No. 23-3168

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOMEROOM, INC., and VAL FRENCH,

Plaintiffs-Appellants,

v.

CITY OF SHAWNEE, KANSAS; DOUG GERBER, in his official capacity as City Manager of the City of Shawnee; and KEVIN MESSICK, in his official capacity as Code Enforcement Officer for the City of Shawnee,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
Civil Action No.: 2-23-cv-2209-HLT-GEB
Honorable Holly L. Teeter, Judge

APPELLANTS' OPENING BRIEF

Oral Argument Requested

BENJAMIN A. RAMBERG
Franke Schultz & Mullen, P.C.
8900 Ward Parkway
Kansas City, MO 64114
(816) 421-7100
bramberg@fsmlawfirm.com

DAVID J. DEERSON
BRIAN T. HODGES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 419-7111
ddeersonpacificlegal.org
bhodges@pacificlegal.org

Attorneys for Plaintiffs-Appellants

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STATEMENT OF RELATED CASES

There are no prior or related appeals in this matter.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because Appellants' claims in the First and Second Causes of Action raise federal constitutional questions. *See* App. 13–15. It also had—but declined to exercise—supplemental jurisdiction under 28 U.S.C. § 1367 to address the Third Cause of Action, which raises a state law claim. *See id.* 15–16, 113.

This Court has jurisdiction under 28 U.S.C. § 1291 because the decision appealed from is a final decision of the District Court which disposed of all claims. The decision was filed on September 12, 2023. *Id.* 113. Appellants timely noticed this appeal on September 27, 2023. *Id.* 115.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether Plaintiff-Appellant HomeRoom, Inc., has standing to assert its constitutional claims.

(2) Whether the fundamental constitutional right of intimate association includes the right to freely select one's living companions.

(3) Whether the *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), is abrogated by subsequent authority; and if not, whether the present case is distinguishable.

STATEMENT OF THE CASE

On April 25, 2022, the City of Shawnee, Kansas, passed Ordinance No. 3419, popularly known as the "Co-Living Ordinance." App. 19–50. The Ordinance prohibits more than three unrelated adults from residing together in the same residence throughout most—if not all—of Shawnee. App. 10, ¶ 26. It defines "related persons" as those related by blood, marriage, adoption, or guardianship, and provides that if any one resident is not so related to any other, then the entire household is deemed unrelated as a matter of law. App. 10, ¶¶ 26, 27.

The Ordinance was designed to shut down operations like that of Plaintiff HomeRoom, an innovative property management startup company that helps connect property owners to residential renters, facilitating a low-transaction-cost housing search for people seeking to live with roommates. App. 10, ¶ 28. Its business model—indeed its raison d'etre—depends upon the ability of unrelated residents to live together. App. 9, ¶ 19. Prior to the adoption of the Ordinance, HomeRoom managed

two properties within the City, which it leased to unrelated co-residents. Because of the Ordinance, HomeRoom was forced to evict its tenants, and now rents those properties only to residents who qualify as related under the Ordinance. App. 11, ¶¶ 31–33.

Yet despite its targeted animus against companies like HomeRoom, the Ordinance operates more as a cudgel than a scalpel. Thus, its broad approach also injures people like Plaintiff Val French, a private citizen, paralegal, wife, and mother. App. 4, ¶ 20. Ms. French owns her home along with her husband. Before the Ordinance, she and her husband lived with their two adult sons—one each from their prior marriages—and the girlfriend of one of those sons. Because the girlfriend was not related to any other resident, the entire five-person household was rendered "unrelated" and therefore unlawful by operation of the Ordinance. Subsequent to the Ordinance's passage, two household members moved out. App. 11–12, ¶¶ 34–40.

On May 9, 2023, Val and HomeRoom filed the instant action against the City of Shawnee, its City Manager Doug Gerber, and its Code Enforcement Officer Kevin Messick (both in their official capacities). The Complaint alleges violations of the Due Process and Equal Protection

Clauses of the Fourteenth Amendment to the U.S. Constitution. It further alleges that the Ordinance is unauthorized as a matter of Kansas state law. App. 13–16.

The Defendants moved to dismiss for failure to state a claim. App. 79. They also argued that the claims against Defendants Gerber and Messick should be dismissed as redundant and duplicative of the claims against the City. App. 84–85. Plaintiffs opposed the motion but agreed voluntarily to dismiss the claims against Mr. Gerber and Mr. Messick if the City agreed that any ruling against it would similarly bind its officials. App. 95 n.1.

The District Court granted the City's motion without argument. App. 127. It first dismissed the claims against Mr. Gerber and Mr. Messick as redundant. App. 120–21. Next, it disposed of HomeRoom's constitutional claims, holding that—because of its corporate status—it does not possess any right to intimate association, and that it lacks standing to assert claims on behalf of its would-be tenants. App. 122–23. As to Ms. French, the court dismissed her constitutional claims under *Belle Terre v. Village of Boraas*, 416 U.S. 1 (1974). App. 126. Finally, having dismissed all federal claims, the court

declined to exercise supplemental jurisdiction over the Plaintiffs' state law claim. App. 127. This appeal followed. App. 129.

SUMMARY OF ARGUMENT

The Co-Living Ordinance purports to be a zoning ordinance. Unlike a traditional zoning ordinance, however, the Ordinance regulates neither the use of land nor the intensity of land use. Instead, it regulates land *users*. *See* 5 Rathkopf's The Law of Zoning and Planning § 81:7 (4th ed. 2023) (Zoning is properly concerned with "regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who occupy the land.").

This is no mere occupancy limit. The Ordinance places no cap on the number of people who may occupy a residential dwelling, so long as those people are related by blood, marriage, adoption, or guardianship. Neither does it 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 the Ordinance regulates is people. Whether a given household violates the Ordinance depends on one factor alone: the relationship of the people who live there.

Yet the right to establish a home, including the right to select members of a household, is a fundamental, cherished, and deeply rooted right of all Americans. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). So, too, is the right to enjoy and participate in intimate associations without undue government interference. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring). The Ordinance violates each of these rights, and it does so in a discriminatory and arbitrary manner that bears no relation to any legitimate government interest.

