In the Supreme Court of Ohio

REED HAVEL, Plaintiff-Appellant, v. BOARD OF ZONING APPEALS, CITY OF KENT, OHIO, Defendant-Appellee.	Case No. 2025-0495 On Appeal from Court of Appeals of Ohio, Eleventh District, Portage County Case No. 2024-P-0010

MERIT BRIEF OF FRIEND OF THE COURT PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and has since become widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel in several landmark Supreme Court cases in defense of the right of individuals to make reasonable use of their property. *See, e.g.*, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024); *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Knick v. Twp. of Scott*, 588 U.S. 180 (2019); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725 (1997); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in numerous important property rights cases. *See Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014); *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In addition, PLF attorneys, including David Deerson, counsel on this brief, represent Val French and HomeRoom, Inc., in a case challenging a zoning restriction in Shawnee, Kansas, that bears significant similarity to the one at issue here. *HomeRoom, Inc. v. City of Shawnee*, 691 F. Supp. 3d 1316 (D. Kan. 2023), *pending appeal*, No. 23-3168 (10th Cir. argued Sept. 26, 2024).

STATEMENT OF FACTS

Amicus adopts the Statement of the Case and Facts contained in the Memorandum in Support of Jurisdiction of Appellant Reed Havel.

INTRODUCTION AND ARGUMENT

This case involves a constitutional challenge to a zoning ordinance.[1] Unlike a traditional zoning ordinance, however, the challenged provision does not regulate the use of land or the intensity of land use. Instead, it regulates land *users*. *See* 5 *Rathkopf's The Law of Zoning and Planning* § 81:7 (4th 3d. 2023) (Zoning is properly concerned with "regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who may occupy the land.").

This is no mere occupancy limit, as the ordinance places no cap on the number of people who may occupy a residential dwelling, so long as they are related by marriage, adoption, or blood within three degrees of consanguinity. Kent Codified Ordinances § 1102.03(a)(79). Neither does the definition of "family" regulate use or intensity; it makes no change to the allowable density of dwellings within a given area, or to lot coverage, or to the number of dwelling units that a development may include. The only thing that the challenged restriction regulates is people. Whether a given household qualifies as a permitted principal use in the R3 zone depends on one factor alone: the relationship of the people who live there.

This restriction interferes with a number of fundamental rights protected by the Constitution. Most immediately, as applied to Mr. Havel, it encroaches on his right to lease property—a core aspect of property ownership. The restriction also obstructs the fundamental, cherished, and deeply rooted right of all Americans to establish a home, including the right to select members of one's household. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Also at stake is the right to enjoy and participate in intimate relationships without undue government interference. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J.,

[1] All three sections of this argument correspond to the Second and Third Propositions of Law accepted by this Court, namely, that both intrinsic and extrinsic constitutional limits on the municipal police power proscribe arbitrary municipal occupancy restrictions.

concurring). Even where these latter rights are not advanced directly by members of the household, courts considering a due process challenge to a restriction on leasing must still determine whether they bear a rational relationship to a legitimate government end—a test which poses a genuine obstacle to ordinances that deny rights depending on the identity and status of land users. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). Moreover, the Ohio Constitution provides even higher due process protection than its federal counterpart. *See State ex rel. Pizza v. Rezcallah*, 84 Ohio St. 3d 116, 131 (1998) ("[T]he free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only when the restriction thereof bears a substantial relationship to the public health, morals and safety.") (internal quotation omitted); *see also Yoder v. City of Bowling Green*, No. 3:17-CV-2321, 2019 WL 415254, at *4 (N.D. Ohio Feb. 1, 2019) (The Ohio Constitution requires "something higher than rational basis review[.]").

Yet the Court of Appeals upheld Kent's restriction with insufficient analysis. *Havel v. Kent Bd. of Zoning Appeals*, 253 N.E.3d 752, 761–62 (Ohio Ct. App. 2024). It erroneously concluded that no fundamental rights were at stake, and it failed to genuinely scrutinize the City's articulated rationale against the scope of its police power. Moreover, it neglected to engage with or acknowledge the heightened protections provided to property rights under the Ohio Constitution as examined in *Yoder*. But the "right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod." *Moreno*, 413 U.S. at 543 (Douglas, J., concurring). This Court should reverse.

