IN THE SUPREME COURT OF OHIO

REED HAVEL,	)	Case No.
Appellant,	)	ON APPEAL from the Court of Appeals for the Eleventh Appellate District of Ohio
-VS-	)	
BOARD OF ZONING APPEALS, CITY OF KENT, OHIO,	)	Ct. of App. No. 2024-P-0010, 2024-Ohio-4544
Appellee.	)	

MOTION AND MEMORANDUM FOR JURISDICTION OF APPELLANT REED HAVEL

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TABLE OF CONTENTS

Page

TABLE OF PRIMARY AUTHORITIES

CASES

The Court of Appeals applied less scrutiny than the Ohio Constitution requires, and created a conflict of authority in the process. As a result, the City of Kent's onerous occupancy restriction persists, while similar restrictions have been enjoined. The Court should accept review to reaffirm that municipal restrictions on uses of private property that are not nuisances require scrutiny that this restriction fails.

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

There are several reasons why this case presents substantial constitutional questions as well as public interest considerations. *First*, many Ohio cities continue to maintain arbitrary occupancy restrictions, and they inflict significant harm on homeowners and tenants, while providing no commensurate benefits: rents artificially escalate, while home values and housing affordability artificially diminish.

Second, the Court of Appeals' Opinion creates an untenable split of authority on whether, pursuant to the Ohio Constitution, unrelated-individual-based occupancy restrictions are constitutionally-permissible. In *Yoder*, the District Court for the Northern District of Ohio, rejecting *Belle Terre*, determined that this Court's precedents require heightened scrutiny:

> [U]nder the Ohio Constitution, private property rights are "fundamental rights" to be "strongly protected". Although the *Norwood* court dealt with a takings claim, it described the "rights related to property, i.e., to acquire, use, enjoy, and dispose of property" as "among the most revered in our law and traditions." Further, Ohio courts apply a higher level of scrutiny to such claims regarding property rights, and homeowners who have acted without knowledge or intent enjoy greater protections . . . the undersigned concludes that Ohio courts, interpreting the Ohio Constitution, apply something higher than rational basis review, but less than strict scrutiny to cases involving property rights. With these principles in mind, the undersigned turns to the City's dwelling limit.

Yoder v. City of Bowling Green, Ohio, No. 3:17 CV 2321, 2019 WL 415254, at 3–4 (N.D. Ohio Feb. 1, 2019)(citations omitted), citing *Norwood v. Horney*, 110 Ohio St.3d 353, 361-62 (2006); *State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 128 (1998); *Boice v. Ottawa Hills*, 137 Ohio St. 3d 412, 416-17 (2013); and Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 198 (2018). The Court of Appeals here took a *completely different* approach, abstaining from identifying the standard of scrutiny or test it was applying, and applying what most closely resembles federal Rational Basis

Review.[1] It reasoned that "In *Yoder*, however, the purpose of the zoning district that implemented the restriction was to *control density* . . . Here, the City of Kent's Code states that the purpose of the R-3 zoning district is "to encourage single family residential development at high densities in areas of existing development of such density, and thereby providing a more orderly and efficient extension of public facilities." *Havel v. Bd. of Zoning Appeals Kent*, 2024-Ohio-4544, ¶¶ 51-52, citing *Kent Codified Ordinances 1103.11(a)*. Such analysis creates different outcomes, within Ohio, when materially identical restrictions are challenged. In other words, Mr. Havel *lost* his property rights while the plaintiffs in *Yoder* retained *theirs* simply because the City of Kent articulated a government interest that the Court of Appeals finds acceptable. This creates uncertainty as to which approach and outcome Ohio courts should follow.

Third, this conflict dials up the unresolved major question of how intensely the Ohio Constitution requires courts to scrutinize municipal use restrictions. When this Court, two decades ago, characterization of private property rights as "fundamental rights" in *Norwood*, many presumed strict scrutiny: "If a legislative enactment violates a fundamental right it is subject to strict judicial scrutiny and will be found to be unconstitutional unless it is shown to be necessary to promote a compelling state interest." *Sorrell v. Thevenir,* 69 Ohio St.3d 415, 422 (1994). But this never materialized. More recent developments may justify a history-based original public meaning inquiry as described in *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029.

