and non-edible plants. (R. 524; 583-84; 652). The edible items—grown for their own consumption—were situated harmoniously beside their ornamental plants as part of one continuous landscape. (R. 524; 583-84; 652). At any given time, Hermine and Tom rotated a diverse selection of nutritious, organic produce in their yard. (R. 525; 583; 651-52). In all, they grew approximately 75 different types of edible plants in their front yard, which provided them with a diverse selection of seasonal, nutritious, and affordable food. (R. 525; 582-83; 651-52). This type of continuous

variety also guaranteed that Hermine and Tom were almost completely food-independent. (R. 525; 582-83; 652). Moreover, raising their own food ensured that Hermine and Tom had full knowledge of the life cycle of the produce they consumed—including, specifically, that it was grown without any artificial fertilizers or pesticides. These are benefits that cannot be duplicated by obtaining food through any other means. (R. 525-26; 583; 588; 652; 655-56).

The garden also provided many benefits that are less quantifiable. For one, the plants Hermine and Tom grew were fresher, and therefore nutritionally superior and better-tasting, than similar items found in grocery stores. (R. 526; 588; 656). Moreover, Hermine and Tom's garden served as a unique and therapeutic outlet that provided them with physical and mental benefits. (R. 526; 582; 584; 589; 651; 656). And growing their own food allowed Hermine and Tom to do their part to protect the environment, as their garden served the dual purpose of "growing food organically on their property as a way to consume plant-based foods while limiting their exposure to the pesticides used in commercial agriculture." (R. 526; 669).

Hermine and Tom's garden was far more than a mere vehicle for self-reliance or a source of healthy food. Working their own soil was a proud endeavor that combined Hermine and Tom's seemingly unrelated interests: landscaping design; environmental consciousness; and a uniquely American, spirited self-

determination. (R. 526-27; 580-84; 589; 649-52; 656). But Miami Shores claimed it was something else: an eyesore.

2. Miami Shores Amends its Ordinances and Cracks Down on Hermine and Tom’s (Still Harmless) Garden.

In March 2013, the Miami Shores Village Council adopted a new zoning code intended to outlaw front-yard vegetable gardens. Whereas the previous zoning code had provided that “[v]egetable gardens are permitted in rear yards,” the new law states plainly that “[v]egetable gardens are permitted in rear yards *only*.” Miami Shores, Fla., Code of Ordinances Part I, app. A, art. V, div. 17, § 536(e) (amended March 19, 2013) (hereinafter “the Ban”) (emphasis added).³ At the time of the amendment, Miami Shores had never received a single complaint from a resident about Hermine and Tom’s garden, despite the fact that they had maintained the garden for 17 years. Then, a month after the village amended its zoning code, a neighbor purportedly⁴ alerted Miami Shores’ Code Enforcement Supervisor, Anthony Flores (“Officer Flores”), to Hermine and Tom’s now-illegal garden. (R. 710).

³ Miami Shores took the position in the lower court that this change to the zoning code was stylistic only, and that vegetable gardens had always been prohibited. (R. 329; 527). This contention, while ultimately irrelevant, is contradicted by the fact that Miami Shores never cited Hermine and Tom under the former zoning code but did so immediately upon passing the new one.

⁴ There is no record of any such complaint. (R. 709-10).

As a result, in the summer of 2013, after nearly two decades of maintaining a front-yard vegetable garden, Hermine and Tom received a “Courtesy Notice” instructing them to “remove all vegetables from front yard.” (R. 527; 584; 600; 653). The notice advised Hermine and Tom that “[v]egetable gardens in [the] front yard [are] prohibited.” (R. 527; 584; 600; 653).

Hermine and Tom later received a formal Notice of Violation explaining that they had been cited for unlawfully growing vegetables in their front yard. (R. 527; 585; 602-03; 653). Confused as to how or why their vegetable garden was suddenly in the City’s crosshairs, Hermine and Tom sought clarity on the meaning of the ordinance. (R. 528; 585; 604-08 (letter from Hermine Ricketts: “Please provide clarification on what vegetation is permitted in [the] front yard”)); (R. 653; 688 (statement of Tom Carroll: “We’re seeking guidance and assistance”)). At their first hearing, even the members of the Code Enforcement Board were confounded by the meaning of the Ban and what it was intended to accomplish.⁵ Given their uncertainty, the Board elected to postpone its review of the matter until the next month’s meeting. In the meantime, the Board instructed Hermine and Tom

⁵ (R. 688-89) (statement of unknown Enforcement Board officer: “Well it should be tabled Everybody beat up this vegetable thing. These vegetables are low vegetables. They don’t have okra growing in their front yard. They don’t have corn growing in their front yard, where they get eight foot stalks They’re green, they accent the house Pineapples are—bromeliads. That’s a[n] ornamental plant that you absolutely eat too, don’t you? . . . You guys go ahead and blabber on about these plants.”).

to provide an itemized list of the plants growing in their yard. (R. 528; 585; 653; 688).

In advance of the second hearing, the couple dutifully prepared a two-page spreadsheet listing the plants—edible and otherwise—that they then grew or had previously grown in their front yard. (R. 528; 585; 609-11). The Board ignored this information and simply ruled that Hermine and Tom were in violation of the City’s ban on front-yard vegetable gardens, without providing any explanation as to why. (R. 528; 585; 612-13; 653; 689). Hermine and Tom were instructed to uproot their vegetable garden within 30 days or face fines of \$50 per day. (R. 528; 585; 612-13; 653; 689).

Forced with the threat of crippling fines, Hermine and Tom uprooted their garden. (R. 529; 654; 660-61).⁶ Five days later, Officer Flores inspected Hermine and Tom’s garden and confirmed that the property had been brought into compliance. (R. 529; 654; 662-63). Approximately six months after their ordeal began, Hermine and Tom filed this lawsuit. (R. 6; 529).

⁶ Hermine and Tom initially planned to appeal the Board’s decision. (R. 529; 586; 614-20; 654). However, after the Board insisted that fines would continue to accrue through the duration of the appeal, (R. 529; 585-86), Hermine and Tom chose to comply with Miami Shores’ demand and uprooted their garden. (R. 529, 586, 615-16). Once Miami Shores’ attorney informed them that “the underlying Code Enforcement case was officially closed,” Hermine and Tom voluntarily dismissed their appeal of the Board’s decision. (R. 529; 586-87; 636-37; 640-42; 654-55).

3. The Evidence Demonstrates There is No Link Between a Ban on Front-Yard Vegetable Gardens and Aesthetics.

Hermine and Tom introduced substantial evidence of the lack of any connection between the Ban and Miami Shores’ purported interest of aesthetics. That evidence included the testimony of their expert, Falon Mihalic—a Florida-licensed landscape architect with extensive experience designing edible landscapes—as well as the testimony of Officer Flores. This evidence demonstrated, among other things, that: (a) There is nothing aesthetically distinct about a “vegetable” or “vegetable garden”; (b) Miami Shores’ landscaping ordinances allow virtually anything else in a front yard, including things that are visually indistinguishable from “vegetables”—just not “vegetables” themselves; (c) the term “vegetable” lacks any botanical definition or common understanding; and (d) taken together, the evidence demonstrates that there is no connection whatsoever between aesthetics and a categorical ban on front-yard “vegetable” gardens. This evidence is undisputed, as Miami Shores proffered no evidence of its own to refute any of these points. (R. 894).

(a) There is Nothing Aesthetically Distinct About a Vegetable.

Hermine and Tom proffered un rebutted evidence that there is nothing aesthetically distinct about a “vegetable” or “vegetable garden.” As Ms. Mihalic testified, “[E]dible plants have no intrinsically good or bad aesthetic qualities.” (R. 562; 568; 676). Officer Flores agreed:

Q: [D]oes substituting an ornamental plant with a plant that bears a vegetable render the garden unattractive?