The District Court dismissed the Appellants' constitutional claims under *Belle Terre v. Village of Boraas*, 416 U.S. 1 (1974). Yet *Belle Terre* has been severely undermined by subsequent jurisprudence and therefore does not stand as the correct analytical framework for reviewing zoning ordinances which, like the one at issue here, discriminate on the basis of the identity and status of the users of land. The leading case is instead *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which stands for the proposition that a more searching review is demanded by such discriminatory ordinances. More particularly here, to the extent that such ordinances impinge on the

fundamental right of intimate association, *Belle Terre* is superseded by the framework outlined in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

Under *Roberts*, associations which are sufficiently small, selective, exclusive, and private in purpose receive the highest measure of constitutional protection. *Id.* at 618, 620. Application of these factors demonstrates that the relationship among household companions "easily qualifies." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012). The Ordinance, which prohibits unrelated persons from living together even in zones which otherwise permit multifamily residency, places a direct and substantial burden on Shawnee residents' right to freely select their household companions. It is therefore subject to strict scrutiny, and under this most exacting standard, it must surely fail. But the Ordinance would fail even if subjected only to the level of rational basis review employed in *Cleburne*. There is simply no reason to believe that a home consisting of an unlimited number of blood relatives is more likely to obstruct genuine zoning goals than a home made up of an equal or lesser number of unrelated persons who live together, cook together, and share the burdens of life.

The District Court also rejected Appellant HomeRoom's claims for lack of standing, reasoning that it cannot possess any right of intimate association by reason of its corporate status. Yet there is no question that HomeRoom easily meets the constitutional standing requirements, being directly injured (and indeed, targeted) by the law in question. And while prudential concerns may generally counsel against permitting a litigant to assert the rights of third parties, that limitation is subject to a frequently observed exception "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). That is exactly the case here, and HomeRoom should therefore be afforded its day in court.

ARGUMENT

I. HomeRoom Has Standing

The District Court incorrectly ruled that Plaintiff HomeRoom did not possess standing.

To establish standing, a plaintiff must demonstrate that it suffers an injury in fact which was caused by the defendant's conduct and which can likely be redressed by a favorable judicial decision. *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). In addition to these constitutional principles, courts may also limit standing pursuant to certain prudential grounds. *Bennett v. Spear*, 520 U.S. 154, 162 (1996). (Prudential standing principles are "judicially self-imposed limits on the exercise of federal jurisdiction" which are "founded in concern about the proper—and properly limited—role of the courts in a democratic society.") (internal quotations and citations omitted). With particular relevance here, a "party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski*, 543 U.S. at 129 (internal quotation and citation omitted).

Here, there is little question that HomeRoom satisfies the constitutional elements of standing. It is injured in fact because it may no longer lawfully operate according to its business model, and indeed has been forced to evict and replace its former tenants whose household configuration ran afoul of the Ordinance. App. 11, ¶¶ 30–33. This injury is the direct result of the Ordinance, and a judicial order declaring that Ordinance unlawful and enjoining its enforcement would provide complete redress. The District Court implicitly accepted HomeRoom's

standing in this sense but held that prudential concerns preclude HomeRoom from asserting the constitutional rights of third parties. App. 122–23 ("Certainly, HomeRoom may be able to assert some claim in this situation, but HomeRoom has not shown that it may assert the constitutional claims asserted in this case on behalf of others.").

Yet this prudential limitation on standing is subject to a frequently observed exception "when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *Kowalski*, 543 U.S. at 130. Accordingly, "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." *Craig v. Boren*, 429 U.S. 190, 195 (1976).

In *Craig v. Boren*, the Court permitted a beer vendor to challenge the constitutionality of Oklahoma's sex-discriminatory liquor law by asserting the equal protection rights of its customers. The Court first observed that the vendor satisfied Article III standing because it was directly injured; it was "obliged either to heed the statutory discrimination, thereby incurring a direct economic injury," or to disobey

and suffer legal consequences. *Id.* at 194. Given its "standing to challenge the lawfulness" of the offending statute, the Court held that the vendor was "entitled to assert those concomitant rights of third parties[.]" *Id.* at 195. Were it otherwise, the threat of legal sanctions could deter the vendor from selling to certain customers, "thereby ensuring that 'enforcement of the challenged restriction against the (vendor) would result indirectly in the violation of third parties' rights." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)).

The situation here is precisely analogous. Like the vendor in *Craig*, HomeRoom is directly injured by the challenged provision of law. As in *Craig*, the challenged law is enforceable directly against HomeRoom. Shawnee Muni. Code § 17.98.010(A) (making any "owner, lessee, or tenant of land" criminally liable for the maintenance of any land use in violation of Shawnee's zoning ordinances). And as in *Craig*, enforcement of the Ordinance against HomeRoom would result indirectly in the violation of the rights of its would-be tenants.

The District Court distinguished *Craig* on the grounds that while the liquor law there was "aimed" at sellers like the vendor, the Ordinance here is directed at unrelated housemates, not the party who leases to

them. App. 122 n.6. Yet this distinction utterly ignores the allegation in the Complaint that the "major impetus behind the adoption of the Ordinance was a desire to regulate away the operation of Plaintiff HomeRoom and similar property management companies." App. 10, ¶ 28; *see Jenkins v. Chance*, 762 Fed. App'x 450, 453 (10th Cir. 2019) (in reviewing dismissal of action under Fed. R. Civ. P. 12(b)(6), court should "accept as true all well-pleaded facts . . . and view those facts in the light most favorable to the nonmoving party").