But if none of the above, this Court should provide guidance by first clarifying *the source* of Ohioans' rights, i.e. where, specifically, in the text they are housed. This Court's precedents just prior to and since the ratification of the municipal police power in 1912 provide a bounty of options.

They first consist of *intrinsic* limits on "police regulations," i.e. the police power, inherent in Article 18, Section 3 - - none of which this Court has since rejected. See *Cleveland Tel. Co. v. City of Cleveland*,

[1] See *Pickaway Cty. Skilled Gaming, L.L.C. v. Cordray*, 2010-Ohio-4908, ¶ 32, 127 Ohio St. 3d 104, 113 ("courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends").

98 Ohio St. 358, 360–71 (1918)(explaining that the municipal police power "is fraught with danger to the personal and property rights of private individuals, and courts have uniformly interfered to restrain the arbitrary and unreasonable exercise of that power to the prejudice of private rights guaranteed by the Constitution of the state"); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 538-39 (1943)("In Ohio the grant of police power to a municipality is found in Section 3, Article XVIII of the Constitution . . . such regulations, to be valid and enforceable, must conform to certain well defined and well understood standards . . . Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public"). *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941)(property rights cannot be interfered with other than through a "nonarbitrary exercise of the 'police power' of the state or municipality, when exercised in the interest of public health, safety, morals or welfare").

Next, this Court has articulated *extrinsic* limits on the police power imposed by an array of enumerated rights – none of which this Court has since rejected. See *Mirick v. Gims*, 79 Ohio St. 174, 178–80 (1908)("Such limitations as are recognized arise by construction from the nature of the power itself, and from the Declaration of Rights contained in article I . . . and in considering these, the first clause of section 20, art. 1, must not be overlooked . . . courts have always asserted the right to restrain the exercise of the power to the extent that private rights may not be arbitrarily or unreasonably infringed. Such cases are within the rights reserved by the Bill of Rights, and are therefore the unconstitutional, or rather extraconstitutional, exercise of police power, and void"); *Palmer v. Tingle*, 55 Ohio St. 423 (1896) ("The inalienable right of enjoying liberty and acquiring property, guarantied by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are *necessary* for the common welfare"); *Direct Plumbing Supply*, at 545-46, 549 ("To be truly in the public welfare within the meaning of Section 19, and thus superior to private property rights, any legislation must be reasonable,

not arbitrary, and must confer upon the public a benefit commensurate with its burdens upon private property," and "[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom of contract beyond the necessities of the situation. The ordinance is therefore held to be invalid as in contravention of Section 19, Article I, of the Constitution of Ohio");[2] *State ex rel. Pizza*, at 131–32 (relying on Section 19 of Article I as protecting "the free use of property guaranteed by the Ohio Constitution"); see also *Yoder*, supra., summarizing the foregoing precedents and applying searching scrutiny to invalidate another Ohio municipality's occupancy restriction through reliance on Sections 1, 2, 16, and 19 of Article I).

Once this Court locates the source of Ohioans' guarantees, it should – to resolve this case and many like it - narrow, amongst a vast array of options, *an administrable test* to be applied by lower courts in cases like this. Just as with locating the rights at stake here, lower courts, in identifying a suitable test, appear to have too many options to choose from – again, none of which this Court has since rejected. See *Evans v. Mannix*, 90 Ohio St. 355, 361–62 (1914)(finding, just after ratification of the 1912 Constitution, a real estate restriction "an arbitrary and unreasonable exercise of police power not required by the general welfare, and therefore unconstitutional and void," by positing that restrictions "must not be arbitrary or unreasonable and must not unnecessarily interfere with the rights of citizens. The very existence of such broad and elastic powers in the state imposes the duty on the courts to scrutinize their exercise to the end that guaranteed rights of citizens may not be improperly infringed"); *Froelich v. City of Cleveland*, 99 Ohio St. 376, at 391 (1919)(requiring local government to meet five criteria: "The means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, *and* must not interfere with private rights beyond the necessities of the situation"); *Direct Plumbing Supply*, *supra.* (such restrictions must be "reasonable," "not arbitrary," "[m]ust

[2] Notably, this Court elsewhere in *Direct Plumbing Supply* invokes an inquiry that includes other enumerated rights as protecting property rights relevant to the use restriction here, querying "[d]oes the ordinance in question offend against the guaranties of the rights of private property and its corrollary-freedom of contract-contained in Sections 1, 16 and 19, Article I of the Ohio Constitution?"