A: No.

(R. 560; 566; 734; 817).

In fact, the Ban prohibits plants that are visually *indistinguishable* from those it allows and that “can often be confused with one another” because they are identical “to the naked eye.” (R. 562-63; 738). Officer Flores readily admitted that banned “vegetables” can “look a whole [lot] like ornamental plants” that are allowed in front yards. (R. 717). He further admitted that “vegetables” themselves “often can have an ornamental value to them.” (R. 568; 731). Indeed, this was the case with respect to Hermine and Tom’s yard, where “[m]any of the edible plants used in [their] property have ornamental properties,” (R. 566; 675; 790; 824), or have “closely related, non-edible species that are used for ornamental purposes.” (R. 562; 676; 791).

Further evidence of the lack of any intrinsically aesthetic character of banned “vegetable” gardens is the fact that the Ban prohibits items that are not even visible, such as roots and tubers, which grow underground. (R. 532; 562-63; 717; 739). Moreover, Officer Flores even testified that a plant’s legality can turn on whether it is male or female, or whether it has fully matured yet, because “a vegetable plant doesn’t become noncompliant until the actual fruit begins to form; as long as it’s just a flower, it’s not noncompliant.” (R. 557; 736-37).

Hermine and Tom also proffered evidence that vegetable gardens, including their own, can be simultaneously attractive and productive. (R. 35; 532; 543; 555; 562; 566; 582; 652; 673-75; 788-90). As Ms. Mihalic testified, the question of whether a garden is attractive has nothing to do with whether the plants growing there are edible, but rather with whether “human intention and care for the landscape are evident.” (R. 562; 566; 673-75; 788-90). Officer Flores again agreed, explaining that whether a garden is attractive depends not on what is grown, but on whether it “looks harmonious.” (R. 556; 723). And Ms. Mihalic and Officer Flores both testified that Hermine and Tom’s garden was “well maintained.” (R. 566; 674; 724; 789). It was a vibrant and attractive space but, at the same time, it was productive,⁷ “environmentally-sound,” and “aligned with the Florida-Friendly Landscape Principles,” which recognize vegetable gardens as a legitimate landscaping use. (R. 526-27; 572; 669;784).⁸

⁷ Miami Shores’ own zoning code expressly states that landscaping may be installed for either “functional or aesthetic reasons.” Miami Shores, Fla., Code of Ordinances Part I, app. A, art. V, div. 17, § 538.

⁸ “The Florida-Friendly Landscape Program is a set of design guidelines, maintenance practices, and approved plant species” developed by the Institute of Food and Agricultural Science at the University of Florida for the purpose of encouraging home landscapes that “help protect water resources and enhance biodiversity.” (R. 669; 784). See Fla. Dep’t Env’tl. Prot. & Univ. of Fla., *The Florida Yards and Neighborhoods Handbook* 15 (2009), http://ffl.ifas.ufl.edu/materials/FYN_Handbook_2015_web.pdf (noting, as one reason for landscaping, that “[y]our passion may be raising vegetables.”).

Neighbors, moreover, regularly complimented Hermine and Tom on the appearance of their garden. (R. 606; 611; 659). The only person or entity to *disapprove* of the garden was Miami Shores.

(b) Miami Shores' Landscaping Ordinances Allow Virtually Everything Else in Front Yards—Just Not Vegetables.

Ultimately, the evidence established that Miami Shores' Ban forbids only one thing: items the Village deems “vegetables.” (R. 724). Fruit is permitted because, according to Officer Flores, “[f]ruits are . . . ornamental.” (R. 569; 720).

Berries and oranges are permitted as well:

Q: Have you ever cited anybody for having a strawberry bush?

A: No.

Q: What about blueberries?

A: No.

Q: Orange tree?

A: No.

Q: Any other – have you ever cited anybody for growing any other items that are commonly thought of as fruits?

A: No.

(R. 719-20). Even lawn ornaments are allowed, regardless of what they look like.

(R. 723). Thus, residents may have plastic “vegetables,” just not real ones. But anything fitting Miami Shores' code enforcement's opinion of a “vegetable”—

even if it is botanically a fruit, like a tomato or eggplant; or an invisible underground root or tuber, like ginger or potatoes—is illegal. (R. 717, 719-20).

(c) The Term “Vegetable” Lacks Any Common Understanding and Results in Enforcement That is Subjective and Arbitrary.

Neither the term “vegetable” nor “vegetable garden” is defined in the Miami Shores code. This is hardly surprising, however, because “[t]he term vegetable is not botanically defined.” (R. 530; 670; 785). In fact, most items referred to as “vegetables” are botanically fruits, roots, tubers, or something else altogether. (R. 530; 670; 785-88).

As Ms. Mihalic and Officer Flores both testified, whether a person considers a particular plant to be a “vegetable” will depend entirely on their personal experiences with food—which is a reflection of their upbringing, education, and culture. (R. 531; 552-54; 557; 670-73; 722; 785-88; 803; 866-67). For example, Officer Flores explained that his view on “what’s a vegetable, what’s a fruit” was formed by what “my mom taught [him]” at the “grocery store” as a child. (R. 673; 722; 788). He readily admitted that his understanding of the term “vegetable” is “subjective” and that Miami Shores’ other code enforcement officer, Mike Orta, may have a “different belief[] of what is or is not a vegetable.” (R. 723). But “[i]f you want to call it a fruit,” Officer Flores testified, “I still call it a vegetable. It’s my opinion.” (R. 554; 561; 723).

This testimony confirms that of Ms. Mihlaic, who explained that because the term “vegetable” lacks any botanical definition, whether a plant is deemed a “vegetable” (and thus subject to the Ban) will depend entirely on the “subjective and variable understanding” of the person enforcing the Ban. (R. 531; 553; 672; 787). “[E]nforcement,” in other words, “is based on the personal opinion of individual code enforcement officers.” (R. 554; 672; 787).

The testimony of Ms. Mihalic and Officer Flores constitutes the only evidence in the record that speaks to what the Ban actually means. *Both* confirm that the question of whether a given plant is illegal depends only on the subjective judgments of those who enforce the Ban. And in practice, as Officer Flores testified, these subjective considerations turn largely on whether he believes that a homeowner is growing a given item for the purpose of eating it. (R. 739; 743). This test, however, applies only to so-called “vegetables,” as once Officer Flores determines an item is a “fruit,” its edibility becomes irrelevant because “fruits are . . . ornamental.” (R. 569; 720).

(d) Taken Together, the Unrebutted Evidence Demonstrated That There Is No Connection Between the Ban and Aesthetics.

Miami Shores proffered no evidence to support its Ban. And, as the trial court expressly noted, “Miami Shores has not explained how a front-yard vegetable garden ban promotes the goal of aesthetics.” (R. 865). Instead, Miami

Shores made the strategic decision to propound only limited discovery, take no depositions, and proffer no evidence either to rebut the evidence adduced by Hermine and Tom or to support its own position that the ordinance is reasonably related to aesthetics. Miami Shores took this course because, in its view: (1) no fundamental right is implicated by the Ban; and (2) evidence does not matter under the reasonable relationship test that applies to laws implicating non-fundamental rights. (R. 832-854).

4. The Trial Court Disregarded Hermine and Tom’s Evidence in Ruling On the Parties’ Cross-Motions for Summary Judgment.

Despite the complete absence of evidence supporting the Ban and the overwhelming—and uncontested—evidence undermining it, the trial court granted summary judgment in favor of Miami Shores. It first determined, in a single sentence and without citing any judicial authority, that the Ban did not implicate Hermine and Tom’s fundamental rights.