I. KENT'S RESTRICTION ON HOUSEHOLDS COMPRISED OF UNRELATED PERSONS INTERFERES WITH FUNDAMENTAL RIGHTS

The court below found that Kent's unrelated-persons restriction posed "no infringement of a fundamental right[.]" *Havel*, 253 N.E.3d at 763. Yet the restriction directly interferes with Mr. Havel's right to lease his property as he chooses, which is a fundamental property right

protected by the Federal and State Constitutions. Moreover, the restriction violates the fundamental right to enter into and enjoy intimate associations. *See Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012) (the relationship among co-residents sharing a household "easily qualifies" for fundamental constitutional protection).

A. The Right to Lease Is a Fundamental Property Right

Property is "more than the mere thing which a person owns," but includes also "the right to acquire, use, and dispose of it." *Buchanan v. Warley*, 245 U.S. 60, 74 (1917). This includes, as a subset of the right to alienate, the right to lease property. *See Barfield v. Damon*, 245 P.2d 1032, 1034 (N.M. 1952) (holding the ownership of land includes the power to lease it) (citing 1 Taylor, *The American Law of Landlord and Tenant* § 304 (9th ed. 1904)); *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 648 (1853) (Leases convey "important rights of property[.]"); *compare Lease*, Black's Law Dictionary (12th ed. 2024) (defining lease as a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration"), *with id.*, *Alienate* (To alienate means to "transfer or convey (property or a property right) to another.").

Property rights like the right to lease are foundational and fundamental. *City of Norwood v. Horney*, 110 Ohio St. 3d 353, 362 (2006) ("The right of private property is an *original* and *fundamental* right, existing anterior to the formation of the government itself[.]") (citing *Bank of Toledo*, 1 Ohio St. at 632). They are "an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972); *see Murr*, 582 U.S. at 394 ("Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan

their own destiny in a world where governments are always eager to do so for them."); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part) ("[P]roperty rights . . . are central to our heritage."). The U.S. Supreme Court has long held that each of the essential attributes of property—including the rights to own, use, alienate, and exclude—is protected by due process. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (The Fourteenth Amendment is "read broadly to extend protection to any significant property interest.") (internal quotation omitted); *Buchanan*, 245 U.S. at 74 (Due process "protects [the] essential attributes of property," including "free use, enjoyment, and disposal[.]"). This Court, too, has held that "the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood*, 110 Ohio St. 3d at 363.

Although federal law typically subjects zoning regulations to rational basis scrutiny, this does not change the fundamental nature of property rights. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property."). Rather, the relatively deferential rational basis standard reflects an attempt to balance property rights against the public's interest in regulating property use to avoid nuisance. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (explaining that zoning is justified by the "maxim '*sic utere tuo ut alienum non laedas*,'" meaning that one should use property in such a way as not to injure that of another). Meanwhile, the Ohio Constitution provides even stronger protection, requiring not merely that an interference with property rights be rational, but that restrictions be "necessary" for public welfare and bear a "substantial relationship to the public health, morals, and safety." *Pizza*, 84 Ohio St. 3d at 131.

Kent's unrelated-person restriction directly interferes with the right of alienation by prohibiting Mr. Havel from renting his home to his tenants merely because more than two of those tenants are unrelated to one another under the City's definition of "family." *See Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977) (Stevens, J., concurring) (The right of "an owner to decide who may reside on his or her property" is a "fundamental right normally associated with the ownership of residential property[.]"). To satisfy the federal Constitution, this interference must bear a genuine rational relationship with some legitimate government aim. To satisfy the Ohio Constitution, it must be necessary for the advancements of that end. As discussed further in Section II *infra*, it cannot satisfy either standard.

B. The Constitution Protects the Fundamental Right to Freely Select One's Household Living Companions

Besides the right to alienate property by lease, this case involves the intersection of two other fundamental rights: the right of intimate association, and the right to establish a home. Together, these rights protect the individual from government interference in their choice of living companions.

The "freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights." *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987) (*Duarte*). This right must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18 (1984); *see State v. Burnett*, 93 Ohio St. 3d 419, 424 (2001) (The "freedom of association includes the choice to enter into and maintain certain intimate human relationships [which are] protected as fundamental, personal liberties.").