confer upon the public a benefit commensurate with its burdens upon private property" before holding "[t]he burdens of the ordinance are unduly oppressive upon individuals and interfere with the rights of private property and the freedom of contract beyond the *necessities* of the situation"); *Correll*, at 538-540 ("if it is apparent that there is no plausible, reasonable and substantial connection between the provisions of the act and the supposed evils to be suppressed, there exists no authority for its enactment. Legislative bodies may not, under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business"); *State ex rel. Pizza*, at 131–32 ("Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public *require* its exercise *and* the means of restriction must not be unduly oppressive upon individuals," and "[p]rivate property rights may be limited through the state's exercise of its police power when restrictions are *necessary* for the public welfare").

In aggregate, this century of standards could *perhaps* be deduced to require municipal government demonstrate necessity, non-arbitrariness, and serious means-end scrutiny. But this Court has never synthesized these tests or provided a pathway for lower courts to follow, and the result has been rampant rubber-stamping of municipal use restrictions in precisely the manner the Court of Appeals chose below.

This Court should accept review to clarify that such minimal scrutiny is inconsistent with this Court's foregoing precedents, which outright say so. *Direct Plumbing Supply*, at 546 ("the constitutional guaranty of the right of private property would be hollow if all legislation enacted in the name of the public welfare were per se valid"); *Correll*, at 539 ("The Courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power"). And this Court is clear that "the final decision upon these questions . . . must in any system of constitutional government be the function of the judicial arm of government").

Despite the submission of Mr. Havel's arguments insisting that the foregoing principles be followed, the Court of Appeals applied *none of the above*. Thus, this Court should accept jurisdiction here to supply

Ohioans with an intelligible standard governing the delineation of permissible from impermissible use restrictions, including the proper source of those rights.

Finally, this Court should accept review because occupancy restrictions would appear to be a quintessential instance where the Ohio Constitution is more protective than the federal baseline. Despite the reasoning otherwise in *Yoder*, and Mr. Havel's raising of exclusively *state constitutional* claims, the Court of Appeals rests its conclusion on *federal* precedent adjudicating only the contours of the *federal* constitution. *Havel*, at ¶ 52 ("it is well-settled law that zoning restrictions that limit unrelated individuals residing within single family dwellings are constitutional"), citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, at 7 (1974).

In doing so, the Court of Appeals failed to reconcile any of the cases or constitutional provisions cited in *Yoder* for the proposition that the Ohio Constitution is more protective of property rights than the federal baseline. This is the blindest of lock-stepping, given the differing text and history of this state's traditional limits on the police power, and the differing texts and applications of Sections 1, 2, 16, 19, and 20 of the Ohio Constitution. Such a "reflexive imitation of the federal courts' interpretation of Federal Constitution" ignores Ohio courts "duty to keep within the light of our own constitution and not to grasp at authorities beyond it" and "obligation to the Ohio Constitution, and we delegate away our duty to say what the law is," *Bloom*, ¶¶ 21, 23, 29.

All the while, even the Supreme Court has acknowledged the great weight of authority invalidating these types of regulations. See *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 513–21, 97 S. Ct. 1932, 1943–46 (1977)(J. Stevens, Concurring)("attempts to limit occupancy to related persons have not been successful . . . in well-reasoned opinions, the courts of Illinois, New York, New Jersey, California, Connecticut, Wisconsin, and other jurisdictions, have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy."). And this Court has recently affirmed "[w]e can and should borrow from well-reasoned and

persuasive precedent from other states." *State v. Mole*, supra, at ¶21-22. These invaluable cases from other states create a path for this Court to follow that is wiser than that of *Belle Terre* or the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellant Reed Havel owns, on a large lot in the City of Kent, a well-maintained six-bedroom, 1,786 square foot home at 248 Columbus Street. *Havel v. Bd. of Zoning Appeals Kent*, 2024-Ohio-4544, ¶3-4. The home has been in his family 31 years, and Mr. Havel acquired it from his mother to house individuals with disabilities, who will invariably be unrelated. *Id.*, ¶ 1-9. Mr. Havel's Columbus Street home is surrounded by duplexes ("two-family dwellings"), and what the City characterizes as "rooming houses" and "lodging houses" (which Mr. Havel documented below) in a zoning district that is characterized by the City as "high density" and explicitly permits home-based businesses, two-family dwellings, multi-family dwellings, assisted living facilities, day cares, cemeteries, and churches and schools. See *Id.*, at ¶ 1-3, 27-28, citing §1103.11(a), (b), and (c).