II. *Belle Terre* Is No Longer Tenable and Does Not Control Here

The District Court rejected the Due Process and Equal Protection claims in this case under *Belle Terre*. App. 126. There, the Supreme Court considered an ordinance which, like the Ordinance at issue here, restricted the number of unrelated persons who may live together in a single residence. 416 U.S. at 2. Yet subsequent developments in the law have cast serious doubt on the continuing viability of *Belle Terre*. First, the analytical framework of *Belle Terre* was replaced by the more searching standard employed in *Cleburne*, 473 U.S. 432. Next, and most importantly here, the doctrine of intimate association—first explicitly recognized a decade after *Belle Terre* in *Roberts*, 468 U.S. 609—is utterly

incompatible with *Belle Terre*. Because *Belle Terre* did not consider that doctrine, which forms the basis of Appellants' theory here, *Belle Terre* should not control the outcome. Even if this Court finds that the Ordinance does not imperil the fundamental right of intimate association, it should look to *Cleburne*, not *Belle Terre*, as the most recent Supreme Court authority on the issue of zoning regulations which discriminate on the basis of the identity of land users.

A. *Belle Terre*'s authority has been greatly diminished by subsequent jurisprudence

Belle Terre has been widely criticized by legal scholars. *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 838 n.5 (Mich. 1984); *State v. Baker*, 405 A.2d 368, 374 (N.J. 1979). It was also quickly undermined by subsequent jurisprudence. *Baker*, 405 A.2d at 374; *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440 n.3 (Cal. 1980) (en banc) (expressing uncertainty as to whether *Belle Terre* "still does declare federal law").

Just three years after *Belle Terre*, the Court decided *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977), holding that while a zoning ordinance could "impose[] limits on the types of groups that could occupy a single dwelling," it could not distinguish between different types of blood relations. Thus, an ordinance that would permit brothers—but not

first cousins—to share a residence violates due process. *Id.* at 499–500. The Court did not define precisely the appropriate standard of review, but explained that the "importance of the governmental interests" at issue and the "extent to which they are served by the challenged regulation" must be "examine[d] carefully" when the law intrudes on family living arrangements. *Id.* at 499. In doing so, the Court highlighted the weakness of the same government rationale it had validated in *Belle Terre*, observing that the ordinance had only a "marginal" and "tenuous" relationship with the expressed goals of maintaining a quiet residential neighborhood. *Compare id.* at 499–500 *with Belle Terre*, 416 U.S. at 9.

The reasoning of *Belle Tere* was further subverted—and, indeed, replaced wholesale—in *Cleburne*, 473 U.S. 432. 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. *Id.* 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 announced that rational basis review was the appropriate standard. *Id.* at 446.

Yet the rational basis review applied in *Cleburne* was far more exacting than the rational basis review employed in *Belle Terre*. *See Cleburne*, 473 U.S. at 459–60 (describing the majority's "refusal to acknowledge that something more than minimum rationality review is at work here") (Marshall, J., concurring in part). Applying a standard that has come to be known as "rational basis with bite," the Court considered and rejected each proffered government rationale in turn. *See, e.g.*, Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 Ind. L. Rev. 779, 793–96 (1987); *Cleburne*, 473 U.S. at 458 (observing that "Cleburne's ordinance is invalidated" by the majority "only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny") (Marshall, J., concurring). Of particular relevance here, the Court reasoned that if the "potential residents of [the subject 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." *Cleburne*, 473 U.S. at 449. Because the record did not clarify how "the characteristics of the

intended occupants of the [property] rationally justify denying to those occupants what would be permitted" to other groups of residents, the Court held that the ordinance lacked a rational basis. *Id.* at 450.

Cleburne, then, stands for the proposition that zoning ordinances which discriminate based on the status or identity of land users call for a more searching review than the one applied in *Belle Terre*. *Cf. City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758 (N.Y. 1974) ("Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings."); 5 Rathkopf's The Law of Zoning and Planning § 81:7 (4th ed. 2023) (Zoning is properly concerned with "regulation of 'land use' and not regulation of the 'identity or status' of owners or persons who occupy the land."). Many of the lower courts which depart from *Belle Terre* on state constitutional grounds do so by employing such a standard. *See, e.g.*, *Kirsch v. Prince George's County*, 626 A.2d 372, 379–80 (Md. 1993); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1242–43 (N.Y. 1985); *see also Yoder v City of Bowling Green*, No. 3:17-CV-2321, 2019 WL 415254, at *4 (N.D. Ohio Feb. 1, 2019) (rejecting a *Belle Terre*-style ordinance under the Ohio Constitution by

applying "something higher than rational basis review, but less than strict scrutiny").

B. *Belle Terre* did not consider the right of intimate association

The most important development undermining *Belle Terre*, for the purposes of this case, is the explicit recognition of the right of intimate association first announced in *Roberts*, 468 U.S. 609. The *Roberts* Court explained that "choices to enter into and maintain certain intimate human relationships" are so "central to our constitutional scheme" as to receive "protection as a fundamental element of personal liberty." *Id.* at 617–18. In conjunction with the related right to establish a home, the right of intimate association forms the basis of the Appellants' theory in this case. App. 13, ¶¶ 42, 44; *see Meyer*, 262 U.S. at 399–400 (discussing the right to establish a home); *Cleburne*, 473 U.S. at 473 (observing that the right to establish a home is implicated by zoning ordinances which limit residential occupancy based on the identity of residents) (Marshall, J., concurring in part).

The ruling of *Belle Terre* did not consider the right of intimate association. Indeed, the Court listed several grounds on which the ordinance there was challenged, and it did not include this ground among

them. 416 U.S. at 7. This should come as no surprise, given that the right of intimate association—as distinct from the right of expressive association—had not yet been formally recognized. *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). Justice Marshall's dissent, however, presciently anticipates the doctrine. He conceived of the relevant right as being at the intersection of the "First Amendment freedom of association" and the "constitutionally guaranteed right to privacy." *Belle Terre*, 416 U.S. at 15 (Marshall, J., dissenting). Although Justice Marshall lacked the benefit of *Roberts*' clear language and analytical guidance, he understood that the ordinance in *Belle Terre* "impinge[d]" on fundamental rights of association, and therefore urged that it must be subject to strict scrutiny. 416 U.S. at 18 (Marshall, J., dissenting). When *Roberts* was decided a decade later, Justice Marshall's view was vindicated.