The right of intimate association is especially potent within the private sphere of the home. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (Constitutional rights take on an "added dimension" in the "privacy of a person's own home."); *see also Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home."); *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law."); *Minnesota v. Carter*, 525 U.S. 89, 99 (1998) (The home is "entitled to special protection as the center of the private lives of our people.") (Kennedy, J., concurring). The right to establish one's home is "long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399; *Payton v. New York*, 445 U.S. 573, 601 (1980) ("[O]verriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.").

Duarte clarified that whether a given relationship qualifies for constitutional protection depends on factors such as "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Duarte*, 481 U.S. at 546. The paradigmatic protected relationships are those which "attend the creation and sustenance of a family," *Roberts*, 468 U.S. at 619, but the U.S. Supreme Court has emphasized that constitutional protection is not restricted to traditional family relationships. *Duarte*, 481 U.S. at 545. In *Roberts*, the Court outlined the right of intimate association but declined to extend its protections to the U.S. Jaycees, a nonprofit educational corporation. The Jaycees had challenged a Minnesota law prohibiting sex discrimination, arguing that it had the associational right to exclude women from its membership. *Roberts*, 468 U.S. at 615–17. Although the Court declined to extend constitutional protection to the U.S. Jaycees due

to its large and unselective nature, *id.* at 621, this nevertheless marks the first case in which the Court explicitly recognized the modern doctrine of intimate association.

The lower court here cited *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974), for the "well-settled law" that zoning restrictions may limit the number of unrelated individuals who live together within a home. *Havel*, 253 N.E.3d at 763. Crucially, however, *Belle Terre* did not consider the right of intimate association. That is not surprising, as that doctrine—as distinct from the right of expressive association—was not formally recognized until the *Roberts* decision a decade later. *See generally*, Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 Fla. L. Rev. 1401, 1422–23 (2015); *see also Burnett*, 93 Ohio St. 3d at 424 (The "right of association encompasses two distinct types of freedoms."). Thus, although the majority opinion in *Belle Terre* concluded that the restriction did not implicate the "right of association," it was clearly thinking only of the right of *expressive* association, as evidenced by its citation to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), a paradigmatic expressive-association case. Justice Marshall's dissent in that case is instructive, as it presciently identified the right of *intimate* association a decade before the doctrine was explicitly recognized in *Roberts*. *See Belle Terre*, 416 U.S. at 15–16 (Marshall, J., dissenting) ("Constitutional protection is extended, not only to modes of association that are political . . ., but also to those that pertain to the social and economic benefit of the members. The selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements.") (internal citations omitted). The majority opinion in *Roberts* confirms that Justice Marshall was correct.

In any case, the relationship among those sharing a residential dwelling stands in stark contrast to large and unselective public-facing groups like the U.S. Jaycees, especially with regard

to the determinative factors—size, selectivity, purpose, and exclusion. Keeping in mind the vital importance to the privacy of the home, application of these factors demonstrates that the relationship among household residents "easily qualifies" for constitutional protection. *Roommates.com*, 666 F.3d at 1221.

Regarding size, selectivity, and exclusion, the analysis is simple: people "generally have very few roommates; they are selective in choosing roommates; and non-roommates are excluded from critical aspects of the relationship, such as using the living spaces." *Id.* The final factor—purpose—asks whether the reason for an association's existence is incompatible with the government intrusion. Oliveri, *supra*, at 1424. Application of this factor supports protection of the relationship in question. The composition of one's home is of vital importance, as the home is "the one retreat to which men and women repair to escape from the tribulations of their daily pursuits[.]" *Carey v. Brown*, 447 U.S. 455, 471 (1980); *see Semayne's Case*, 5 Coke Rep. 91, 91b (1604) ("[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose[.]"). The selection of household companions therefore entails deeply private choices about happiness, *Stafford v. Inc. Vill. of Sands Point*, 102 N.Y.S.2d 910, 913 (N.Y. Sup. Ct. 1951); safety and security, *Roommate.com*, 666 F.3d at 1221; and economic interests, *Moreno*, 413 U.S. at 541 (Douglas, J., concurring) (Co-residence in response to economic hardship is "an expression of the right of freedom of association that is very deep in our traditions.").