But upon surveilling the home and learning that each bedroom in Mr. Havel's home was occupied, *not in contravention* of the lawful business of residential leasing prescribed by the State in R.C. 5321.01, *et seq*., the City ordered Mr. Havel to remove all but two inhabitants. The City submits that whenever greater than two unrelated individuals dwell together within the same home, however harmless and irrespective of the number of bedrooms, bathrooms, square footage, or parking capacity, that home is suddenly converted into what the City of Kent labels a "rooming house," a term which does not appear on the City's list of permitted uses. In response to the City's threats, Mr. Havel applied for (and was denied) a certificate of nonconforming use. *Id*., at ¶ 8.

However, "in its order, the trial court additionally held that the City of Kent's zoning restriction, which limits the occupancy of single-family dwellings located in R-3 high-density residential zoning districts to no more than two unrelated individuals, to be unconstitutional" on the basis that it was impermissibly arbitrary. *Id*., at ¶ 1, 48. The Court of Appeals observed "the Code restricts Havel's use of the Property to

renting to no more than two unrelated individuals. Therefore, Havel's use of the property is in violation of the City of Kent's zoning ordinances." ¶¶ 30-32. It then reversed: "We further hold that the application of the City of Kent's zoning code, which creates a restriction in the R-3 zoned district limiting occupancy of single family homes to no more than two unrelated individuals, is constitutional as applied." *Id.*, at ¶ 2.

In doing so while attempting to distinguish Mr. Havel's claims from *Yoder*, the Court of Appeals first reasoned "In *Yoder*, however, the purpose of the zoning district that implemented the restriction was to *control density*. The restriction essentially had no bearing on density since there was no impact on density regardless of whether five related or five unrelated individuals resided in a single-family home." ¶50-52.[3]

Secondly, the Court of Appeals suggesting lockstepping Ohioans' rights with the federal Constitution's protections of Ohioans' homes, perfunctorily concluding "Further, it is well-settled law that zoning restrictions that limit unrelated individuals residing within single family dwellings are constitutional. *Village of Belle Terre v. Boraas*, 416 U.S. 1, at 7 (1974). *Havel*, ¶53.

Third, the Court of Appeals reasoned "there is no taking, and there is no infringement on a fundamental right, nor is there an intrusion into the dynamics or compositional makeup of Havel's family. Havel is free to rent to more than two unrelated individuals in one of the alternative permitted districts within the City of Kent." ¶54.

Thus, the following Court of Appeals' points of law are now squarely before this Court: whether a municipal use restriction with an otherwise arbitrary effect may be insulated from invalidation when, without more, (1) the municipality's articulated purpose is deemed sufficient; (2) federal court's interpretation of federal guarantees have rejected similar claims, even though only state constitutional claims (that are *not*

[3] On this topic, the Court added the following: "The City of Kent's restriction is consistent with limiting and allocating locations for specific property uses. The restriction is less concerned with the relationships of individual occupants of single-family residences than the use of the property itself *as a single-family residence* . . . The City of Kent's restriction encourages property development of a distinct type of use within the R-3 area to facilitate public facilities, which is different than the Bowling Green's restriction which attempted to merely constrain population density, by placing a limit that had no actual impact on the population density. For this reason, *Yoder* is not analogous to the case before this Court." *Havel*, ¶51-52.

coextensive) are made; or (3) the use restriction is inapplicable in other locations within the City on the basis of zoning district designation. In sum, do any of these three determinations by a Court obviate analysis as to whether the use restriction is impermissibly arbitrary?[4]

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The Ohio Constitution is more protective of residential occupancy rights than the Federal Constitution, as articulated in *Vill. of Belle Terre v. Boraas*

To be sure, the United States Supreme Court has suggested that some restrictions like the City of Kent's here may not violate right protected by the *federal* Constitution. But the Ohio Constitution is *more protective* of private property rights than its federal counterpart, such that Ohio should join the growing chorus of states that have already invalidated restrictions on the *identity* of a home's inhabitants.