The *Belle Terre* Court did not recognize the imperiled right for what it was, and it did not apply any of the diagnostic factors—such as size, purpose, selectivity, or exclusion—outlined in *Roberts* and discussed further below. *See Roberts*, 468 U.S. at 620. Nor did it make any attempt

to engage in the "careful assessment of where" the co-residential relationship's "objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.* If it had, it would have reached inescapable conclusion that such relationships "easily qualify" for constitutional protection. *Roommate.com*, 666 F.3d at 1221.

In short, *Belle Terre*'s analytical framework has been replaced by *Cleburne*, which requires a more searching form of review for zoning ordinances which discriminate based on the identity of land users. *Roberts*, meanwhile, establishes that certain associations are so intimate as to receive "fundamental" constitutional protection. *Roberts*, 468 U.S. at 618. In other words, zoning ordinances which burden the right of intimate association are subject to the strict scrutiny reserved for fundamental rights. *See Petralla v. Brownback*, 787 F.3d 1242, 1261 (10th Cir. 2015).

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

This case involves the intersection of two 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*, 468 U.S. at 617–18.

The right of intimate association is especially potent within the private sphere of the home. *See 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 US. 89, 99 (1998) (the home is "entitled to special protection as the center of the private lives of our people.") (Kennedy, J., concurring); *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"). 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; *see also 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.").

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 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 a nonprofit educational corporation, the U.S. Jaycees. 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 this marks the first case in which the Court explicitly recognized the modern

doctrine of the right of intimate association, it nevertheless declined to extend constitutional protection to the U.S. Jaycees, reasoning that large and unselective groups are not the sort of private intimate associations warranting protection. *Id.* at 621. The Court returned to the doctrine a few years later in *Duarte*, again finding that the group seeking constitutional protection—Rotary International—was "not the kind of intimate or private relation that warrants constitutional protection." *Duarte*, 481 U.S. at 546.

The relationship among living companions, or roommates, stands in stark contrast to large and unselective public-facing groups like the U.S. Jaycees and Rotary International, especially with regard to the relevant factors—size, selectivity, purpose, and exclusion. Keeping in mind the vital importance of the privacy of the home, application of these factors demonstrates that "[t]he roommate relationship easily qualifies" for constitutional protection. *Roommate.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." *Roommate.com*, 666 F.3d at 1221.

The final factor—purpose—also supports protection of the right to freely select living companions. Courts applying this factor ask whether the reason for an association's existence is incompatible with the government intrusion. Oliveri, 67 Fla. L. Rev. at 1424. The composition of one's home is of vital importance as "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits[.]" *Carey v. Brown*, 447 U.S. 455, 471 (1980). The selection of household companions therefore entails deeply private choices about happiness, *Stafford v. Incorporated Village of Sands Point*, 102 N.Y.S.2d 910, 913 (Sup. Ct. 1951); safety and security, *Roommate.com*, 666 F.3d at 1221; and economic interests. *U.S. Dep't of Agric. v. 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").

The Ninth Circuit's decision in *Roommate.com* is instructive. There, the court considered whether the Fair Housing Act's (FHA's) anti-discrimination policies apply to the selection of roommates. 666 F.3d at

1216. Although the statute's text was ambiguous, *id.* at 1222, the court elected to read the FHA not to interfere with the roommate selection process under the doctrine of constitutional avoidance. *Id.* The court observed that "choosing a roommate implicates significant privacy and safety considerations[,]" and concluded that "restrict[ing] our ability to choose roommates compatible with our lifestyles" would be "a serious invasion of privacy, autonomy and security." *Id.* at 1221.

Indeed, "[a]side from immediate family or a romantic partner, it's hard to imagine a relationship more intimate than that between roommates[.]" *Id.*; *see Roberts*, 468 U.S. at 620 (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, therefore, demonstrates that the association among household companions—whether blood-related or otherwise—"easily qualifies" for constitutional protection.[1] *Id.* In short,

[1] It is true that *Roommate.com* concerned the inverse application of same right at issue here; it discussed the right *not* to enter into the intimate association of household companions. App. 113. Yet this distinction is immaterial, because the "right to invite" a person into one's home is undoubtedly a "right of association" that is "basic in our constitutional

the associational right advanced by Appellants here is a fundamental liberty interest protected by the Constitution.

IV. The Ordinance Impermissibly Violates the Constitutional Right of Intimate Association

Because the right of intimate association is fundamental, any law which poses a direct and substantial interference with that right is subject to strict scrutiny. App. 87; *Stewart v. City of Oklahoma City*, 47 F.4th 1125, 1138 (10th Cir. 2022). That is the case here, and under strict scrutiny, the Ordinance must fail.

A. The Ordinance works a direct and substantial interference with the fundamental right of intimate association

The Co-Living Ordinance is expansive in its reach. It prohibits "co-living groups" even in zones where multifamily residential use is otherwise permitted by right. *Compare* App. 28–31, ¶¶ 8–10 (prohibiting co-living in the DU, RGA, and RHR zoning districts) *with* Shawnee Muni. Code § 17.51.010 (permitting two-family and/or multifamily use in these

regime." *Moreno*, 413 U.S. at 543 (Douglas, J., concurring); *see also Moore*, 431 U.S. at 520 (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.").

districts). This works a direct and substantial burden[2] on the right of intimate association by "absolutely or largely preventing" Shawnee residents from forming constitutionally protected domestic associations with non-relatives anywhere in the city. *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001).

In support of its motion to dismiss, Shawnee argued that the Ordinance does not prevent Ms. French from maintaining *some kind* of "association" with her son's girlfriend App. 87. This is far beside the point. Yes, the two can meet for coffee, but they cannot live together. It is their association *as household living companions* that is protected by the Constitution and which is directly and substantially burdened by the Ordinance.

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[2] This fact represents a separate distinction between the present case and *Belle Terre*. The Village of Belle Terre is small; when the case was decided, it contained just 220 homes inhabited by 700 people. *Belle Terre*, 416 U.S. at 2. Essentially a single neighborhood, the entire village was zoned for single-family use. *Id.* The City of Shawnee is ten times larger; it includes more than 25,000 homes inhabited by nearly 70,000 people. United States Census Bureau, QuickFacts: Shawnee City, Kansas, www.census.gov/quickfacts/fact/table/shawneecitykansas/PST045222.