Indeed, "[a]side from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates[.]" *Roommate.com*, 666 F.3d at 1221; *see Roberts*, 468 U.S. at 620 (The analysis of an intimate association claim "unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum

from the most intimate to the most attenuated of personal attachments."). Application of the *Duarte* factors, in short, demonstrates that the relationship among household companions—whether blood-related or otherwise—"easily qualifies" for constitutional protection. *Roommate.com*, 666 F.3d at 1221.

C. Mr. Havel Is an Appropriate Litigant to Assert These Rights on Behalf of His Tenants

Regardless of whether Mr. Havel himself has an intimate relationship implicated in this case, he has standing to assert the associational rights of his tenants under the reasoning from *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, the Court permitted a beer vendor to challenge the constitutionality of Oklahoma's sex-discriminatory liquor law by asserting the equal protection rights of her customers. The Court reasoned that because the law was directly enforceable against the vendor, she was "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer . . . sanctions and perhaps loss of license." *Id.* at 194 (internal quotations omitted). Moreover, the threat of these sanctions could deter vendors from giving their customers equal treatment, thus ensuring that enforcement of the law against the vendor "would result indirectly in the violation of third parties' rights." *Id.* at 195. Thus, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Id.*; *see also City of E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 114 Ohio St. 3d 133, 138 (2007) (acknowledging and applying federally developed exceptions to the usual rule against third-party standing); *State v. Burke*, No. C-790028, 1979 WL 208813, at *1 (Ohio Ct. App. Dec. 19, 1979) (applying *Craig*). The situation of a landlord and his tenants is precisely analogous to that of a vendor and her customers. Compl. ¶ 24.

II. THE UNRELATED-PERSONS RESTRICTION CANNOT SURVIVE EVEN THE MOST DEFERENTIAL SCRUTINY

As an interference with the fundamental right of association, Kent's restriction on the right of unrelated people to live together in a home is subject to strict scrutiny. *Harrold v. Collier*, 107 Ohio St. 3d 44, 50 (2005). As an interference with the right to use property, the regulation is subject to intermediate scrutiny under Ohio law, *Norwood*, 110 Ohio St. 3d at 363, and rational basis review under federal law, *Nebbia v. New York*, 291 U.S. 502, 510, 523, 537 (1934) (holding "reasonable relation" test is appropriate to balance private rights of property with the public right to regulate "in the common interest"). The unrelated-persons restriction fails even the most deferential standard of review. By transitive reasoning, it necessarily fails the other applicable standards as well.

A. Under Rational Basis Review, Courts Must Actually Evaluate Proffered Rationales

A zoning ordinance is unconstitutional if it lacks a "substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395; *see id.* at 391 (also describing the requisite relationship as "rational" interchangeably with "substantial"). In other words, courts must analyze both the legitimacy of the government's ends under the police power and the rationality of the government's means to achieve those ends. *Lingle*, 544 U.S. at 541–42 (The "substantial relation" inquiry asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose."); *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (The "touchstone of due process" involves "protection of the individual against arbitrary action of government" such as "the exercise of power without any reasonable justification in the service of a legitimate governmental objective.").

The relationship between means and ends must be real. *Mahone v. Addicks Utility Dist. of Harris Cnty.*, 836 F.2d 921, 937 (5th Cir. 1988). Though deferential, the rational basis test is "a

level of scrutiny, not a rubber-stamping exercise." *Hines v. Quillivan*, 982 F.3d 266, 278 (5th Cir. 2020) (Elrod, J., concurring in part). Thus, courts must actually evaluate the government's articulated rationales to determine whether those rationales truly advance legitimate government goals within the police power.

