IN THE SUPREME COURT OF FLORIDA

Case No. SC2017-2131

HERMINE RICKETTS and
LAURENCE CARROLL,

Petitioners,

vs.

L.T. Case No. 3D16-2212

VILLAGE OF MIAMI SHORES,
FLORIDA, et al.,

Respondent.
_____/

PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITIONERS' BRIEF ON JURISDICTION

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I. JURISDICTIONAL STATEMENT

The Third District Court of Appeal ("Third DCA") has developed its own version of constitutional review. As the decision in this case ("Opinion," cited as Appendix, "App. #") demonstrates, the Third DCA's rational basis test is unconcerned with the two most significant (and most recent) decisions by this Court on the subject, and instead fully embraces the reasoning of their dissents.

Specifically, the Opinion flouts this Court's precedent—which was reaffirmed by this Court as recently as six months ago—that a law cannot be upheld where there is zero evidence that it actually does what it was purportedly intended to do. *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49, 57 (Fla. 2017) (holding law unconstitutional because "there [wa]s no evidence . . . justifying [it]"); *Estate of McCall v. U.S.*, 134 So. 3d 894, 909 (Fla. 2014) (plurality) (finding law unconstitutional because "the available evidence fail[ed] to establish a rational relationship" between the law and its purported purpose); *id.* at 921 (Pariente, J., concurring) (finding same law unconstitutional because there was "no evidence . . . that would justify" it).

In sum, the Third DCA's test allows courts to do what *McCall* and *Kalitan* specifically say they may not—accept "speculative experiment[s]," *Kalitan*, 219 So. 3d at 58, and "recitations amounting only to conclusions" to uphold a law. *McCall*, 134 So. 3d at 906 (plurality) (citations omitted)); *id.* at 919 (Pariente, J.,

concurring) (same). Indeed, while the Third DCA refuses to even acknowledge *McCall* and *Kalitan*, it nonetheless embraces—verbatim, but without attribution—their dissents. The Opinion is thus in express and direct conflict with this Court's precedent, and discretionary review is critical to bring the Third DCA in line with the rest of the state. *See* Art. V, § 3(b)(3), Fla. Const.

II. STATEMENT OF THE CASE AND FACTS

Petitioners Hermine Ricketts and Tom Carroll ("Hermine and Tom") are a married couple who reside in Miami Shores, Florida. For 17 years, Hermine and Tom grew and cared for a vegetable garden in the front yard of their home, peacefully and without incident. However, in 2013, the Village of Miami Shores, Florida ("the City") amended its landscaping code to provide 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) (emphasis added to indicate amended language). Almost immediately after this ban on front-yard vegetable gardens ("the Ban") took effect, Hermine and Tom were cited for violating the Ban, and the City's code enforcement board subsequently found them to be in violation. Hermine and Tom initially filed an appeal from the code enforcement board's decision, but, unable to afford the City's threat of $50 per day in fines for noncompliance—fines the City refused to stay during the pendency of

the appeal—Hermine and Tom uprooted their garden, dismissed the appeal, and filed the instant declaratory judgment action instead.

Hermine and Tom asserted, among other things, that the Ban, on its face and as applied, violated their rights to equal protection under Article I, section 2 and due process under Article I, section 9 of the Florida Constitution. In support, they adduced extensive, unrebutted evidence in the trial court establishing that:

- neither "vegetables" nor "vegetable gardens" are inherently attractive or unattractive, and thus the aesthetic appeal of a garden depends not on *what* one grows but on *how* one grows it;

- the Ban prohibits all vegetable gardens, *regardless of their appearance*, while allowing virtually everything else—from fruit, flowers, and trees, to boats, pink flamingos, and jet skis;

- the Ban prohibits edible plants while allowing other non-edible varieties that are visually indistinguishable; and

- the question of whether a plant is edible, and thus a prohibited "vegetable" is left to the subjective whims of the City's code enforcement officers.

Despite this evidence demonstrating the lack of any connection between the Ban and the City's purported interest in aesthetics, the trial court upheld the Ban under a misapplication of the Florida rational basis test.