B. The Ordinance fails under strict scrutiny

Because the Ordinance substantially interferes with a fundamental right, it is subject to strict scrutiny. *Petrall*, 787 F.3d at 1261. In other words, it can only survive if it is narrowly tailored to advance a compelling government interest. *Riddle v. Hickenlooper*, 742 F.3d 922, 928 (10th Cir. 2014). Under strict scrutiny, there is no presumption of legitimacy; the government bears the burden of establishing that its law passes constitutional muster. *Johnson v. California*, 543 U.S. 499, 505 (2005). Under this most exacting standard, the Ordinance must fail.

Shawnee suggests that the "obvious underlying purpose of the Ordinance" is the maintenance of the single-family character of neighborhoods. App. 90. Yet this ignores the allegation in the Complaint that the "major impetus" behind the Ordinance was to "regulate away" the operation of property management companies like HomeRoom. App. 10, ¶ 28; *see Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (in reviewing a Rule 12(b)(6) motion to dismiss, court must "accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff").

Regardless, even if the Court were to accept Shawnee's proffered rationale at this stage and disregard the allegations in the Complaint, the City still does not meet its burden under strict scrutiny. It presents no authority that maintaining the single-family character of neighborhoods is a compelling—as opposed to a merely legitimate—government interest, and it makes no argument that the Ordinance is narrowly tailored to advance that interest. Indeed, it is difficult to square this proffered rationale with the fact that the Ordinance is comprehensive in scope, applying even in zones where multi-family use is permitted by right. *Compare* App. 28–31, ¶¶ 8–10 (prohibiting co-living in the DU, RGA, and RHR zoning districts) *with* Shawnee Muni. Code § 17.51.010 (permitting two-family and/or multifamily use in these districts).

C. The Ordinance fails even under rational basis

Even if the Ordinance were not subject to strict scrutiny as a violation of the fundamental right of intimate association, it would still fail under the searching form of rational basis review outlined in *Cleburne*.

The *Cleburne* Court considered and rejected each of the government's purportedly "rational" bases 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 justify denying to those occupants what would be permitted" to others, the Court held it was not rational. *Id.* at 450.

So too, here. Much like in *Cleburne*, only a single factor determines whether or not a household violates the Co-Living Ordinance: the relational status of its occupants. 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 City does not offer any reason for such a distinction because none exists. *See Charter Twp. of Delta*, 351 N.W.2d at 842–43 (finding no evidence that "unrelated persons . . . have as a group behavior patterns that are more opprobrious than the population at large"); *Yoder*, 2019 WL 415254, at *6 (unpublished) (ordinance prohibiting three or more unrelated individuals from occupying single-family home is "arbitrary"); *Adamson*, 610 P.2d at 441 (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 and preventing noise and disturbance."); *Distefano v. Haxton*, No. WC-92-0589, 1994 WL 931006, at *11 (Super. Ct. R.I. Dec. 12, 1994) (unpublished) ("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[.]").

The Ordinance suffers from both overinclusivity and underinclusivity. *See, e.g.*, *McMinn*, 488 N.E.2d at 1243. It is overinclusive in that it criminalizes households like the Frenches'—a family in any colloquial sense—who quietly and peacefully enjoy their property in harmony with their neighbors. It is underinclusive in that it fails to mitigate the problem of households which—though they may be "related" under the statute—nevertheless create nuisances with loud music, overgrown lawns, domestic violence, or too many cars. There is simply no reason to believe that the blood-related families, unlimited in number, are more conducive to any legitimate government interest than an equal or lesser number of unrelated individuals living together,

cooking together, and sharing the burdens of life as a family does. The only predictable effects of the Ordinance are the violations of fundamental rights and the increased difficulty of finding affordable housing.

CONCLUSION

The legacy of *Belle Terre* is odious. It has served to permit arbitrary laws which violate fundamental associational rights, and it its only practical effect is to make it more difficult for those without family ties in a given area to find affordable housing. Many of HomeRoom's former tenants, for example, were unable to afford rent in Shawnee without roommates and have therefore been forced to relocate to nearby jurisdictions. App. 6, ¶ 32. Cities in Kansas which employ ordinances restricting unrelated households have more than three times as many empty bedrooms as cities without such restrictions. Pacific Legal Foundation, *In Kansas Cities, Roommate Bans Keep Extra Bedrooms Empty*.[3] Meanwhile, the Kansas City region suffers from a deficit of

[3] https://pacificlegal.org/wp-content/uploads/2024/01/Unrelated-Roommate-Bans-in-Kansas.pdf.

approximately 64,000 affordable rental units. Mid-America Regional Council, Assessing the Affordable Housing Gap (2023).[4]

Fortunately, with respect to zoning ordinances that discriminate based on the identity and status of land users, *Belle Terre*'s hand-waving standard of review was long ago replaced by the more searching inquiry exemplified in *Cleburne*. With respect to ordinances which infringe on the fundamental right of intimate association, particularly in the context of the home, the relevant test is the one outlined in *Roberts*. Applying the *Roberts* test, as the Ninth Circuit found in *Roommate.com*, leads inexorably to the conclusion that the right to select household companions deserves fundamental constitutional protection. It is therefore long past time to acknowledge that *Belle Terre* can no longer withstand the weight of countervailing authority.

STATEMENT OF ORAL ARGUMENT

Oral argument is requested. This case presents issues of foundational importance to the constitutionality of identity-based zoning restrictions which Appellants submit are not only improper, but which have a deleterious effect on the nation's housing affordability crisis. Oral

[4] https://www.marc.org/news/economy/assessing-affordable-housing-gap.

argument would assist the Court in its consideration of issues that go to the heart of the Constitution's protections for individual liberty against arbitrary government restriction.

DATED: January 22, 2024.