This standard is confirmed by U.S. Supreme Court case law. *Euclid* explained that the justification for a land-use regulation must be "sufficiently cogent to preclude us from saying . . . that [it is] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395. Shortly after that decision, in *Nectow v. City of Cambridge*, the Supreme Court invalidated a zoning ordinance which prohibited any commercial use in an area that historically accommodated such use. 277 U.S. 183, 188 (1928). Despite the Massachusetts high court's conclusion that the ordinance was not "whimsical" or "without foundation in reason," *Nectow v. City of Cambridge*, 157 N.E. 618, 620 (Mass. 1927), the U.S. Supreme Court reversed on the basis that the prohibition would not actually promote the "health, safety, convenience, [or] general welfare" of local residents when "taking into account the natural development" of the city and the "character of the district" in question. *Nectow*, 277 U.S. at 187–88; *see also N.D. State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (The regulation must have "a manifest tendency to cure or at least to make the evil less."); *Moore*, 431 U.S. at 498 n.6 ("[O]ur cases have not departed from the requirement that the government's chosen means must rationally further some legitimate state purpose.").

B. Zoning Classifications Are Especially Suspect Where They Operate Upon the Identity and Status of Persons Rather Than the Use of Land

The federal cases are most critical of zoning designations which, like Kent's here, are based entirely on the status and identity of persons using the land. In *Village of University Heights v. Cleveland Jewish Orphan's Home*, 20 F.2d 743 (6th Cir. 1927), the Sixth Circuit considered the

constitutionality of a zoning ordinance under which the local authorities had denied a permit to an orphanage for Jewish children. The court applied a rational basis standard, observing that the zoning regulation "should not be disturbed by the courts, unless clearly arbitrary and unreasonable." *Id.* at 745 (internal quotation omitted). Yet it struck down the ordinance as applied to the orphanage, noting that if the same buildings "were intended for a private school, or for private residences, their use as such would not and could not be prohibited." *Id.* Although an orphanage might be "less agreeable to the community" than private residences, the court was "unwilling to hold that it is within the power of the village to prohibit the use . . . for that purpose." *Id.* Among the village's justifications was the argument that the public welfare would be harmed by the presence of so many children of "a single race, creed, or nationality" all attending the same school, as the residents of the orphanage surely would. *Id.* To that, the court noted that the same rationale would apply to private households occupied by families with large numbers of children of a single nationality or religious faith. *Id.*

Cleburne is perhaps the gold standard of the proper application of rational basis to a zoning classification that is based on the identity and status of land users. There, the Court considered a challenge to an ordinance which required a special-use permit to develop a group home for mentally retarded persons while permitting other types of group homes by right. 473 U.S. at 447–48. Although the Fifth Circuit had applied a heightened standard of review based on its determination that mental retardation was a "quasi-suspect classification," the Supreme Court disagreed with that determination and concluded that rational basis review was the appropriate standard. *Id.* at 446.

Nonetheless, applying rational basis, the Court rejected each of the government's rationales for treating the mentally retarded differently than similarly situated residents. In doing so, it

explained that "mere negative attitudes, or fear . . . are not permissible bases" for treating similarly situated residents differently. *Cleburne*, 473 U.S. at 448. For example, the Court rejected the argument that the zoning ordinance there was properly concerned with overcrowding, reasoning that there were no restrictions on the number of non-retarded people who could occupy residential properties in the same zone. *Id.* at 449. The Court observed that the mentally retarded status of the would-be residents was the only determinative factor under the ordinance: if the "potential residents of [the property] were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city's zoning ordinance." *Id.* (internal quotations omitted). Thus, the key question was "whether it is rational to treat the mentally retarded differently." *Id.* Because the record did not clarify why "the characteristics of the intended occupants . . . rationally justif[ied] denying to those occupants what would be permitted" to others, the Court held it was not rational. *Id.* at 450.

C. Kent's Restriction on Unrelated Persons Has No Rational Basis

Much like in *Cleburne*, only a single factor determines whether or not Mr. Havel's leasing agreement violates Kent's R3 zoning regulations: the relational status of his tenants. The question then becomes whether it is at all rational to treat unrelated individuals—who may be engaged in precisely the same housekeeping activities as blood-relatives—differently. *Id.* at 448 (To sustain such a classification, the record must show an actual "rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests.").