The District Court affirmed. It refused to consider any of the evidence proffered by Hermine and Tom, and instead reasoned that "speculation unsupported by evidence or empirical data" is sufficient to sustain a law—even one that is "purely experimental." App. 8-9 (citation omitted). And despite

Hermine and Tom's more than 10 pages of briefing on the applicability of this Court's 2017 ruling in *North Broward Hospital District v. Kalitan*, 219 So. 3d 49 (Fla. 2017), and 2014 ruling in *Estate of McCall v. U.S.*, 134 So. 3d 894 (Fla. 2014), the District Court did not even cite—much less discuss—those cases. Instead of considering the evidence, as *McCall* and *Kalitan* require, it simply adopted the (never-argued) hypothesis that "the cultivation of plants to be eaten as part of a meal, as opposed to the cultivation of plants for ornamental reasons" might conceivably present an aesthetic threat justifying the Ban. App. 10.

III. SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction for two separate reasons. First, the Opinion's analysis expressly and directly conflicts with this Court's very recent decisions in *McCall* and *Kalitan*, which held that courts must consider the evidence in applying the rational basis test and that mere speculation or conjecture on the part of government is not sufficient for a court to sustain a law. But the Third DCA did not just refuse to apply this Court's binding precedent in *McCall* or *Kalitan*; it seemingly applied their *dissents* instead.

Second, this case is an ideal vehicle for resolving these conflicts because it involves significant legal and societal issues that reach far beyond Hermine and Tom's front yard. Indeed, this case is only the latest in a series of instances nationwide in which local governments have enacted—and aggressively

enforced—laws making it illegal to grow edible plants in view of the neighbors. The case raises significant questions regarding the limits, or total lack thereof, on the power of government to regulate on one's doorstep. The conflicts described below thus implicate legal and societal issues of statewide and national importance.

IV. ARGUMENT

A. THE OPINION IS IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S HOLDINGS IN *MCCALL* AND *KALITAN*.

The Opinion is in express and direct conflict with the prior rulings of this Court in *McCall* and *Kalitan*. Those opinions hold that evidence matters in rational basis cases and a court may not dismiss actual evidence in favor of speculation and conjecture. Yet that is precisely what the Third DCA did here. In fact, the Third DCA did not even discuss, much less apply, *McCall* and *Kalitan*. Instead, the court embraced the *dissenting* opinions in those cases, and applied a rubber-stamp version of the rational basis test. Specifically, the Third DCA flatly ignored the controlling precedent of the Florida Supreme Court regarding: (1) whether the Florida rational basis test differs from the federal test; (2) whether the rational basis test compels courts to consider evidence; and (3) whether the rational basis test allows for pure speculation and experimentation on the part of the government. Each of these three issues is addressed in turn.

First, it is indisputable, in light of *McCall*, that the Florida rational basis test is not the same as the federal rational basis test. *McCall* involved a law that was upheld under the federal rational basis test by the Eleventh Circuit, which then asked this Court to determine whether the outcome would be the same under Florida's version of the test. The 5-2 answer was "No." *McCall*, 134 So. 3d at 897, 899. Nonetheless, the Third DCA—echoing the *dissents* in *McCall* and *Kalitan*—relied extensively on the federal test when framing its analysis:

McCall/Kalitan	***McCall/Kalitan* Dissents**	**Third DCA Opinion**
Relying entirely on *Florida* precedent to reject the notion that **"recitations amounting only to conclusions,"** are sufficient under the Florida test. *McCall*, 134 So. 3d at 906 (plurality) (citation omitted)); *id.* at 919 (Pariente, J., concurring) (same).	Advocating for the analysis applied under *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993), which held that laws **"may be based on rational speculation unsupported by evidence or empirical data."** *See McCall*, 134 So. 3d at 932 (Polston, C.J., dissenting) (quoting the identical language); *Kalitan*, 219 So. 3d at 61 (Polston, J., dissenting) (same).	Embracing the very same federal test advocated by the dissents: **"[L]aws may be based on rational speculation unsupported by evidence or empirical data."** App. 8 (quoting *City of Ft. Lauderdale v. Gonzalez*, 134 So. 3d 1119, 1121 (Fla. 4th DCA 2014) (quoting the federal test from *Beach Commc'ns*)).

