IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC2017-2131

L.T. CASE NO.: 3D16-2212

HERMINE RICKETTS and LAURENCE CAROLL,

Petitioners,

v.

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

Respondent,

On Review from the District Court of Appeal, Third District, State of Florida

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RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. STATEMENT OF THE CASE AND FACTS

Petitioners, Hermine Ricketts and Laurence Carroll, (collectively "Petitioners") sued Miami Shores Village, ("the Village") to declare a zoning provision unconstitutional, under the Florida Constitution. Op. at 2-3.[1] The challenged provision, part of the landscape design standards in section 536 of the Village's Zoning Code (the "Ordinance"), provided that "[v]egetable gardens are permitted in rear yards only." *Id*. at 4.

The Ordinance states that the purposes of the Ordinance include the "'protection and promotion of the … appearance … of the village,' the protection of 'the distinctive character of Miami Shores Village that resulted from … [t]he application and careful administration of protective regulations,' and the protection of 'property values and the enjoyment of property rights by minimizing and reducing conflicts among various land uses ….'" *Id*. at 9 (citing Miami Shores Village Code of Ordinances, §100).

Petitioners' covered their front yard with a vegetable garden including over 75 different varieties of vegetables. *Id*. Petitioners filed their lawsuit attacking the constitutionality of the Ordinance after an earlier, code enforcement case (arising from a resident's complaint). *Id*. at 3. Petitioners twice appeared at hearings before

[1] References to the Third District Court of Appeal's ("Third District") opinion attached to Petitioners' jurisdictional brief are to the page number preceded by the letters "Op." References to the Petitioners' Brief on Jurisdiction are to the page number preceded by the letters "JB."

the Village Code Enforcement Board, before the Village issued its order sustaining the violation. *Id*. at 4. Petitioners appealed that administrative decision, but subsequently complied by removing the vegetable garden and voluntarily dismissing their appeal. *Id.* No fines were imposed. *Id.*

Petitioners later filed this action seeking a declaratory judgment and injunctive relief challenging the constitutionality of the Ordinance. *Id.* The impact of having dismissed the prior appeal of the administrative proceeding, however, was that any attempt to assert an "as applied" constitutional challenge as opposed to a "facial" constitutional challenge was barred by the doctrines of *res judicata* and waiver. *Id*. at 5.

The trial court granted summary judgment to the Village, finding that the Ordinance was rationally related to a legitimate government interest. *Id*. at 3, 10. The Third District affirmed. The Third District's opinion noted that the burden in "[a] facial challenge to legislation, as in the case of the [O]rdinance…, 'is more difficult than an 'as applied' challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid.'" *Id*. at 5 (quoting *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004); *Ogborn v. Zingale*, 988 So. 2d 56 (Fla. 1st DCA 2008)). The Court further determined that the rational basis test applied, and that the Ordinance was rationally related to the

aesthetic concerns of the Village Code's design standards and landscape regulations. *Id*. at 9.

The Third District followed its prior decision in *Membreno v. City of Hialeah*, 188 So. 3d 13 (Fla. 3d DCA 2016), *rev. denied*, 2016 WL 3486427 (Fla. June 27, 2016), and reiterated the heavy burden borne by a party challenging the constitutionality of a legislative enactment under the rational basis test. *Id*. at 8-9. Additionally, the court cited its decision in *Kuvin v. City of Coral Gables*, 62 So. 3d 625 (Fla. 3d DCA 2010), wherein it "addressed the relevance and validity of zoning regulations based on aesthetics" and "cited with approval numerous Florida cases in which zoning regulations based on aesthetics have been upheld as preserving the residential look and feel of a community." *Id*. at 10 (citing *Kuvin*, 62 So. 3d at 634-35). Thus, the Third District held that since the Ordinance did not restrict a fundamental right or suspect class, *Membreno* and *Kuvin* controlled the analysis and that the Ordinance was constitutional.

The Petitioners now seek this Court's review of the Third District's decision, claiming that it expressly and directly conflicts with (1) *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014), and (2) *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017), in which, Petitioners contend, this Court modified decades of Florida law governing the standard for the traditional rational basis test where laws regarding aesthetics are concerned. *See* JB at 1. This is so despite that, as

Petitioners admit (JB at 4), the Third District's opinion nowhere mentions *McCall* or *Kalitan*.[2]

II. SUMMARY OF THE ARGUMENT

The Third District's opinion never cites the alleged conflicting opinions, but rather, is based upon the prior decisions in *Membreno* and *Kuvin*. *Membreno* summarizes decades of law from this Court to show that accepting Petitioners' arguments "would herald a sea change in Florida Constitutional law." *See Membreno*, 188 So. 3d at 18, 25-29. *Kuvin* discusses the relevance and validity of zoning regulations based on aesthetics, and cites with approval numerous Florida cases from this Court and the Florida District Courts of Appeal in which zoning regulations based on aesthetics have been upheld as preserving the residential look and feel of a community. *Kuvin*, 62 So. 3d at 633-34.