Respectfully submitted,

/s/ David J. Deerson

DAVID J. DEERSON
BRIAN T. HODGES
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 419-7111
ddeersonpacificlegal.org
bhodges@pacificlegal.org

BENJAMIN A. RAMBERG
Franke Schultz & Mullen, P.C.
8900 Ward Parkway
Kansas City, MO 64114
(816) 421-7100
bramberg@fsmlawfirm.com

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). It is printed in Century Schoolbook, a proportionately spaced 14-point font, and includes 6,455 words, excluding items enumerated in Rule 32(f). I relied on my word processor, Microsoft Office 365, to obtain the count.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

DATED: January 22, 2024.

/s/ David J. Deerson
DAVID J. DEERSON
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ David J. Deerson
DAVID J. DEERSON
Attorney for Plaintiffs-Appellants

ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

HOMEROOM, INC., et al.,

Plaintiffs,

v.

SHAWNEE, KANSAS, CITY OF, et al.,

Defendants.

Case No. 2:23-cv-02209-HLT-GEB

MEMORANDUM AND ORDER

This case involves a local ordinance that limits the number of unrelated people who can live together in Shawnee, Kansas. Plaintiffs are a private citizen and a property management company. Their principal contention is that the ordinance violates their constitutional rights to intimate association and equal protection. Defendants move to dismiss. Doc. 12. They contend the Supreme Court resolved this issue in 1974. The Court agrees that the Supreme Court resolved similar due process and equal protection challenges in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and that the Supreme Court's holding is binding on this Court. The differences identified by Plaintiffs do not meaningfully distinguish *Belle Terre* and instead elevate form over substance. The Court thus grants the motion and dismisses the constitutional challenges. The Court also declines supplemental jurisdiction over the remaining state-law claim and dismisses it without prejudice.

I. BACKGROUND[1]

Defendant City of Shawnee adopted Ordinance No. 3419 in April 2022. Doc. 1 at ¶ 24. The ordinance defines "Co-Living Group" as "a group of four (4) or more unrelated persons age

[1] The following facts are taken from the well-pleaded allegations in the complaint. Doc. 1.

eighteen (18) or older living together in a dwelling unit, provided that if any one (1) of the adult persons is unrelated to another adult person in the group, the entire group shall be classified as unrelated." *Id.* ¶ 26.[2] "Related persons" means "(A) Persons related by blood, marriage, adoption, or guardianship; or (B) A person having legal custody of a minor or the designee of a parent or other person having legal custody of a minor." *Id.* ¶ 27. The ordinance prohibits Co-Living Groups in every residential-use zone in the City. *Id.* ¶ 25 It does not limit occupancy of related individuals. *See id.* ¶ 4. It applies regardless of whether the residence is rented or owner-occupied. *Id.* ¶ 34. The City has established a pattern and practice of enforcing the ordinance. *Id.* ¶ 29.

Plaintiff Val French is a private citizen. *Id.* ¶ 9. When the City adopted the ordinance, French lived in a house she owned with her husband, their two adult sons, and the girlfriend of one of the sons. *Id.* ¶ 36. Each member of the household contributed to the household's "responsibilities, burdens, and joys of residential domestic life." *Id.* ¶ 38. This arrangement was rendered unlawful under the ordinance because the girlfriend was not related to anyone in the household by blood, marriage, or adoption. *Id.* ¶ 37. Thus, two of the residents of French's house—her son and his girlfriend—have moved out. *Id.* ¶ 39. French cannot invite them to move back or rent out the spare room to another tenant because of the ordinance. *Id.* ¶ 40.

Plaintiff HomeRoom, Inc. is a property management startup company. *Id.* ¶ 10. It helps connect property owners to residential renters and facilitates low-cost housing searches for those looking for co-living situations. *Id.* ¶ 19. The ordinance was in part directed at HomeRoom's business model. *Id.* ¶ 28. HomeRoom manages two residential properties in Shawnee that are owned by investors. *Id.* ¶ 30. HomeRoom is the "master tenant" for each property. *Id.* HomeRoom

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[2] The ordinance is attached to the complaint as an exhibit, Doc. 1-1, and Defendants agree it is properly considered in deciding the motion to dismiss, Doc. 13 at 2 n.1.

used to sublet the homes to unrelated roommates. *Id.* ¶ 31. But HomeRoom was forced to evict those tenants after the City enacted the ordinance, and it now sublets the properties to blood-related families. *Id* ¶¶ 32-33.

Both French and HomeRoom claim to be injured by the ordinance. *Id.* ¶ 11. French contends the ordinance prohibits her from inviting others to live in her home. *Id.* ¶ 16. HomeRoom contends the ordinance makes it impossible to operate its business in the City. *Id.* French and HomeRoom have sued the City, City Manager Doug Gerber, and the City's primary Code Enforcement Officer Kevin Messick. *Id.* ¶¶ 21-23. Gerber and Messick are sued in their official capacities. *Id.* ¶¶ 22-23.

French and HomeRoom assert three claims. First, they bring a 42 U.S.C. § 1983 claim and argue the ordinance violates substantive due process on its face under the Fourteenth Amendment's right to intimate association and the right to establish a home. *Id.* ¶¶ 41-47. Second, they bring a § 1983 claim facially challenging the ordinance under the Equal Protection clause of the Fourteenth Amendment. *Id.* ¶¶ 48-54. Third, they seek declaratory relief under K.S.A. § 60-1701 for noncompliance with the Kansas Zoning Enabling Act. *Id.* ¶¶ 55-65.

II. STANDARD

A complaint survives a Rule 12(b)(6) motion to dismiss by containing "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation and citation omitted). A claim is plausible if it is accompanied by sufficient factual content to allow a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The plausibility standard requires "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a 'probability requirement.'" *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's

liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation and citation omitted). Courts undertaking this analysis accept as true all well-pleaded allegations in the complaint but need not accept legal conclusions. *Id.* Likewise, conclusory statements are not entitled to the presumption of truth. *Id.* at 678-79. Dismissal under Rule 12(b)(6) is also appropriate "where an issue of law precludes recovery." *Jones v. Addictive Behav. Change Health Grp., LLC*, 364 F. Supp. 3d 1257, 1265 (D. Kan. 2019).