The trial court further agreed with Miami Shores’ position that it was appropriate to disregard undisputed evidence which demonstrated that there is nothing aesthetically unique about “vegetables.” To be clear, the trial court *acknowledged* the existence of evidence demonstrating that:

- “[P]roperties planted with edible plants are not aesthetically degrading,” (R. 895);
- “Edible plants or vegetables ‘do not have an intrinsically good or bad visual quality,’” *id.*;

- “Some ornamental plants and edible plants are identical to the naked eye,” (R. 898);
- “Some edible plants may be aesthetically pleasing and some non-edible plants may not be aesthetically pleasing,” *id.*; and
- “Some edible plants may be visually identical to non-edible plants,” *id.*

The trial court, however, refused to consider this evidence in its rational basis analysis. Instead, the trial court held, incorrectly, that doing so would be to “second guess[] the legislature” with respect to its apparent “value judgment” that “vegetable gardens are not aesthetically pleasing,” while visually identical ornamental plants or fruits presumably are. (R. 895).

The trial court did, however, consider evidence on the point that “[t]he term ‘vegetable’ is ambiguous.” (R. 896). As the court acknowledged, “[T]here is some evidence, which it is proper for this Court to examine, that the term ‘vegetable’ is ambiguous because it does not have an undisputed definition, . . . is subject to being influenced by a person’s background and education, and . . . can be interpreted differently by different people.” *Id.* The court further acknowledged that such “[e]vidence of ambiguity is relevant to a rational basis analysis because a law that is ambiguous is capable of arbitrary enforcement.” (R. 895). But rather than invalidate the Ban on this ground, the trial court attempted to save the Ban by devising its own “purpose-based understanding” of the term “vegetable”—one that

turns on whether a given plant “is grown or cultivated specifically in order to be eaten . . . as part of a meal.” (R. 897; 898). Drawing on this “purpose-based” understanding, the trial court then made a series of assumptions—or, in its word, “surmis[ings]”—to conjecture that the Ban could conceivably be related to aesthetics. Specifically, the court reasoned that:

(1) “It is not irrational to surmise that since the purpose of a vegetable garden is to grow food to eat, the primary purpose of such a garden is productivity, not aesthetics”;

(2) “[i]t is rational to surmise that people do not grow vegetable gardens for the purpose of being aesthetically pleasing”; and

(3) “therefore it is rational to conclude that a vegetable garden is less likely to be aesthetically pleasing than other landscape options.”

(R. 898-99). The trial court did not explain, however, why other permissible productive uses, such as growing fruit or berries, were more likely to be aesthetically pleasing than a vegetable garden. Rather, the court simply granted summary judgment in favor of Miami Shores and against Hermine and Tom.

III. STANDARD OF REVIEW

“The standard of review of a summary judgment order is de novo.” *Sierra v. Shevin*, 767 So. 2d 524, 525 (Fla. 3d DCA 2000) (per curiam). Appellate courts likewise review a trial court’s decision on the constitutionality of a regulation de novo. *See City of W. Palm Beach v. Chatman*, 112 So. 3d 723, 726 (Fla. 4th DCA 2013). Under the de novo standard, “[N]o deference is given to the judgment of the

lower courts.” *D’Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). “If the ‘slightest doubt’ exists” as to whether a grant of summary judgment was appropriate, “then summary judgment must be reversed.” *Sierra*, 767 So. 2d at 525.

Hermine and Tom also appeal the denial of their motion to compel (and subsequent motion for reconsideration). Appellate courts “review orders regarding discovery under an abuse of discretion standard.” *Alvarez v. Cooper Tire & Rubber Co.*, 75 So. 3d 789, 793 (Fla. 4th DCA 2011).

IV. SUMMARY OF THE ARGUMENTS

Hermine and Tom raised four claims in this case. Two of the claims, substantive due process and equal protection, are likely decided under Florida’s reasonable relationship test—a test the Ban cannot satisfy. As to the two remaining claims, Hermine and Tom assert that the Ban abridges their fundamental rights to “acquire, possess and protect property” and “to be let alone and free from government intrusion into [their] private li[ves],” and that the Ban cannot survive the strict scrutiny applicable to laws that impinge such rights.

In light of the unrebutted evidence in the record, this case can be resolved purely on “non-fundamental” rights grounds. In that regard, the trial court erred in its consideration of Hermine and Tom’s claims under the Due Process and Equal Protection Clauses of the Florida Constitution for three basic reasons. First, the

trial court wrongly held that evidence is largely irrelevant under the reasonable relationship test, which applies to laws that infringe non-fundamental rights. Second, had the trial court considered the evidence before it, it would have concluded that the Ban bears no connection—much less a reasonable one—to aesthetics. And third, as even the trial court recognized, the Ban is ambiguous and thus susceptible to arbitrary, subjective enforcement because it does not even define the term “vegetable”—a term that *has no* botanical definition. In sum, the trial court adopted an unprecedented and impermissibly deferential version of the reasonable relationship test, in which it both disregarded unrebutted evidence and then rewrote the ordinance in question, before ruling in favor of Miami Shores. Under any proper application of the reasonable relationship test, Hermine and Tom should have prevailed.

Even if this Court finds that the Ban survives reasonable relationship review, it must still address the serious fundamental-rights problems raised by a prohibition on a citizen’s right to use her property to grow food for her own consumption. First, the fundamental constitutional right to “acquire, possess and protect property” protected by Article I, section 2 of the Florida Constitution includes the right to productively use one’s property to provide for one’s self and family. In fact, there is perhaps no more historically recognized benefit of property ownership than the right to use it for one’s own sustenance. Second, Hermine and Tom

demonstrated that the fundamental right “to be let alone and free from governmental intrusion into” one’s “private life,” which is protected by Article I, section 23, is also impeded by the Ban. This express right of privacy squarely protects privacy in food and nutrition choices, which are some of the most intimate choices a person can make.

The trial court, however, did not engage in any analysis whatsoever with respect to the fundamental rights claims, rejecting them in a single, unsupported sentence. Because the Ban abridges these two fundamental rights, it should have been subjected to strict scrutiny. And because Miami Shores produced no evidence that the Ban is narrowly tailored to achieve a compelling state interest, it cannot survive such scrutiny.

V. ARGUMENTS AND AUTHORITIES

A. THE BAN VIOLATES HERMINE AND TOM’S RIGHTS TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

Hermine and Tom demonstrated, with abundant evidence, that a ban on front-yard vegetable gardens bears no reasonable relationship to aesthetics. And Miami Shores provided no evidence whatsoever to refute this conclusion—a point that even the trial court recognized. (R. 894) (“Miami Shores has not explained how a front-yard vegetable garden ban promotes the goal of aesthetics.”).

Nevertheless, the trial court upheld the Ban under the reasonable relationship test, refusing to consider Hermine and Tom’s unrebutted evidence of its irrationality

and brushing aside the fact that its ambiguousness invites arbitrary and subjective enforcement.

Part 1 of this section will address the trial court’s erroneous conclusion that evidence is essentially irrelevant under the reasonable relationship test. In Part 2, Hermine and Tom demonstrate that if the trial court had considered the un rebutted evidence in this case, it would have concluded that the Ban is wholly disconnected from Miami Shores’ purported interest in aesthetics. Finally, in Part 3, Hermine and Tom demonstrate that the trial court’s novel interpretation of the term “vegetable”—which the court undertook to clarify an otherwise ambiguous ordinance and minimize the risk of its arbitrary and subjective enforcement—does not cure the Ban’s unconstitutionality at all; it only compounds it.