No conflict exists between the Third District's decision and either of the alleged conflicting decisions. The Third District's decision simply holds that legitimate government interests support the challenged Ordinance, and that the

[2] Petitioners' Statement of the Case and Facts makes assertions that do not appear within the four corners of the decision on review. Such extraneous assertions are improper in a jurisdictional brief, and this Court should therefore disregard them. *See, e.g., Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict…. [W]e are not permitted to base our conflict jurisdiction on a review of the record …. Thus, it is pointless and misleading to include a comprehensive recitation of the facts not appearing in the decision below ….").

Ordinance provisions are rationally related to the government's objective. That is the same test that has been applied by this and other Florida courts for decades.

Although one of this Court's two plurality opinions in *McCall* implied a different rational basis test by conducting an independent analysis and engaging in evidentiary fact finding, only two justices joined in that opinion. *McCall* thus has no precedential value on that issue; it does not contain a majority opinion upon which to base conflict jurisdiction. And, in *Kalitan*, based on the agreement between the plurality and "concurring in result" opinions in *McCall*, this Court simply reached the same result with regard to the unconstitutionality of the similar medical malpractice caps at issue in *Kalitan*. However, nothing on the face of the *Kalitan* decision expressly recedes from or overrules any prior settled law regarding the rational basis test.

And even if the issue here was "important," this Court lacks jurisdiction. This Court may review "important" cases only if the district court of appeal certifies the issue as one of great public importance. The Third District court did not certify great public importance here. Therefore, this Court must deny review.

III. ARGUMENT

A. Express and Direct Conflict Does not Exist

Petitioners sought review here solely based upon a claim that the Third District's opinion expressly and directly conflicts with a decision of another district

court or of this Court on the same question of law. *See* Petitioners' Notice of Intent; Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has made clear that conflict jurisdiction exists where decisions are irreconcilable. *Aravena v. Miami-Dade Cty.*, 928 So. 2d 1163, 1166-67 (Fla. 2006). Petitioners fail to meet this standard.

Here, the Third District cited neither *McCall* nor *Kalitan*. Nevertheless, Petitioners contend that the Third District's decision conflicts with those decisions, because it relies on *Membreno* and *Kuvin*. First, a claim of conflict may not be based upon a district court's citation of another case. *See Dodi Publ'g Co. v. Editorial Am., S.A.*, 385 So. 2d 1369 (Fla. 1980) ("The issue to be decided from a petition for conflict review is whether there is an express and direct conflict in the decision of the district court before us for review, not whether there is a conflict in a prior written opinion which is now cited for authority").

Additionally, Ricketts does not conflict with *McCall*, because there is no majority opinion in *McCall*.[3] While it is true the first plurality opinion in *McCall* engages in an independent evaluation to determine whether there was an actual

[3] *See* Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 460 (2005) ("[T]he Court's opinion for purposes of precedent would consist of those principles on which at least four members of the Court have agreed …. A 'concurring in result only' opinion indicated … a refusal to join in the majority's opinion …. [T]he effect of such as case is that there is no 'opinion' of the Court and this no precedent" beyond that specific case.).

medical malpractice crisis in Florida, *only two justices fully concurred in that analysis. McCall,* 134 So. 3d at 916. Three justices concurred in the result only, but they expressly disagreed with the other two justices' independent evidentiary evaluation, *because it is not permitted under the rational basis analysis. Id*. The remaining two justices dissented. *Id.* at 922.

And, in *Kalitan*, this Court merely reached the same conclusion with regard to the unconstitutionality of the similar caps, because of the agreement between the plurality and "concurring in result" opinions in *McCall*. *Kalitan*, 219 So. 3d at 57. However, this did not herald the sea-change in Florida constitutional law regarding the traditional rational basis test argued by Petitioners. It is well-established that the Florida Supreme Court does not overrule its previous decisions *sub silentio*. *See Arsali v. Chase Home Finance, LLC,* 121 So. 3d 511, 516-17 (Fla. 2013) (citing *Roberts v. Brown*, 43 So. 3d 673, 683 (Fla. 2010) ("Had we intended to overrule our prior declaration … we would have done so in a more definite and express manner then the aforementioned language.…"); *Willis v. Gami Golden Glades, LLC,* 967 So. 2d 846, 875 (Fla. 2007) ("[W]e do not recede from our cases *sub silentio*."); *Puryear v. State,* 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio*.")). As the court in *Membreno* stated:

> Most importantly, neither of the plurality opinions in *McCall* expressly indicates an intent to overrule cases like *Haire, Lite, Lasky,*

> *Belk-James, McKnight, Shands, Gallagher,* or *Warren.* We cannot assume the Court intended to silently overturn such well-established, long standing, black letter law. *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002). We are particularly wary of jumping to such a conclusion when to do so would undermine the rational basis test, a centerpiece of modern separation of powers, which was developed to resolve a constitutional crisis that resulted from a subjective substantive due process test.

Membreno, 188 So. 3d at 31.

Additionally, it is clear that this case is factually distinguishable from *McCall* and *Kalitan*. *McCall* and *Kalitan* dealt with malpractice damages caps in wrongful death cases and personal injury actions, respectively. This case, however, involves a zoning ordinance regulating the location of vegetable gardens.

Additionally, the "express and direct" requirement for conflict jurisdiction means, among other things, that the "inherent or so-called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." *Dept of Health and Rehabilitative Servs. v. Nat'l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986). Petitioners, however, rely solely upon claims of implied or inherent conflict insufficient to support jurisdiction.[4] Petitioners argue three purportedly express and direct conflicts with "*McCall/Kalitan.*" First they take issue with the question of whether the federal rational basis test is the same as the Florida rational

[4] For example, Petitioners focus heavily and repeatedly on commonalities between the Third District's opinion here and the dissents in *McCall* or *Kalitan*. Such commonalities simply fail to establish any direct conflict with an express proposition of law announced in a *majority* opinion of this Court.

basis test (an issue never addressed in, and irrelevant to, the Third District's decision). However, Petitioners only cite to *McCall* (in which there was no majority opinion) in their chart regarding this issue. *See* JB at 6. Next, Petitioners assert that to uphold a law there must be evidence establishing how the law "alleviates" the problem it purports to solve. *Id*. However, Petitioners again improperly focus on the plurality opinion in *McCall* and cite to no express or direct statement in either the majority of *McCall* or *Kalitan* adopting such legal precedent. *See* JB at 7.[5]

Finally, Petitioners argue express and direct conflict exists with regard to a purported holding in *McCall* and *Kalitan* that laws may never be based upon reasonable speculation. JB at 7-8. Again, there is no such express holding in either *McCall* or *Kalitan*. Petitioners are seeking to "imply" such a rule of law where no

[5] Instead, as reflected in the chart at JB 7, Petitioners impermissibly seek to *imply* such a holding from language in *Kalitan* considering "the legitimacy of the asserted state objective," which merely noted that the plurality opinion in *McCall* "observed a lack of evidence demonstrating how the statutory cap alleviated this [purported medical malpractice] crisis …." *Kalitan*, 219 So. 3d at 58. There was and could be no legitimate dispute between the parties in this case concerning "the legitimacy of the asserted state objective" as the propriety of aesthetic concerns, as a legitimate state objective for zoning regulations is well-established. *See Kuvin*, 62 So. 3d at 634-35 (citing cases).

such holding was expressly announced by the Court.[6] This does not constitute an express and direct conflict.

Accordingly, as there is no express and direct conflict between the Third District's decision and either *McCall* or *Kalitan*, this Court should deny Petitioners' request for this Court to exercise its discretionary jurisdiction.

B. The Decision was not Certified by the District Court to be of Great Public Importance

This Court's discretionary review of "important" issues is limited to questions certified by district courts to be "of great public importance." *See* Art. V, § 3(b)(4), Fla. Const. The Third District did not certify that this case presents a question of great public importance. Accordingly, there is no basis here for discretionary review.

IV. CONCLUSION

Because there is no direct and express conflict with any of the cases cited by Petitioners and because this case is not certified to be of great public importance, this Court lacks jurisdiction and should deny review.

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[6] Compare Petitioners' quote in the chart at JB 8 with the actual, completely irrelevant, language of the *McCall* plurality Opinion:

> "In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease."

Kalitan, 219 So. 3d at 58 (quoting *McCall*, 134 So. 3d at 912).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January 2018, a true and correct copy of the foregoing Respondent's Answer Brief on Jurisdiction was filed and served electronically on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned counsel has complied with the font requirement of the Florida Rule of Appellate Procedure 9.210 (a)(2), because this brief is set in Times New Roman 14-point font.

By:/s/ Nina Greene
Nina Greene, Esq.

(7718-230 / 2816353 / #1437)