III. ANALYSIS

The principal issue in the motion is whether Plaintiffs state a constitutional claim. But the motion also raises some ancillary issues that the Court must address. Defendants make three specific arguments. First, Defendants contend that the claims against Gerber and Messick are duplicative of the claims against the City. Doc. 13 at 1. Second, Defendants contend the complaint fails to state a constitutional violation. *Id.* Third, Defendants argue the complaint fails to state a claim of non-compliance with Kansas zoning laws. *Id.* The Court agrees on the first two points and declines to reach the third.

A. Official Capacity Claims Against Gerber and Messick

Defendants first argue that the official capacity claims against Gerber and Messick are duplicative of the claims against the City. *Id.* at 4-5. Plaintiffs agree to dismiss the claims against Gerber and Messick if the City agrees that any ruling in the case is binding on the officials. Doc. 18 at 1 n.1 ("Plaintiffs name Mr. Gerber and Mr. Messick to ensure that relevant City officials are bound by any eventual ruling and therefore accountable to ensure that the Ordinance is not enforced against Court order."). Defendants do not address this issue in the reply.

The Court finds that the official capacity claims against Gerber and Messick should be dismissed. "[T]he Supreme Court has held that a suit against a municipal official in his official

capacity is tantamount to a suit against the municipal entity itself." *Smith v. City of Lawrence, Kan.*, 2020 WL 3452992, at *5 n.8 (D. Kan. 2020). Courts "routinely" dismiss such claims as duplicative or redundant to the claims against the entity defendant. *Id.*; *see also Jones v. Wildgen*, 320 F. Supp. 2d 1116, 1124 (D. Kan. 2004) ("In suits in which a government entity is a party, the Court has previously dismissed official capacity claims against individuals."). The Court also notes that the claims in this case do not distinguish among Defendants. The claims in the complaint refer only to "the City." Doc. 1 at ¶¶ 41-65. Gerber and Messick are only mentioned in the complaint for their job titles and not in relation to any conduct towards Plaintiffs. *See id.* ¶¶ 22-23. It is therefore unclear what constitutional violations Plaintiffs could attribute separately to Gerber or Messick. Accordingly, the Court finds the claims against Gerber and Messick are redundant to the claims asserted against the City and dismisses those claims.

B. Constitutional Claims

Plaintiffs assert two 42 U.S.C. § 1983 claims under the Fourteenth Amendment. Both claims present facial challenges. Both claims are based on Plaintiffs' contention that the ordinance infringes on their fundamental rights to intimate association and to establish a home in violation of substantive due process and equal protection. *See* Doc. 18 at 2.[3] These claims are based on the ordinance's limitation on the number of unrelated people who may reside together in a dwelling.

1. HomeRoom

The Court first addresses these claims asserted by HomeRoom. Defendants move to dismiss the constitutional claims asserted by HomeRoom because it is a corporate entity with no constitutionally protected right of intimate association and because HomeRoom does not have

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[3] Although Plaintiffs initially contend that the "right to establish a home" is a separate fundamental right from the right to intimate association, their analysis largely focuses on the latter.

standing to assert constitutional claims on behalf of its sublessees. Doc. 13 at 5. As to the first point, the Court agrees with Defendants. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[A]n association lacking these qualities—such as a large business enterprise—seems remote from the concerns giving rise to this constitutional protection."); *Moore v. Tolbert*, 490 F. App'x 200, 204 (11th Cir. 2012) ("Corporations do not have 'friends' or 'family members' in any coherent sense. It is unclear, then, how corporations can have intimate associations at all."); *Fiore v. City of Detroit*, 2019 WL 3943055, at *5 (E.D. Mich. 2019) ("Business relationships do not support intimate association claims.").

As to the second point, HomeRoom argues that it is asserting the rights of third parties, i.e., the rights of its would-be unrelated tenants. *See* Doc. 18 at 11-12. But even to the extent HomeRoom could establish Article III standing as to itself, prudential limitations on standing still require the Court to dismiss its constitutional claims based on the rights of others. "[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (internal quotation and citation omitted). A party may be excepted from this rule if it shows that it has a close relationship with the person who holds the right and there is some hindrance on that person's ability to protect her own interest. *Id.* at 129-30. Here, however, HomeRoom only purports to assert the rights of its would-be sublessees. HomeRoom does not identify any authority that would establish this as a close enough relationship to forgo prudential standing limitations.[4] Nor does it

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[4] HomeRoom relies on *Craig v. Boren*, 429 U.S. 190 (1976), but its analysis is not persuasive. In *Craig* a vendor challenged a law that regulated the sale of beer to men under age 21. *Id.* at 192. The Supreme Court found the vendor had standing because the law was aimed at those who sell—not use—beer and she could assert "those concomitant rights of third parties" also affected. *Id.* at 194-95. Here, however, the ordinance is directed at unrelated housemates, not the "master tenant" of the same. While the ordinance may undoubtedly affect HomeRoom's business, something more must be shown before it can assert the right of intimate association of its would-be tenants. *See Kowalski*, 543 U.S. at 130 (noting that outside the limited situations like *Craig*, courts apply the "'close relationship' and 'hindrance' criteria").

give any reason why those individuals are unable to assert their own rights, as French is doing. Certainly, HomeRoom may be able to assert some claim in this situation, but HomeRoom has not shown that it may assert the constitutional claims asserted in this case on behalf of others. Accordingly, the Court dismisses HomeRoom's constitutional claims.