1. The Trial Court’s Determination That Evidence Does Not Matter in a Reasonable Relationship Analysis Is Incorrect.

To survive the reasonable relationship (or “rational basis”) test, a law must “bear[] a reasonable relationship to a permissible governmental objective” and not be “discriminatory, arbitrary, or oppressive.” *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997). Evidence and facts matter in this analysis. *See, e.g., Membreno v. City of Hialeah*, 188 So. 3d 13, 28 (Fla. 3d DCA 2016), *review denied*, No. SC16-616, 2016 WL 3486427 (Fla. June 27, 2016) (“Courts should not act as rubber stamps when analyzing a law under the rational basis test.”). Yet here, the trial court expressly refused to consider un rebutted evidence concerning the lack of a

reasonable relationship between the Ban and the government’s purported interest in aesthetics—for example, evidence that “vegetables” are not aesthetically degrading, have no intrinsically good or bad visual quality, and are often visually indistinguishable from those items that Miami Shores *allows* in front yards. The court refused to consider such evidence, it explained, because to do so would be to “second guess[] . . . a value judgment by the legislature.” (R. 895). In other words, the trial court did precisely what this Court has said it may not do: “act as [a] rubber stamp[]” for government. *Membreno*, 188 So. 3d at 28.

The Florida Supreme Court’s decision in *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), is perhaps the most recent discussion of a court’s obligation to consider evidence in a reasonable relationship case. In *McCall* the Court considered whether an aggregate cap on noneconomic damages was reasonably related to the state’s purported interest in lowering medical malpractice premiums. *Id.* at 897. In holding that it was not, the Florida Supreme Court explained that anything short of a sincere, evidence-based inquiry would be akin to an “abandon[ment] [of the Court’s] obligation” to assess the constitutionality of the law. *Id.* at 905 (plurality) (explaining that the Court would be shirking its duty if it were to “fail to consider the existing factors and circumstances to determine whether there is legitimacy to [the government’s] justification”). The “Court’s role is not to simply ‘rubber stamp’ the Legislature’s actions,” after all, and legislative

determinations “are not entitled to the presumption of correctness ‘if they are nothing more than recitations amounting only to conclusions.’” *Id.* at 919 (Pariente, J., concurring in result) (quoting *Moore v. Thompson*, 126 So. 2d 543, 549 (Fla. 1960)).

Applying the reasonable relationship test in this light, the Court determined that “there [wa]s no evidence of” the purported crisis the legislature was attempting to solve with the cap on noneconomic damages, nor was there any “mechanism in place to assure that savings [we]re actually passed on from the insurance companies to the doctors.” *Id.* at 91920 (Pariente, J., concurring). Together, these deficiencies revealed a “critical missing link” between the cap and its purported objective. *Id.* at 920. Accordingly, the law “not only fail[ed] the smell test, but the rational basis test as well.” *Id.*

McCall is hardly unique in its insistence that courts consider evidence—or the lack thereof—in assessing whether a law bears a reasonable relationship to the governmental interest it purportedly serves. In *In re Florida Bar*, 349 So. 2d 630 (Fla. 1977) (per curiam), for example, the Florida Supreme Court invalidated rules governing contingency fee contracts because “there [wa]s a complete absence of any evidence that the proposed [regulation] . . . ha[d] any real or substantial relation to the cure of the espoused evil.” *Id.* at 634-35. And in *Eastern Air Lines, Inc. v. Florida Department of Revenue*, 455 So. 2d 311 (Fla. 1984), the same court

made clear that a plaintiff is entitled to proffer evidence in her attempt to “negate . . . conceivable bas[e]s which might support” the law at issue and to demonstrate that the classification drawn by the law “is palpably arbitrary.” *Id.* at 314.

In short, there is no proper permutation of the reasonable relationship test that allows a court to simply disregard un rebutted evidence that reveals a disconnect between a law and the ends it purportedly serves.⁹ Courts must—and thus routinely do—consider evidence in reasonable relationship cases. The trial court in this case erred in concluding otherwise. In fact, the trial court did not even acknowledge *McCall* or any of the other cases requiring it to consider evidence in its reasonable relationship analysis. Instead, the trial court misconstrued this Court’s decision in *Membreno v. City of Hialeah*, 188 So. 3d 13 (Fla. 3d DCA 2016), as giving it license to turn a blind eye to the facts before it. *Membreno*, of course, does no such thing. Rather, it simply holds that “once a court determines *there exists a good faith conflict over facts*, . . . the law must be upheld if ‘it is at

⁹ Even under the federal rational basis test, courts are no less obligated to consider evidence. *See, e.g., Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n.16 (1975) (“This Court need not in [a rational basis case] accept at face value assertions of legislative purposes.”); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (holding that plaintiffs are entitled to “negate a seemingly plausible basis for the [challenged] law by adducing evidence of irrationality”). Hermine and Tom acknowledge that this Court has held that Florida’s reasonable relationship test is identical to the federal rational basis test. *Membreno*, 188 So. 3d at 19-22. However, they respectfully maintain that Florida’s test is more searching than the federal test and hereby preserve the issue for review by the Florida Supreme Court.

least debatable” that “legislative finding[s]” support the law. *Id.* at 27-28 (emphasis added).

Here, however, there were *no* legislative findings, much less “a good faith conflict” over whether they support the Ban. Accordingly, the trial court’s expansive reading of *Membreno*—as requiring it to ignore a plaintiff’s unrebutted evidence, *even in the absence of any legislative findings supporting the law*—was erroneous. Had the trial court considered the evidence, as it was required to do, it would have concluded that the Ban fails to survive the reasonable relationship test.

Finally, there is no merit to the trial court’s suggestion that considering the evidence that Hermine and Tom proffered would have been tantamount to “second guessing” the Miami Shores’ “motives” or questioning its “value judgment” regarding the need to promote aesthetics. Rather, considering such evidence was merely part of the court’s duty to ensure that the Ban “bears a reasonable relationship to a permissible governmental objective.” *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997). As discussed below, it does not.

2. Had the Trial Court Considered the Evidence, It Would Have Concluded that the Ban Has No Connection to Aesthetics and Draws an Arbitrary Distinction Between Vegetables and Everything Else.

None of the evidence adduced by Hermine and Tom has been rebutted. In this section, Hermine and Tom demonstrate that any proper consideration of that

evidence defeats the trial court’s assertion that “one could surmise” that the Ban is reasonably related to aesthetics.

As discussed in further detail below, the Ban is wholly disconnected from Miami Shores’ purported interest in aesthetics for two basic reasons. In subsection (a), Hermine and Tom demonstrate that the Ban is arbitrary because it prohibits certain plants (those Miami Shores code inspectors deem “vegetables”) while allowing other, visually indistinguishable plants. In subsection (b), Hermine and Tom demonstrate that the Ban is at once over- and under-inclusive in the distinction it draws.

(a) Both the Florida Supreme Court and This Court Have Held Unequivocally That Laws Which Distinguish Between Visually Identical Items Are Not Reasonably Related to Aesthetics.

As the preceding section demonstrated, the trial court erred by disregarding the undisputed evidence in this case. Specifically, the trial court acknowledged, but flatly refused to consider, unrebutted evidence demonstrating that the Ban forbids vegetables on the one hand, but allows items that are *aesthetically indistinguishable* on the other. (R. 898) (“[T]here is evidence that some ornamental plants and edible plants are identical to the naked eye.”). This uncontested fact, coupled with the precedent of both this Court and the Florida Supreme Court, compels the conclusion that the Ban is unconstitutional.