First, the Ohio Constitution may be applied without adherence or deference to federal constitutional precedent -- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens. *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993).

Second, the Ohio Constitution's text and history is more protective of property rights. "One of the faults of the 1802 constitution identified by the drafters [of the 1851 Constitution] was that the earlier clauses were deemed insufficient to properly protect private property rights." *Moore v. Middletown*, 2010-Ohio-2962, ¶¶ 66-67. Thus, "[h]istorically, the laws of Ohio were designed to ensure the right to own and protect property." *Id*., at ¶ 66-67. Indeed, the framers of the Ohio Constitution's Bill of Rights made clear in 1851 that their purpose was to protection Ohioans' liberty, rather than to assist government in facilitating arbitrary government restrictions, professing a goal of "*securing to all the largest liberty*." I Smith, *Debates of the Ohio Convention* (1851, reprinted 1933), at 69–70. Those principles are also reflected through This Court's analysis that Sections 1 and 19 of Article I provide greater protection for the home than the Federal Constitution.

[4] Of note, the parties below moved for reconsideration, and the Court of Appeals entry on reconsideration does not materially differ from its initial Opinion and Entry.

Resultantly, this Court recognizes elevated sanctity of "*the home*—the place where ancestors toiled, where families were raised, where memories were made." *Norwood*, ¶ 4. This elevated sanctity arises from the extra protection the Ohio Constitution affords to "[t]he rights related to property, *i.e.,* to acquire, use, enjoy, and dispose of property," as "inalienable," "among the most revered in our law and traditions": "it is not surprising that the founders of our state expressly incorporated individual property rights into the Ohio Constitution in terms that reinforced the sacrosanct nature of the individual's "inalienable" property rights, Section 1, Article I, which are to be held forever "inviolate." *Norwood*, ¶ 34-35.

Given the individual's fundamental property rights in Ohio, the courts' role in reviewing threats to those rights is "important *in all cases*." *Norwood*, ¶ 74. Thus, when reviewing "the state's intrusion onto the individual's right to garner, possess, and preserve property," Ohio courts employ meaningful scrutiny, rather than *rubber-stamping* the putative governmental intrusion. *Norwood*, ¶ 88; see also *Yoder v. City of Bowling Green, Ohio,* No. 3:17-cv-2321, 2019 WL 415254, at 4 (N.D. Ohio Feb. 1, 2019). Consequently, this Court is in no manner bound by *federal* precedent such as *Village of Belle Terre* when protecting rights under the Ohio Constitution.[5]

Third, many other states have identified compelling reasons, under their state constitutions, to break with *Belle Terre*. "Courts, including state courts of last resort, around the country have relied on state constitutions to invalidate such prohibitions. Most of these acknowledged the existence of *Village of Belle Terre*, but found it irrelevant to state constitutional interpretation or otherwise inapposite." *Distefano v. Haxton*, No. C.A. NO. WC 92-0589, 1994 WL 931006, at 14 (R.I. Super. Dec. 12, 1994)("It is a strange - and unconstitutional - ordinance indeed that would permit the Hatfields and the McCoys to live in a

[5] See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In many ways, the City's regulations more closely resemble those later invalidated by the Supreme Court in *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 507 (1977)("the ordinance unconstitutionally abridges the "freedom of personal choice in matters of . . . family life (that) is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

residential zone while barring four scholars from the University of Rhode Island from sharing an apartment on the same street . . . Ordinance forbidding occupancy of otherwise suitable residential units by more than three persons not related by blood, marriage, or adoption is violative of the mandates of the due process and equal protection clauses of Article 1, Section 2 of the Rhode Island Constitution").