Second, as *McCall* established (and *Kalitan* very recently reaffirmed), evidence matters in rational basis cases. In *McCall*, this Court struck down the challenged law—which, according to the government, was meant to address a malpractice insurance crisis—because "*the available evidence fail[ed] to establish* a rational relationship between [the law] and alleviation of the purported crisis." *Id.*

at 909 (plurality) (emphasis added); *see also id.* at 920–21 (Pariente, J., concurring) (concluding there was "*no evidence* of a continuing medical malpractice crisis that would justify" the law (emphasis added)). In *Kalitan*, a case involving similar damages caps, this Court expressly reaffirmed *McCall*, holding that where there was "a *lack of evidence* demonstrating how the [law] alleviated th[e] crisis" there was "no rational relationship" between the cap and its stated objective of reducing premiums. *Kalitan*, 217 So. 3d at 58, 59. But the Third DCA again sided with the dissents in *McCall* and *Kalitan* regarding the import of evidence:

McCall/Kalitan	***McCall/Kalitan* Dissents**	**Third DCA Opinion**
A law should be struck down when there is **"a lack of evidence demonstrating how [it] alleviate[s]"** the problem it purports to solve. *Kalitan*, 217 So. 3d at 58 (citing *McCall*)	A law should be upheld even when **"unsupported by evidence"** that it alleviates the problem it purports to solve. *See McCall*, 134 So. 3d at 932 (Polston, C.J., dissenting); *Kalitan*, 219 So. 3d at 61 (Polston, J., dissenting) (same).	Ignoring evidence establishing that the Ban *does not* promote aesthetics, and upholding the Ban on the grounds that a law survives even if **"unsupported by evidence."** App. 8.

As such, the Third DCA refused to consider *any* of the evidence. Indeed, it was so unconcerned with evidence that it held that Hermine and Tom were not even entitled to the discovery of evidence directly tethered to the main prongs of the rational basis test. *See* App. 3, n.2.

Third, courts are not obligated to obediently accept bald speculation and conjecture on the part of the government. Once more, however, the Third DCA

adopted a position consistent with the dissents in *McCall* and *Kalitan*. In fact, the Third DCA takes the dissents—which allow for *rational* speculation—one step further, allowing for "pure[] experiment[ation]," rational or not. App. 9. Such a ruling, on its face, conflicts with this Court's precedent:

McCall/Kalitan	***McCall/Kalitan* Dissents**	**Third DCA Opinion**
"[I]t is **unreasonable and arbitrary** [for the Legislature to engage] in a **speculative experiment**." *Kalitan*, 219 So. 3d at 58 (quoting *McCall*, 134 So. 3d at 912) (underline in original).	A law **"may be based on rational speculation."** *See McCall*, 134 So. 3d at 932 (Polston, C.J., dissenting); *Kalitan*, 219 So. 3d at 61 (Polston, J., dissenting) (same).	The Ban was not unreasonable *or* arbitrary because laws **"pass[] the rational basis test even if purely experimental."** App. 9.

Having effectively disregarded this Court's directives in these three respects, the court easily upheld the Ban. App. 8-10. In short, the Third DCA did precisely what *McCall* said a court may not do: "rubber stamp the [City's] asserted justification" for a law. *McCall*, 134 So. 3d at 905 (plurality); *id.* at 919 (Pariente, J., concurring) (same).[1] In light of these conflicts, review is necessary to reestablish the appropriate parameters of Florida's rational basis test.