For example, in *Campbell v. Monroe County*, 426 So. 2d 1158 (Fla. 3d DCA 1983), this Court invalidated a county ordinance that forbade the use of a generic building facade material that was structurally and visually indistinguishable from the required (but more expensive) material. *Id.* at 1160-61. The Court considered the evidence before it, including the “undisputed. . . testimony of the county’s . . . official,” who explained that “from an aesthetic point of view it doesn’t make any difference because they both look the same,” and that, “if the work is well done, you can stand twenty feet away and not tell the difference.” *Id.* *Campbell* relied on “th[is] undisputed. . . [and] candid testimony of the county’s official” to conclude that the purportedly aesthetics-based regulation was “arbitrary and discriminatory,” and thus void, because it had no connection to aesthetics. *Id.*

The testimony of the official that the Court in *Campbell* relied upon in reaching its conclusion is virtually identical to the testimony provided by Officer Flores in this case. *See id.* at 1161. When asked, “[I]sn’t it true that ornamental plants and edible plants can often be confused with one another?”, Officer Flores responded, unequivocally, “To the naked eye, yes.” (R. 563; 738; 824). Hermine and Tom’s expert witness, Ms. Mihalic, similarly testified that edible plants can be “aesthetically indistinguishable from non-edibles” and that “there are many instances of edible plants with closely related, non-edible species that are used for ornamental purposes.” (R. 676; 791). “One example,” she noted, “is edible and

non-edible Ginger plants, all of which are classified in the same family.” *Id.* As Ms. Mihalic explained, “Edible Ginger, (*Zingiber officinale*) has very similar leaves and growth habit to multiple non-edible tropical perennial gingers,” and “[d]istinguishing between related edible and non-edible plants is achievable only with robust horticulture experience and botanical knowledge.” *Id.* Nevertheless, under the Ban, a garden with non-edible plant varieties is allowed in a front yard, but a garden of visually indistinguishable edible varieties is not.¹⁰

The Florida Supreme Court, like this Court in *Campbell*, has also held that laws drawing such arbitrary and irrational distinctions in the name of “aesthetics” are impermissible. In *Eskind v. City of Vero Beach*, 159 So. 2d 209 (Fla. 1963), for example, the Florida Supreme Court held that a sign restriction that prohibited advertisement of hotel rates was unconstitutional because such a sign was “not aesthetically distinguishable” from “sign[s] advertising various aspects of a motel’s services or conveniences” or the rates of other types of businesses, both of which were allowed. *Id.* at 211. “It seems obvious to us,” the court held, “that a rate sign in front of a motel *is no more offensive to the aesthetic sensibilities . . .* than would be a rate sign in the same immediate area advertising the charges of the other business activities.” *Id.* (emphasis added).

¹⁰ For that matter, *plastic* peppers, tomatoes, and cucumbers are allowed, but real peppers, tomatoes, and cucumbers are not.

As the Florida Supreme Court in *Eskind* explained, municipalities do not have the power to pass (and the courts must strike down) laws that arbitrarily restrict the rights of property owners, regardless of their purported justification:

A municipality . . . in appropriate circumstances may move *without discrimination* to preserve the city’s aesthetic qualities. *Nevertheless, it does not have the power to impose arbitrary restrictions which deprive an individual of his property rights under the banner of regulation.*

Id. at 212 (emphasis added); *see also Signs, Inc. of Fla. v. Orange Cty.*, 592 F. Supp. 693, 697 (M.D. Fla. 1983) (“Aesthetic concerns, of course, are purely subjective and this Court cannot second guess the County on its evaluation of beauty. But merely because the County has determined [something] unattractive to the eye, it does not give the County carte blanche to eliminate the perceived eyesore.”). Here, as in *Eskind*, a regulation that prohibits one type of garden “but permit[s] every other type . . . imaginable,” *Eskind*, 159 So. 2d at 211, is plainly unconstitutional.

Campbell and *Eskind* are not outliers—far from it. Many other Florida cases, in both this District and beyond, establish that legislation that provides for differential treatment of virtually identical items—allowing some while outlawing others—cannot withstand constitutional scrutiny. *See, e.g., Sunshine Key Assocs. v. Monroe Cty.*, 684 So. 2d 876 (Fla. 3d DCA 1996) (invalidating a regulation that allowed recreational vehicles under eight feet in width but that prohibited

otherwise identical vehicles wider than eight feet); *Dennis v. City of Key West*, 381 So. 2d 312 (Fla. 3d DCA 1980) (invalidating a law that barred the mooring of live-aboard vessels but that allowed the mooring of otherwise identical vessels that were not lived aboard); *Kuster Enters., Inc. v. Fla. Dep't of Transp.*, 357 So. 2d 794 (Fla. 1st DCA 1978) (invalidating a law that prohibited prefabricated pools from being transported on the roadways but that allowed boats and trailers of the same width to be transported).

The same type of undisputed evidence that proved outcome-determinative in cases like *Campbell* and *Eskind* is present here. In the end, “[t]here is nothing in the record to show how” the ban on vegetable gardens “bears a fair and substantial relation to the [aesthetic] object of the legislation,” but there is plenty of evidence that proves it does not. *Joseph v. Henderson*, 834 So. 2d 373, 375-76 (Fla. 2d DCA 2003). The evidence makes clear that there is “no justification from an aesthetic viewpoint to prohibit [vegetables] but permit[] every other type of [plant] imaginable.” *Eskind*, 159 So. 2d at 211. Had the trial court considered this evidence, rather than expressly dismiss it as “not relevant,” the court would have concluded—as should this Court—that the Ban bears no connection to aesthetics.

(b) The Ban is Both Under- and Over-inclusive.

Even setting aside the fact that the Ban proposes a cure to a non-existent problem, it is still unconstitutional. That is because the means chosen to respond to

the hypothetical problem do nothing to combat it. To the contrary, the Ban is at once so under- and over-inclusive as to undermine its purported objective of aesthetics. And, as the Florida Supreme Court has ruled, such a failure renders a law unconstitutional.

In *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), for example, the Florida Supreme Court considered the constitutionality of a law that enabled a surviving spouse to void a testator's gift to a charitable entity in certain circumstances. *Id.* at 65 n.3. The Florida Supreme Court held that the law—which was purportedly intended to protect testators from the undue influence of charitable organizations, *id.* at 69—was fatally under-inclusive because it did “not protect against overreaching by unscrupulous lawyers, doctors, nurses, housekeepers, companions, or others” with the “opportunity to influence a testator.” *Id.* at 70.

The same logic applies here. If “vegetables” can present an aesthetic “threat,” so, too, can fruit trees, flowers, vines, and blueberry bushes—all of which are perfectly legal in Miami Shores. As in *Zrillic*, the Ban is thus so under-inclusive as to be unconstitutional. Simply put, there is no more rational basis to ban vegetables than there is to ban any of the countless other items that Miami Shores (correctly) allows. *See id.*; *see also In re Florida Bar*, 349 So. 2d 630, 635 (Fla. 1977) (“On the record . . . before us . . . there is no more rational basis to

adopt . . . the suggested maximum fee schedule than there is to establish such a maximum on the fees contracted for by architects, engineers, accountants or physicians, to name a few similar professions.”).

The Ban is also unconstitutionally *over-inclusive* under *Zrillic*, as it prohibits *all* “vegetables” without regard to whether they present any aesthetic threat at all. In *Zrillic*, the Court held that the law at issue was over-inclusive “because it void[ed] many intentional bequests by testators who were not impermissibly influenced or who d[id] not have immediate family members in need of protection.” *Zrillic*, 563 So. 2d at 70 (internal quotation marks and citation omitted). Just as the law in *Zrillic* over-inclusively voided many charitable gifts without any concern for their actual legitimacy, the Ban in this case prohibits *all* vegetables without any regard to their actual aesthetic character. It treats corn, for example, which can grow upwards of fifteen feet tall, the same as it treats cabbage, which grows low to the ground, and potatoes, which grow *underground*. It treats green vegetables, such as kale and spinach, the same as it treats orange vegetables, such as carrots and sweet potatoes. Thus, even if aesthetic considerations such as height, color, and shape are legitimate bases on which to dictate what a person may or may not grow on her own property (a dubious proposition), Miami Shores’ vegetable ban sweeps far too broadly. By encompassing *all* vegetables, it completely ignores the very aesthetic considerations it purports to serve.