The answer is no. *See Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 842–43 (Mich. 1984) (finding no evidence that "unrelated persons . . . have as a group behavior patterns that are more opprobrious than the population at large"); *City of Santa Barbara v. Adamson*, 610 P.2d 436, 441 (Cal. 1980) (holding maintenance of a "residential environment" is not dependent on blood,

marriage, or adoptive relationship among residents); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1243 (N.Y. 1985) ("Manifestly, restricting occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals of reducing parking and traffic problems, controlling population density[, or] preventing noise and disturbance."); *Distefano v. Haxton*, No. WC-92-0589, 1994 WL 931006, at *11 (Super. Ct. R.I. Dec. 12, 1994) ("There is nothing on the record to suggest—nor does common sense or any legislative facts . . . lead to the conclusion—that [a town] will be a safer, quieter community with less violations of the public peace if only persons related by blood, marriage or adoption can occupy apartments and houses[.]").

Here, the Court of Appeals' decision in this regard is entirely unpersuasive. It relies on the purpose of the R-3 zoning district as set forth at Section 1103.11(a) of the Kent Codified Ordinances, which states that the R-3 district is designed "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*, 253 N.E.3d at 763. Thus, it reasons, the unrelated-persons restriction "encourages property development of a distinct type of use within the R-3 area to facilitate public facilities[.]" *Id.* But it does not explain how regulating the relationship among Mr. Havel's tenants could have any possible effect on the development of property for single-family use. Indeed, the very fact that unrelated people like Mr. Havel's tenants seek to live together within a single-family dwelling indicates that permitting such use would not disincentivize the development of such dwellings in the R-3 zone. Neither does the "orderly and efficient extension of public facilities" depend in any conceivable way on the relationship of household residents. *Id.* It is not as if a water-treatment plant serving a household

of three brothers operates differently depending on whether their brotherhood is by birth or by fraternal order. *Cf. Yoder*, 2019 WL 415254, at *1.

The court cited the *Belle Terre* case for the "well-settled law" that zoning restrictions may limit the number of unrelated individuals who live together within a home. *Havel*, 253 N.E.3d at 763; *see Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). On the contrary, the only generally applicable holding that can be extrapolated from *Belle Terre* is that the preservation of residential character is a permissible government end. *See id.* at 9. One cannot assume from *Belle Terre* that a restriction on unrelated individuals is everywhere and always a rational means to promoting that end; the rational basis test applied to zoning ordinances is heavily context-dependent. *Euclid*, 272 U.S. at 388 (holding due process determination cannot be made by "abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality"); *Nectow*, 277 U.S. at 187 (upholding special master's conclusion that ordinance lacked rational basis when "taking into account the natural development [of the community] and the character of the district"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (The rational basis analysis "does not proceed with abstraction . . . . [W]e will examine the State Board's rationale informed by the setting and history of the challenged rule."). In that regard, it is well worth noting that the Village of Belle Terre was a tiny community of 220 homes inhabited by 700 people and consisting of a single zoning district. *Belle Terre*, 416 U.S. at 2. The City of Kent is approximately 40 times larger with a population of about 28,000 people making up about 10,000 households. U.S. Census Bureau, Profile: Kent City, Portage County, Ohio, https://data.census.gov/profile/Kent_city,_Portage_County,_Ohio?g=060XX00US3913339872#populations-and-people (last visited Sept. 8, 2025); *see Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 & n.2 (N.Y. 1975) (describing the Village of Belle Terre as a "'one zone'

community" and observing that what is "appropriate for one community may differ substantially from what is appropriate for another").

The only conceivable basis for discriminating among residents on the basis of their family-relationship status rests on assumptions and prejudices about the sort of people who choose to live with non-relatives: lower-income people who cannot afford to live without roommates or groups like students, immigrants, and other recent arrivals. *State v. Baker*, 405 A.2d 368, 372 (N.J. 1979) (These laws "necessarily reflect generalized assumptions about the stability and social desirability of households comprised of unrelated individuals."); *Moreno*, 413 U.S. at 535 (criticizing the "wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households" implicit in the Food Stamp Act); *McMinn v. Town of Oyster Bay*, 105 A.D.2d 46, 55 (N.Y. App. Div. 1984) ("By regulating the genetic and internal composition of the one-family household[,] the . . . ordinance conclusively presumes that occupancy by persons unrelated by blood, marriage or adoption is inimical to the general welfare."). But well-established law categorically does not recognize such unfounded assumptions as a legitimate consideration in a zoning ordinance. *Cleburne*, 473 U.S. at 450 (rejecting rationales that "appear[] . . . to rest on an irrational prejudice"); *see id.* at 473 ("With respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility, heightened scrutiny is surely appropriate.") (Marshall, J., concurring in part).