[1] This case is not the first time the Third DCA has dismissed *McCall. See Membreno v. City of Hialeah*, 188 So. 3d 13, 31 (Fla. 3d DCA 2016), *rev. denied*, No. SC16-616, 2016 WL 3486427 (Fla. June 27, 2016). Indeed, this is now the second time in as many years that the Third DCA has flouted the clear holding of this Court. Here, however, the Third DCA did so notwithstanding this Court's ruling in *Kalitan*, which further cemented Florida's rational basis precedent. Thus, while this Court declined to exercise jurisdiction in *Membreno*, review in this case is necessary to correct this pernicious trend.

B. THESE ARE ISSUES OF STATEWIDE AND NATIONAL SIGNIFICANCE AND THIS CASE IS THE PERFECT VEHICLE FOR RESOLVING THEM.

This case is the perfect vehicle to resolve these important issues. It involves a matter of public importance, stemming from a troubling government overreach into the personal lives and property of an unassuming suburban couple. Hermine and Tom were forced to destroy a vegetable garden that they had grown peacefully in their own yard for 17 years—or face fines of $50 per day for noncompliance. These facts, which the Third DCA recognized were straightforward and "compelling," App. 1, 3, place this case at the vital intersection of property rights and personal freedom. And the case asks the fundamental question of whether government may override these interests through a supposedly aesthetics-based law that not only lacks evidentiary support, but that has been factually proven *not* to advance aesthetics.

These are issues of both state and national concern. In Florida alone, there is an obvious tension between the desires of the many homeowners[2] who, like Hermine and Tom, wish to engage in gardening practices *encouraged* by the State,[3]

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[2] *See, e.g.*, Steven Kurutz, *The Battlefront in the Front Yard*, N.Y. Times, Dec. 19, 2012, www.nytimes.com/2012/12/20/garden/gardeners-fight-with-neighbors-and-city-hall-over-their-lawns.html?pagewanted=all (profiling an Orlando couple's struggle with City Hall over their desire to grow vegetables in their front yard).

[3] As the evidence showed, Hermine and Tom's garden fully complied with—and was encouraged by—the Florida-Friendly Landscape Program, a state-endorsed "set of design guidelines, maintenance practices, and approved plant species"

and the position of the City, which is that all non-fundamental constitutional rights are subordinate to the aesthetic preferences of regulators and the rubber stamp of courts.[4] And nationwide, stories of similarly aggressive local governments abound.[5] This case thus presents an ideal opportunity to finally resolve the lingering conflicts and inconsistencies in Florida law discussed above.

V. CONCLUSION

Petitioners respectfully request that this Court accept jurisdiction and resolve the aforementioned conflicts.

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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." *See* Fla. Dep't Envtl. Prot. & Univ. of Fla., *The Florida Yards and Neighborhoods Handbook* 15 (2009), ffl.ifas.ufl.edu/materials/FYN_Handbook_2015_web.pdf (identifying "raising vegetables" as a legitimate landscaping activity).

[4] Video of Oral Argument at 17:40–18:05, *Ricketts v. Village of Miami Shores*, No. 3D16-2212, 2017 WL 4943772 (Fla. 3d DCA Nov. 1, 2017), www.3dca.flcourts.org/Archived_Video.shtml (search "16-2212" and click link to download video).

[5] *See* Baylen Linnekin, *Biting the Hands That Feed Us: How Fewer, Smarter Laws Would Make Our Food System More Sustainable*, 145-74 (2016) (chronicling, in a Chapter entitled, "I Say 'Tomato,' You Say 'No,'" numerous instances across the U.S., including this one, in which homeowners have been forced to stop growing vegetables in their front yards); Mark Bittman, *Lawns Into Gardens*, N.Y. Times, Jan. 29, 2013, opinionator.blogs.nytimes.com/2013/01/29/lawns-into-gardens/ ("[S]everal times a year we hear of a situation . . . where the mayor claims to be striving to make his city green while his city harasses homeowners . . . for planting vegetables in their front yard, threatening to fine them $500 a day — for gardening.").

RESPECTFULLY SUBMITTED this 11th day of December 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of December 2017, a true and correct copy of the foregoing *Petitioners' Brief on Jurisdiction* was filed and served electronically on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief complies with the font requirement of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14-point font.

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