Ultimately, “[t]here is no reason to believe that [the public] need[s] more protection against” “vegetables” than against any of the many plants that Miami Shores permits. *Zrillic*, 563 So. 2d at 70; *see also Proctor v. City of Coral Springs*, 396 So. 2d 771, 774 (Fla. 4th DCA 1981) (finding that the government’s purported interests were not served because “[t]he ordinance does not speak in terms of weight, width or other relevant concerns”) (Hurley, J., concurring); *Estate of McCall v. United States*, 134 So. 3d 894, 919-20 (Fla. 2014) (Pariente, J., concurring) (noting all the ways in which the law in question failed to address the government’s purported interest).¹¹ Accordingly, the Ban’s over- and under-inclusivity—and its resultant failure to promote aesthetics in any capacity—is proof of its unreasonableness. A law cannot be said to be rational when the only thing it forbids is “vegetables” (which, in most cases, are botanically fruit anyway) on the theory that an item suddenly becomes unattractive once a code enforcement officer decides it may be edible.

¹¹ Miami Shores of course undermines its own purported commitment to “green” principles by banning front-yard vegetable gardens. (R. 570-71) (discussing Miami Shores’ purported interest in environmentally friendly living and even “green government”). In fact, Miami Shores openly “encourages homeowners and business owners to follow” the guidelines of publications which *endorse* vegetable gardens as a perfectly legitimate type of residential garden. *See Going Green Residential*, Miami Shores Vill., <http://www.miamishoresvillage.com/miami-shores-village/how-can-i-go-green.html> (last visited Feb. 28, 2017) (linking to Fla. Dep’t of Env’tl. Prot. & Univ. of Fla., *The Florida Yards and Neighborhoods Handbook* 15 (2009), http://ffl.ifas.ufl.edu/materials/FYN_Handbook_2015_web.pdf).

3. The Trial Court Further Erred By Adopting a Novel, “Purpose-Based” Interpretation of the Ban Which Fails to Alleviate—And, In Fact, Only Compounds—the Ban’s Unconstitutionality.

As demonstrated above, the unrebutted evidence in this case makes clear that the Ban is unconstitutional because a ban on “vegetables” bears no reasonable connection whatsoever to aesthetics. Relatedly, the Ban is unconstitutional because the term “vegetable” is utterly ambiguous and undefined, inviting arbitrary and subjective enforcement. Even the trial court recognized this risk, noting that it is “relevant to [consider] whether a term used in the legislation being challenged, but not defined in that legislation, is ambiguous” because “a law that is ambiguous is capable of arbitrary enforcement, and ‘a law that is . . . arbitrary . . . cannot, by definition, bear a rational basis to a legitimate legislative purpose.’” (R. 895) (citing *Easy Way of Lee Cty., Inc. v. Lee Cty.*, 674 So. 2d 863, 866 (Fla. 2d DCA 1996); *Membreno v. City of Hialeah*, 188 So. 3d 13, 21 n.6 (Fla. 3d DCA 2016)).

Here, the Ban is inherently incapable of even-handed enforcement because there simply is no commonly held definition of the term “vegetable.” The term is not defined in Miami Shores’ code and there is no botanical definition of the term, as Ms. Mihalic testified. (R. 530; 785). In fact, most items that might be deemed “vegetables” are botanically fruits or roots, and whether a botanical fruit or root is deemed a “vegetable” ultimately comes down to the personal experience and

perception of the person affixing the label.¹² Indeed, many of the plants that Hermine and Tom grew (and that Miami Shores insisted were “vegetables”) were actually fruit. (R. 671-72; 786-87) (listing eggplant, okra, pepper, and snap peas). The trial court correctly recognized the problem presented by the lack of a definition of “vegetable”—namely, that the Ban lends itself (indeed, invites) arbitrary and subjective enforcement. As the trial court explained, Officer Flores “conceded that the other enforcement officer in Miami Shores might have different beliefs [from his own] about whether something is a fruit or vegetable.” (R. 896).

In short, and as the trial court summarized, the evidence proffered by Hermine and Tom indicated that “the term ‘vegetable’”: (1) “is ambiguous because it does not have an undisputed definition”; (2) “is subject to being influenced by a person’s background and education”; and (3) “can be interpreted differently by different people.” (R. 896). This should have been the beginning—and the end—of the court’s analysis, for “[n]o legislative body . . . can delegate to an administrator arbitrary discretion to determine the meaning of a zoning code.” *Henry v. Bd. of Cty. Comm’rs of Putnam Cty.*, 509 So. 2d 1221, 1222 (Fla. 5th DCA 1987).¹³

Without clear standards, “the zoning provision is a nullity.” *Id.*

¹² This is perhaps most commonly demonstrated by the timeless “debate about tomatoes being classified as a fruit or vegetable.” (R. 671; 786).

¹³ See also *ABC Liquors, Inc. v. Ocala*, 366 So. 2d 146, 149 (Fla. 1st DCA 1979) (holding that laws “which are subject to whimsical or capricious application or unbridled discretion will not meet the test of constitutionality”); *City of Miami v.*

Rather than invalidate the Ban on this ground, the trial court attempted to save it by adopting a novel interpretation of the Ban—one that Florida courts have already foreclosed as unconstitutional. Specifically, the trial court concocted what it called a “purpose-based understanding” of the term “vegetable garden” that turns on whether the plants are “grown or cultivated specifically in order to be eaten . . . as part of a meal.” (R. 897-98). But not only is divining the intent of property owners an impossible task, it is also a consideration that is wholly irrelevant to the purported aesthetics-based justification for the Ban. Thus, by reading the ordinance in this way—shifting it from a ban that regulates what homeowners grow to a ban that regulates *why* they grow it—the trial court rendered the Ban significantly *less* defensible.

In fact, in *Kuvin v. City of Coral Gables*, 62 So. 3d 625 (Fla. 3d DCA 2010), this Court already indicated that such a “purpose-based” regulation would be irrational and unconstitutional. *Id.* at 635. Although *Kuvin* ultimately upheld the constitutionality of an ordinance restricting the parking of pick-up trucks, it did so specifically because the ban operated on concrete, “design”-based criteria. *Id.* at 635-38; *see also id.* at 635 (noting that the banned vehicles “look[] the same and [are] likely to be used to store and carry bulk material exposed to public view”).

Save Brickell Ave., Inc., 426 So. 2d 1100, 1104 (Fla. 3d DCA 1983) (“If definite standards are not included in the ordinance, it must be deemed unconstitutional as an invalid delegation of legislative power to an administrative board.”).

But “[t]o base the constitutionality of the ordinances *solely on whether a person uses his vehicle* for personal or commercial purposes,” the Court added, “would create an irrational classification, lead to absurd results, and be impractical, if not impossible, to enforce.” *Id.* at 635 (emphasis added); *see also Proctor v. City of Coral Springs*, 396 So. 2d 771 (Fla. 4th DCA 1981).

This sort of “irrational classification”—which this Court roundly rejected in *Kuvin*—is precisely the type of distinction that Miami Shores has drawn here. The Ban, as construed by the trial court, is concerned only with the presumed intent of the property owner—i.e., whether he or she has “grown or cultivated [vegetables] specifically *in order to be eaten . . . as part of a meal*” (R. 897) (emphasis added)—and not at all with aesthetics. As such, the Ban draws the very sort of “irrational” and impossibly arbitrary distinction that this Court in *Kuvin* said cannot be drawn.