Even if the record supported any of these prejudicial rationales, which it does not, it is simply not within a municipality's zoning authority to regulate *who* may make an otherwise legal use of land. *Phillips Supply Co. v. Cincinnati Zoning Bd. of Appeals*, 17 N.E.3d 1, 5 (Ohio Ct. App. 2014) ("Generally, zoning laws may regulate the use of the land, not the identity of the users."); *see Women's Kan. City St. Andrew Soc. v. Kansas City*, 58 F.2d 593, 603–04 (8th Cir.

1932) (invalidating a restriction that "goes to the extent of determining who shall occupy for residence purposes a residence that meets in every respect the requirements of" the relevant district, and noting that such a restriction "would seem to go further than the police power has ever attempted to go in these zoning ordinances"). The purpose of zoning is to regulate land *use*, not land *users*. 5 *Rathkopf's The Law of Zoning and Planning* § 81:7 (4th 3d. 2023) (Zoning is properly concerned with "regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who may occupy the land."); *cf. Akron v. Rowland*, 67 Ohio St. 3d 374, 387 (1993) ("The case law is legion that people cannot be punished because of their status [or] the company they keep[.]").

In short, "zoning laws restrict land use"—not land users. *Harrah's Ohio Acquisition Co. v. Cuyahoga Cnty. Bd. of Revision*, 154 Ohio St. 3d 340, 345 (2018). So long as Mr. Havel's tenants make the same use of a property that a household of related persons would—they live together and share the joys and burdens of daily life—there is simply no rational reason to treat them differently.

III. CO-LIVING ARRANGEMENTS HAVE A LONG HISTORY AND TRADITION IN AMERICAN LIFE

In addition to the rights explicitly guaranteed by the first eight amendments to the U.S. Constitution, the Due Process Clause also provides substantive protection for fundamental rights even if not named directly within the Constitution. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 237 (2022). To determine whether an unmentioned right is nevertheless protected as fundamental, courts must ask "whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Id.* at 237–38 (quoting *Timbs v. Indiana*, 586 U.S. 146, 150 (2019). The right to constitute one's own household is such a right. *See* Akhil Reed Amar, *America's Lived Constitution*, 120 Yale L.J. 1734, 1773 (2011) (Although "nothing in the written Constitution explicitly demands special protection of "houses"

. . .[,] surely the document invites judges . . . to attend to this explicit word and this implicit concept in pondering which unenumerated rights are properly claimed by the people.").

The "banding together" of people into a common household to better meet the burdens of life is "an expression of the right of freedom of association that is very deep in our traditions." *Moreno*, 413 U.S. at 541 (Douglas, J., concurring). In the colonial census, for example, the terms "household" and "family" were used interchangeably to denote "an independent economic unit, the members of which lived in one dwelling or in proximity." Robert V. Wells, *Household Size and Composition in the British Colonies in America*, *1675–1775*, 4 J. of Interdisc. Hist. 543, 546 (1974) (noting that "such a definition clearly differs from our modern conceptions of the term[] family (which implies kinship)").

The same held true in the early days of independence, as Americans in the former colonies and in the frontiers sought suitable living arrangements to respond to changing economic and social conditions. *See, e.g.*, Laura Thatcher Ulrich, *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785–1812* 19 (1990) (describing how the Ballard family in Hallowell, Maine, during the founding era lived in the house of John Jones, a local mill owner, along with hired hands); James E. Davis, *Frontier America*, *1800-1840: A Comparative Demographic Analysis of the Settlement Process* 22 (1977) (noting that frontier households included relatives, friends, and employees). It continued to hold in the era of industrialization. One study of Kentucky coal miners in 1910 found that between 5% and 16% of households had unrelated individuals, depending on the age of the household head. Thomas A. Arcury, *Household Composition and Early Industrial Transformation: Eastern Kentucky 1880 to 1910*, 2 J. Appalachian Stud. Ass'n 47, 59 (1990).