"Indeed, one State Supreme Court wondered even within six years after the decision in *Belle Terre* as to whether the opinion 'still does declare federal law.'" *Id.,* citing *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440, n. 3 (Cal. 1980)((invalidating ordinance defining family as related persons or not more than five unrelated persons); see also *Charter Township of Delta v. Dinolfo,* 419 Mich. 253 (1984)(even if preservation of the residential nature of a neighborhood is a proper subject for legislative protection occupancy restriction limiting unrelated persons from dwelling together was arbitrary); *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 942–44 (1989)("Because the ordinance here similarly restricts the size of a functionally equivalent family but not the size of a traditional family, it violates our State Constitution"); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 546–54 (1985)(no "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end . . . This ordinance, by limiting occupancy of single-family homes to persons related by blood, marriage or adoption or to only two unrelated persons of a certain age, excludes many households who pose no threat to the goal of preserving the character of the traditional single-family neighborhood"); *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 421–33 (1990)("Recognizing that the municipality's goal of preserving stable, single-family residential areas was entirely proper, we nevertheless held that the ordinance was violative of our state constitution because 'the means chosen [did] not bear a substantial relationship to the effectuation of that goal'"); *Kirsch Holding Co. v. Borough of Manasquan, supra,* 59 N.J. 241, at 254 (1971)("The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many

uses which defeat that goal"); *Kirsch v. Prince George's Co., Maryland,* 331 Md. 89, 626 A.2d 372 (1993) (invalidating ordinance imposing special restrictions on properties occupied by three to five unrelated persons on state and equal protection grounds). For these reasons, the Court of Appeals rote reliance on federal jurisprudence in the face of state claims was impermissible.

<u>Proposition of Law No. 2</u>: Intrinsic constitutional limits on the municipal police power proscribe arbitrary municipal occupancy restrictions.

"Our construction of the constitution's text must be done in light of relevant history and tradition." *State ex rel. Cincinnati Enquirer v. Bloom*, 2024-Ohio-5029, ¶35. *Bloom* requires Ohio courts to "consider how the language would have been understood by the voters who adopted the text," when "construing constitutional text that was ratified by direct vote," ¶ 40, "text, history, and tradition," ¶ 28, and "the values underlying that text." ¶ 56. In 1912, the public voted to enact Article XVIII, Section 3. This conferred upon Ohio municipalities, amongst other things, the authority to "to adopt and enforce within their limits such local police, sanitary and other similar regulations." This "phrase refers to a municipality's police power." Steinglass & Scarselli, *The Ohio Constitution* (2d Ed. 2022), at 534-535.

First, this power was understood up through 1912 to be intrinsically limited to the preemptive interdiction of nuisances otherwise bound to occur: "It is not difficult to find the rule which determines the limitations upon lawful ways or manner of using lands. It is the rule, which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim [that] one can lawfully make us of his property only in such a manner as that he will not injure another . . . A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so . . . it cannot prohibit as a nuisance an act which inflicts no injury upon the health or property of others . . . If they do not cause injury or annoyance to others, the attempted legislative interference is unwarranted by the constitution, and it is the duty of the courts to declare it to be unconstitutional" Cooley, *A Treatise on the Constitutional Limitations which rest upon The Legislative Power of the States* (1868), §122, at p. 423, §122a, at p. 426-27. This is precisely why this Court in *Froelich*, *Direct Plumbing*, *Correll,* and *Pizza* require "necessity." See

also Randy Barnett, *The Original Meaning of the Fourteenth Amendment* (2021), pp. 304-309 (police powers exist only "to prevent rights violations before they happen (rather than relying solely on lawsuits for damages after the fact) . . . "[T]o prevent the [rights] violations from occurring, the police power allows for the regulation of behavior that risk violating the rights of others").

Here, simply allowing more than two unrelated individuals to dwell together within a six-bedroom house, without more, is not a nuisance *per se*, nor *inherently likely*[6] to cause a nuisance. Consequently, it is not within the scope of the City of Kent's police power to prohibit it. Likewise, for the reasons articulated in the Proposition below, the City of Kent's occupancy restriction on Mr. Havel's home exceed the intrinsic limits of its police power because that restriction is impermissibly "arbitrary."

<u>Proposition of Law No. 3</u>: Extrinsic constitutional limits on the municipal police power proscribe arbitrary municipal occupancy restrictions.