As *Kuvin* explained, such a purpose-, or use-, based ordinance would be wholly unworkable because “it is not always obvious how the vehicle’s owner uses the vehicle, and in many cases, its owner may use the vehicle for both commercial and personal purposes.” *Kuvin*, 62 So. 3d at 635 (finding that such a restriction would “be impractical, if not impossible, to enforce”). The same is true here. First, “it is not always obvious how” a property owner intends to “use[]” the plants she grows, *id.* at 635, as Officer Flores himself even acknowledged. (R. 739). When

asked, for example, whether he would cite someone who was growing dandelions for their greens, he testified, “I wouldn’t know if they were growing them for the purpose of eating them.” (R. 739). Second, “in many cases, [the property] owner may use” the plants for both ornamental *and* culinary purposes, *Kuvin*, 62 So. 3d at 635—a point Officer Flores also conceded repeatedly.¹⁴ As this Court’s ruling in *Kuvin* foretold, and as Officer Flores’ testimony confirmed, such a subjective, purpose-based approach to enforcement fails constitutional muster because it “lead[s] to absurd results, and [is] impractical, if not impossible, to enforce.” *Kuvin*, 62 So. 3d at 635.

In short, the Ban, even as construed—in fact, *especially* as construed—by the trial court, is unconstitutional precisely for the reasons this Court explained in *Kuvin*: It is “impractical, if not impossible, to enforce” and “lead[s] to absurd results.” *Id.*¹⁵ Whether a particular garden is aesthetically pleasing may depend on the eye of the beholder, but it does not depend on the mind of the gardener.

¹⁴ See, e.g., (R. 740) (admitting that Swiss chard could be “used as an ornamental plant”); (R. 738) (admitting that kale “is very attractive for landscape planting and is edible”); (R. 737-38) (admitting that a leek is “attractive in appearance with its silvery base and green top”); (R. 738) (admitting that “[t]rue ginger is often confused with related plants grown as ornamentals in Florida”); (R. 739) (admitting that “the vegetable chrysanthemum looks very much like the leafy portion of the . . . ornamental version”).

¹⁵ Although this Court ultimately upheld the ordinances at issue in *Kuvin*, it did so precisely because they did not draw the sort of purpose-, or use-, based classification that is at issue in this case. Unlike this case, moreover, *Kuvin* lacked a comprehensively developed legal and evidentiary record. In fact, the majority in

B. THE BAN VIOLATES HERMINE AND TOM’S FUNDAMENTAL RIGHTS.

Even if this Court disagrees and upholds the Ban under the reasonable relationship test, however, it still must address Hermine and Tom’s fundamental rights claims and the strict scrutiny they trigger. The Ban separately violates two of Hermine and Tom’s fundamental rights, both of which are expressly protected by the Florida Constitution’s Declaration of Rights. First, it violates their right to “acquire, possess and protect property,” Fla. Const. art. I, § 2—specifically, to peacefully and productively use their property to feed themselves and their family. Second, the Ban violates their “right to be let alone and free from governmental intrusion into the[ir] . . . private li[ves],” Fla. Const. art. I, § 23—specifically, intrusion into their choices regarding what foods to produce and consume.

Hermine and Tom provided extensive briefing to the trial court in support of their fundamental rights claims. Nonetheless, the trial court’s ruling on those claims was so brief that it can be quoted, in its entirety, here:

Although the Plaintiffs assert that strict scrutiny should apply to this case, this Court is not convinced that the prohibition of front-yard vegetable gardens impairs any fundamental right.

(R. 893). The trial court’s one-sentence rejection of Hermine and Tom’s arguments is not only short shrift, but also legal error.

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*”).

Section 1 below demonstrates that Hermine and Tom have a fundamental right to use their property, peacefully and productively, to feed themselves. The trial court erred by instead holding that Miami Shores could restrict Hermine and Tom’s use of their property *precisely because* they were using it productively to feed themselves. Section 2 demonstrates that Hermine and Tom have a fundamental right of privacy that protects their choices concerning the foods they grow and consume. Because the Ban implicates Hermine and Tom’s fundamental rights, it is “presumptively invalid” and cannot survive unless it satisfies strict scrutiny, which it cannot. *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 635 (Fla. 2003).

1. The Right of a Person to Use Her Property to Feed Herself and Her Family is a Fundamental Right.

Property rights, given their esteem as “one of the great rights preserved in our constitution and for which our forefathers fought and died,” *Baycol, Inc. v. Downtown Dev. Auth. of Fort Lauderdale*, 315 So. 2d 451, 455 (Fla. 1975) (footnote omitted), are among Floridians’ fundamental rights. As the Florida Supreme Court held in *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990), property rights are “woven into the fabric of Florida history.” *Id.* at 67. This District has expressed a similar, historically-rooted reverence for this “fundamental” classification, reaffirming, after *Zrillic*, that “[p]rivate property rights have long been viewed as sacrosanct *and fundamentally immune from*

government interference.” *CNL Resort Hotel, L.P. v. City of Doral*, 991 So. 2d 417, 420 (Fla. 3d DCA 2008).

The property rights secured by Article I, section 2 include, specifically, the right “to use and enjoy property,” *Zrillic*, 563 So. 2d at 67 (internal quotation marks and citations omitted)—that is, the right of a property owner “to use his property in his own way and for his own purpose[.]” *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 885 (Fla. 1974). In fact, “the right to use” property is “[t]he most valuable aspect of the ownership of property.” *Snyder v. Bd. of Cty. Comm’rs of Brevard Cty.*, 595 So. 2d 65, 70 (Fla. 5th DCA 1991) (per curiam), *quashed on other grounds*, 627 So. 2d 469 (Fla. 1993). And there is perhaps no more fundamental use of property than using it, peacefully and productively, to feed one’s self and family. *See, e.g., Ramon v. Saenz*, 122 S.W. 928, 929 (Tex. Civ. App. 1909) (“*Certainly* his right to plant and cultivate his land and enjoy the products thereof, were property rights which he was entitled to exercise and enjoy.” (emphasis added)).

The trial court’s order turns these venerable protections on their head. Without so much as attempting to distinguish these rulings, the trial court instead concluded that Hermine and Tom’s productive use of their property entitled them not to enhanced protection, but *less*. (R. 899). According to the trial court, “It is rational to surmise” that the “productiv[e]” use of property to grow “vegetables” is

“less likely to be aesthetically pleasing”—and, therefore, it is more susceptible to government restriction—“than other landscape options.” *Id.*

The trial court did not—indeed, could not—reconcile its “surmis[ing]” with the un rebutted evidence in the record, which established that a yard’s attractiveness has nothing at all to do with whether it is productive. Nor did the trial court explain why a ban on productive use involving vegetables specifically—as opposed to productive uses to grow other edible items, such as fruit or berries—furthers aesthetics.

The trial court’s position, moreover, cannot be squared with the natural law origins of Article I, section 2, which make clear that productive use of property to feed one’s self and family is at the very core of that provision’s protections. The Florida Supreme Court has held that Article I, section 2 is “grounded in natural law,” *Zrillic*, 563 So. 2d at 67, and this Court has further recognized that its “protecti[on] [of] private property rights against governmental interference stems back to both English common law and Lockean philosophy.” *CNL Resort Hotel, L.P.*, 991 So. 2d at 420; *see also Zrillic*, 563 So. 2d at 67 (looking to English common law to inform its modern understanding of property rights). It is therefore highly relevant that John Locke, the greatest natural law influence on America’s Founders, 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.¹⁶ In this light, the trial court’s conception of property rights—which effectively regards property as a decorative canvas, not a space for productive use—is wholly irreconcilable with one of the most historically rooted (and still widely acknowledged) features of property ownership.