The tradition is no less deeply rooted for college students such as Mr. Havel's tenants. For example, Alexander Hamilton, as a recent arrival in New York, sought a place to live while attending King's College. He found it in the home of his friend Hercules Mulligan and Mulligan's wife Elizabeth. *See* CIA.gov, Stories: The Legend of Hercules Mulligan (June 30, 2016), https://www.cia.gov/stories/story/the-legend-of-hercules-mulligan/ (last visited Sept. 8, 2025). Mulligan, who "needs no introduction,"[2] played an important role in persuading Hamilton to renounce his Tory sympathies and join the Sons of Liberty. *Id.* Other influential living companions of Hamilton included future Continental Army Solider and U.S. District Judge Robert Troup, as well as New Jersey Governor and Continental Congress representative William Livingston. Ron Chernow, *Alexander Hamilton* 43, 53 (2005).

Living with non-relatives can also be profoundly important for "deeply personal" reasons relating to the "kind and quality of intimate relationships within the home." *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting). In other words, selecting the members of one's household can be a crucial element in the pursuit of happiness. *See* Ohio Const. art. I, § 1 (protecting the inalienable right of all people to "seek[] and obtain[] happiness and safety"). In 1841, for example, when a young Henry David Thoreau was struggling to establish himself as a writer, his friend Ralph Waldo Emerson invited him to live in the Emerson family home. Henry Stephens Salt, *Life of Henry David Thoreau* 48 (1890). The arrangement was important for Thoreau's stability and development, particularly after the death of his brother John, but it also provided emotional nourishment and a helping hand for Emerson, who described Thoreau's role as a "great benefactor

[2] Lin-Manuel Miranda, *Hamilton: An American Musical*, act 1, sc. 20 (Yorktown (The World Turned Upside Down)).

and physician to me." *See generally, id.* 48–71. The two-year stay likely inspired the following stanzas in Thoreau's "The Departure":

> In this roadstead I have ridden,
> In this covert I have hidden:
> Friendly thoughts were cliffs to me,
> And I hid beneath their lee.
>
> This true people took the stranger
> And warm-hearted housed the ranger;
> They received their roving guest,
> And have fed him with the best;
>
> Whatsoe'er the land afforded
> To the stranger's wish accorded,—
> Shook the olive, stripped the vine,
> And expressed the strengthening wine.
>
> And by night they did spread o'er him
> What by day they spread before him;
> That good will which was repast
> Was his covering at last.

Id. at 70–71; *cf. Moreno*, 413 U.S. at 543 (Douglas, J., concurring) ("[T]he right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod.").

Indeed, there are all manner of socially and economically important reasons why unrelated people may choose to share a single home together. From the earliest days of American society, "complexity and diversity" of family arrangements were necessary to meet the challenges of arriving in a new world. Wells, *supra*, at 570. The "emphasis would have had to have been on flexibility[,]" because a "rigid social order based on assumptions of shared family experiences simply could not have survived in the New World." *Id.* Such has always been the case and remains so today. For example, just as living with non-relatives can be an important source of stability for up-and-comers like the young Hamilton and Thoreau, so too can sharing a home be a dignified option for the elderly, who may be widowed or otherwise unable to live with family, yet

nevertheless seek companionship, stability, and assistance with household chores and expenses. *See generally* Anne P. Glass & Lauretta Lawlor, *Aging Better Together, Intentionally*, 44 Generations: J. Am. Soc'y on Aging 1, 7–11 (2021). To take a fictional but nevertheless beloved example, TV's *Golden Girls* featured a home with four elderly women, only two of whom were related to one another. Jake Harwood and Howard Giles, *'Don't Make Me Laugh': Age Representation in a Humorous Context*, 3 Discourse & Soc'y 403, 405 (1992). But Dorothy, Rose, Blanche, and Sophia would not be allowed to live together in Kent's R-3 zone.

CONCLUSION

For the reasons stated above, amicus urges the Court to REVERSE the judgment of the Court of Appeals and hold that Kent's restriction on unrelated persons living together violates the Constitutions of Ohio and of the United States.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 8th day of September, 2025, the foregoing was served upon all parties of record via e-mail.

/s/ Oliver J. Dunford
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