A holistic application of Sections 1, 2, 16, 19, and 20 of Article I proscribes the municipal police power from prohibiting, without more, three unrelated individuals from dwelling together in Mr. Havel's six-bedroom home. "An arbitrary interference by the government with the reasonable enjoyment of private lands is a taking of private property without due process of law." Cooley, *supra*, §122, at p. 423. And "to determine whether a deprivation of life, liberty, or property is arbitrary requires courts to assess whether there is a sufficient relationship between the means adopted and these undisputed ends." Barnett, *supra*., at 310. In Ohio, when suppression is based solely on the status of the classified group without any relationship to a legitimate state interest, the classification may be found to be unconstitutionally *arbitrary*. *State v. Mole*, 2016-Ohio-5124, at ¶ 61. The City's Occupancy Restriction is unconstitutionally arbitrary and untailored because it is and unequal, indirect, over-inclusive, and under-inclusive means.

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[6] Barnett, *supra*., at 311. One significant "question about police power ends" is "whether states may prohibit conduct preformed in private and outside the view of the general public – conduct that has no external social costs associated with it that would justify categorizing it as a nuisance – on the sole ground that the legislature deems such conduct to be immoral . . . We doubt that the regulation of purely private acts based solely on claims about morality can be nonarbitrary in actual operation . . . Any purported government end, the scope of which cannot be objectively assessed by a citizen or independent judiciary, poses an intolerable risk of arbitrariness . . . such a power lacks a judicially-administrable limiting principle")

First, neither the City nor the Court of Appeals adequately explains how the City's social engineering *targeting disfavored relationships between those living together in any particular home* "encourages single family residential development," or "provides a more orderly and efficient extension of public facilities," much less interdicts a nuisance. Rather than regulating structures, development, or a *land use*, the ordinance instead regulates *the identity of who* can use the land for otherwise legal and acceptable purposes.

Second, the number of innocuous household arrangements forbidden by the Occupancy Restriction are endless. A four-bedroom home cannot be leased to three or four elderly widows ("The Golden Girls" are a nuisance that must be evicted, according to the City and the Court of Appeals). Nor three nuns. Nor three Mormon missionaries, medical residents or travel nurses working at the local hospital, judges or law students, or National Guard members concerned over deployment. Indeed, the arbitrariness of the law is demonstrated by the fact that, pursuant to the City's restriction, only if an engaged couple were to rush their wedding date, could they move a sister in.

Third, greater than three young adults remotely related by blood could reside in one home, even if they are unruly, abuse drugs and alcohol, blare loud music, and own cars for which there is insufficient parking. This is true even if those young adults are even interrelated in a manner so attenuated such that they are merely third cousins.

Fourth, many homes surrounding Mr. Havel on Columbus Street are *entirely exempt* from the City's use restrictions, whether as "grandfathered" or otherwise. But "the very existence of the 'escape hatch' of the variance procedure only heightens the irrationality of the restrictive definition, since application of the ordinance then depends upon which family units the zoning authorities permit to reside together and whom the prosecuting authorities choose to prosecute." *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 512 (1977). And in this "high density" location, still other uses equally or more injurious to the City's avowed goals remain permitted – multi-family dwellings, duplexes, businesses, assisted living facilities, etc.

Fifth, there is *no limiting principle* governing the extent of the City's power if the Court of Appeals were upheld: the City would remain free to limit the occupancy of large homes to just *one* individual (or to ban single individuals altogether).

Finally, the sky will not fall once the City's Occupancy Restriction is enjoined, as there are far more tailored means of advancing the City's vague interests, such as providing a minimum number of bedrooms, parking spaces, square footage per resident, or directly prohibiting and punishing any disruptive conduct. *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 421–33 (1990)("Disruptive behavior-which, of course, is not limited to unrelated households-may properly be controlled through the use of the general police power"); see also *Guide to Local Occupancy Codes in Northeast Ohio* (2013), by Krissie Wells and Madhavi Seth, Housing Research & Advocacy Center, pp. 4-5 (most other "jurisdictions in Northeast Ohio with their own occupancy codes base their limits on the number of residents on the size, in square feet, of the premises"). And neighbors are welcome to avail themselves of any of the many *proper* means Ohio supplies for them to maintain control over affairs of nearby residents, such as homeowners' associations, condominium associations, restrictive covenants, deed restrictions, and easements. The City's Occupancy Restriction is simply not amongst them: it impermissibly focuses on subjective social engineering.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court accept the three Propositions of Law specified above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served by email to counsel for Appellee City of Kent, Ohio, this 7th day of April, 2025.

/s/ *Maurice A. Thompson*
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