The understanding of property as a source of sustenance—and thus, liberty—was not lost on the Founders.¹⁷ Without the ability of Americans to work their own land to provide for their own needs, the Founders understood that Americans could never be truly free.¹⁸ Early life in Florida reflected these same ideals of self-sufficiency.¹⁹ Without respect for property rights, early settlers on

¹⁶ John Locke, *Second Treatise of Civil Government* ch. V § 32 (1690) (“As much Land as a Man Tills, Plants, Improves, Cultivates, and can use the Product of, so much is his *Property*.”).

¹⁷ As Thomas Jefferson succinctly put it, “Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous and they are tied to their country and wedded to its liberty and interests by the most lasting bonds.” Letter from Thomas Jefferson to John Jay (Aug. 23, 1785), in *Words of the Founding Fathers* 136 (Steve Coffman ed. 2012).

¹⁸ See, e.g., Andrea Wulf, *Founding Gardeners: The Revolutionary Generation, Nature, and the Shaping of the American Nation* 7 (2011) (“[A]s tension over the Stamp Act grew, [Benjamin] Franklin argued that the colonies would be able to pressure the British by boycotting their goods. ‘I do not know a single article,’ Franklin told MPs, that the colonies couldn’t either ‘do without or make themselves.’”); *id.* at 8-9 (“In response to the Stamp Act, [John] Adams . . . promised that he would not buy ‘one shilling worth of any thing that comes from old England.’”).

¹⁹ See, e.g., Fla. Const. of 1838, pmbl. & art. I, § 1 (recognizing that “to form ourselves into a Free and Independent State” it was necessary to formally

Florida’s frontier—a lot that was “[h]ighly individualistic and . . . fiercely dedicated to popular democracy,” Michael Gannon, *The New History of Florida* 219 (1996)—could not have survived.²⁰ And after Florida obtained statehood, such protections for basic self-determination remained crucial to survival in the vast new state, where early settlers remained isolated and thus had to cultivate the land to survive:

We see very little meat and have never seen a butcher or a butcher shop. However . . . [a]t this moment I can step into my garden and pull dinner fresh peas, fresh cabbages, fresh carrots, or I can pick a mess of collards, or a huge eggplant, and at any time can dig a mess of sweet potatoes . . . This is the kind of garden we have in Florida. Make it any time that you please.

Frank Oppel, *Tales of Old Florida* 223 (Castle Books 1989) (documenting Florida, in 1910, as “A Haven for the Gardener”). In short, the vital relationship between property rights, sustenance, and liberty is a central part of Florida’s history and constitutional jurisprudence, as the Florida Supreme Court has recognized. *Peavy-Wilson Lumber Co. v. Brevard Cty.*, 31 So. 2d 483, 485 (Fla. 1947).

acknowledge the “inherent and indefeasible rights . . . of acquiring, possessing, and protecting property”).

²⁰ Florida’s pre-statehood Constitution embodied the character of the pioneers in the unexplored wilderness of Florida, who depended on the productive use of their property to survive and forge a new, independent Florida. See Charlton W. Tebeau, *A History of Florida* 136 (1971) (“[P]lanters [arrived] with possessions in wagons . . . [T]hey camped at night, opened up roads, and even built bridges on the way . . . and then they cleared the land to plant the first crops . . . [T]hese people [had] come with the resolution of founding a new country.” (internal quotations omitted)).

Hermine and Tom’s vegetable garden was simply the modern incarnation of the frontier garden that embodied the early American and early Floridian spirit. Their garden afforded them the sustenance and self-sufficiency of the gardens of old, yet it was fully integrated, along with non-edible plants, into an attractive landscape. (R. 543; 548; 674; 789). The rights which protect this peaceful and productive use are at the core of our founding philosophies, and they are as fundamental today as they were two hundred years ago. The trial court erred in concluding otherwise—and in effectively holding that property is meant to be merely decorative, not productive.

2. “The right to be let alone and free from governmental intrusion into [a] person’s private life”—Which Includes Decisions Concerning What Foods to Grow and Consume—Is a Fundamental Right.

Finally, the Ban abridges Hermine and Tom’s constitutional right of privacy, which guarantees that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life.” Fla. Const. art. I, § 23.

As the Florida Supreme Court has explained, “Privacy has been used interchangeably with the common understanding of the notion of ‘liberty,’ and both imply a fundamental right of self-determination.” *In re Browning*, 568 So. 2d 4, 9-10 (Fla. 1990) (citations omitted).²¹ This fundamental right of self-

²¹ Not only is the Florida Constitution’s “right of privacy . . . a fundamental right,” *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 626

determination includes the right to make choices concerning food and other aspects of one’s health and nutrition. “An integral component of self-determination,” the Florida Supreme Court has stressed, “is the right to make choices pertaining to one’s health,” *id.* at 10, and “a competent person has [a] constitutional right . . . extend[ing] to all relevant decisions concerning one’s health” including, specifically, choices concerning “food,” *id.* at 11-12.²²

Florida’s fundamental right of privacy thus encompasses the very right Hermine and Tom sought to exercise here—providing for their own dietary and wellness needs by growing their own food. The trial court erred in concluding otherwise.

(Fla. 2003), it is also “much broader in scope than that of the federal constitution.” *Id.* at 620.

²² The courts of other states likewise recognize that the right to privacy or individual liberty protects choices concerning food and nutrition. *See, e.g., Gray v. State*, 525 P.2d 524, 528 (Alaska 1974) (“‘The right of the people 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) (“The decision whether to ingest food, beverages or other substances comes within the purview of that right to privacy.”); *City of Helena v. Dwyer*, 42 S.W. 1071, 1073 (Ark. 1897) (“The right to procure healthy and nutritious food, by which life may be preserved and enjoyed, and to manufacture it, is among these inalienable [privacy] rights.” (quoting *Powell v. Pennsylvania*, 127 U.S. 678, 692 (1888) (Field, J., dissenting))); *Commonwealth v. Campbell*, 117 S.W. 383, 385 (Ky. Ct. App. 1909) (“[T]he question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen.”).

3. The Ban Cannot Survive Strict Scrutiny.

Because the rights impacted by the Ban are fundamental, Miami Shores cannot prevail unless it proves that the Ban substantially furthers a compelling state interest and uses the least restrictive means of doing so. *See N. Fla. Women's Health*, 866 So. 2d at 644-45 (Pariente, J., concurring). Miami Shores has not even attempted to meet any of these burdens. Therefore, if this Court finds that a fundamental right is implicated, reversal of the trial court's order is warranted.

VI. CONCLUSION

Based on the foregoing, Hermine and Tom have shown that the trial court erred in its consideration and application of both the facts and the law. Accordingly, Hermine and Tom respectfully request that this Court reverse the lower court's order on the parties' cross-motions for summary judgment and award summary judgment in Hermine and Tom's favor. In the alternative, Hermine and Tom respectfully request that this Court reverse the lower court's order denying Hermine and Tom's Motion to Compel, and remand this case to the trial court with instructions to enter an order and conduct further proceedings consistent with such an opinion.

RESPECTFULLY SUBMITTED this 2nd day of March 2017.

INSTITUTE FOR JUSTICE

By: /s/ Ari Bargil
Ari Bargil (FL Bar No. 71454)
Allison Daniel (FL Bar No. 118618)
INSTITUTE FOR JUSTICE
2 South Biscayne Boulevard, Suite 3180
Miami, FL 33131
Tel: (305) 721-1600
Fax: (305) 721-1601
Email: abargil@ij.org; adaniel@ij.org

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

* Admitted *pro hac vice*

Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2017, a true and correct copy of the foregoing Appellants' Initial Brief was filed with the Court and served electronically 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

Counsel for Appellees

/s/ Ari Bargil
INSTITUTE FOR JUSTICE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.100(l) of the Florida Rules of Appellate Procedure as it is computer-generated and is in Times New Roman 14-point font.

/s/ Ari Bargil
INSTITUTE FOR JUSTICE