2. French

The Court next considers the constitutional claims asserted by French. As already noted, "[t]he Supreme Court has held that it is not arbitrary or unreasonable to limit to two the number of unrelated persons who can live together." *Jones*, 320 F. Supp. 2d at 1131. In *Belle Terre*, the Supreme Court considered an ordinance that restricted land use to single-family dwellings, with family meaning "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." 416 U.S. at 2. The ordinance limited the number of unrelated people living together to two. *Id.* The Supreme Court detailed various cases addressing zoning ordinances and noted a degree of deference is generally owed to governing bodies on zoning decisions. *Id.* at 2-6. Although ordinances based on suspect classifications like race would "immediately be suspect," the ordinance in question "involve[d] no procedural disparity inflicted on some but not on others" and involved no fundamental rights guaranteed by the Constitution. *Id.* at 6-8. The Supreme Court thus found that the ordinance should be upheld if it was reasonable, was not arbitrary, and bore a rational relationship to a permissible state objective. *Id.* at 8. In other words, the Supreme Court applied rational basis scrutiny. It then concluded that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs," and that limiting the number of unrelated people to two was a proper exercise of legislative discretion. *Id.* at 8-9. The Supreme Court deemed the ordinance constitutional.

Belle Terre has long been cited as binding authority on this issue in federal court. *Jones*, 320 F. Supp. 2d at 1131-35; *Doe v. City of Butler, Pa.*, 892 F.2d 315, 319-23 (3d Cir. 1989) (explaining the Supreme Court's different treatment of ordinances targeting related versus unrelated residents and noting that the latter is evaluated under rational basis scrutiny); *Fed. Hill Cap., LLC v. City of Providence*, 227 A.3d 980, 991 (R.I. 2020) ("In light of the fact that Federal Hill Capital has failed to provide any convincing authority for the notion that a right to live anywhere with anyone exists, coupled with the fact that *Village of Belle Terre* rejects such a notion, and that the general idea flies in the face of the purpose of zoning as a concept in and of itself . . . we are not persuaded that there exists any fundamental right under the facts of this case.");[5] *Citizens For Fair Hous. v. City of E. Lansing*, 2001 WL 682491, at *2 (Mich. Ct. App. 2001) ("The right to live with one's family is constitutionally protected . . . but the right to live with any number of individuals who are not one's 'family' is not." (citing *Belle Terre*)); *see also* Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 Fla. L. Rev. 1401, 1414 (2015) (noting that the issue currently "is settled as a matter of federal law"); Katia Brener, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. Rev. 447, 453-54 (1999) ("Because the ordinance in *Belle Terre* restricted merely the number of unrelated persons who could live together, the *Belle Terre* decision remains good law and is controlling in federal cases.").

Plaintiffs argue that *Belle Terre* "does not have binding effect over this suit" because it did not consider the right of intimate association. Doc. 18 at 7. Plaintiffs are correct that the Supreme Court in *Belle Terre* did not specifically name the substantive due process right of intimate

[5] *Federal Hill Capital* considered an ordinance limiting the number of college students who could live together under the Rhode Island state constitution, but it noted that the rights under the state and federal constitutions were coterminous. *Fed. Hill. Cap.*, 227 A.3d at 988.

association.[6] But this argument elevates form over substance. In *Belle Terre*, the Supreme Court considered the plaintiffs' arguments that the ordinance improperly considered whether residents of houses were married or unmarried and that the ordinance "reeks with an animosity to unmarried couples who live together." *Belle Terre*, 416 U.S. at 7-8. The Supreme Court concluded that the "ordinance places no ban on other forms of association, for a 'family' may, so far as the ordinance is concerned, entertain whomever it likes." *Id.* at 9. The Supreme Court's analysis touches on the same substantive due process issues raised here. And although Plaintiffs argue that "subsequent jurisprudence has greatly undermined [*Belle Terre*'s] force," Doc. 18 at 6, none of the cases cited directly address the issue at hand. *See Fed. Hill. Cap.*, 227 A.3d at 989-91 (noting that *Belle Terre* had largely settled this issue and finding no grounds to deviate from it). Plaintiffs have a right to argue for a change in the law, but *Belle Terre* remains good law and is binding authority this Court must follow. *See United States v. Doby*, 2019 WL 5825064, at *1 (D. Kan. 2019) (explaining that this Court is required to followed binding authority from the Tenth Circuit and the Supreme Court).

Plaintiffs also rely heavily on *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*. 666 F.3d 1216 (9th Cir. 2012). The issue there was whether the Fair Housing Act ("FHA") restricted the ability to select roommates using a questionnaire that inquired about sex, sexual orientation, and familial status. *Id.* at 1218-20. The Ninth Circuit declined to read the FHA to extend to shared living units—and thus prevent individuals from screening potential

[6] *Belle Terre* considered the ordinance in the context of various constitutional rights and considerations, including that it interfered with the right to travel, the right to express social preferences, the right of privacy, and the right of association. *Belle Terre*, 416 U.S. at 7-8. But it did not explicitly distinguish between the right of association protected by the First Amendment versus the Fourteenth Amendment. *See Trujillo v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*, 768 F.2d 1186, 1188 (10th Cir. 1985) (explaining the distinction between "freedom of expressive association in the First Amendment" and "freedom of intimate association as 'an intrinsic element of personal liberty'" (quoting *Roberts*, 468 U.S. at 620))). *Belle Terre* also considered the ordinance under the Equal Protection clause. *Belle Terre*, 416 U.S. at 1. Both parties in this case generally equate the analysis under the Equal Protection clause with the analysis under substantive due process. Doc. 13 at 10-11; Doc. 18 at 2 n.2. Given that, it would be difficult to extract *Belle Terre* from the analysis here simply because it did not expressly address the right to intimate association.

roommates for certain characteristics—because doing so would "raise[] substantial constitutional concerns" and would potentially be a "serious invasion of privacy, autonomy and security." *Id.* at 1221-22. The court instead adopted a "narrower construction that excludes roommate selection from the reach of the FHA" to avoid a constitutional conflict with the FHA. *Id.* at 1222. The Ninth Circuit did note the important personal interests in selecting roommates. But the issue in *Roommate.com* (whether the FHA should be read to interfere with relationships inside a home) was different than the issue here and in *Belle Terre* (whether municipalities can limit unrelated people living in a residence under zoning authority). The Ninth Circuit did not discuss *Belle Terre*, and, as noted above, *Belle Terre* is binding on this Court.

In sum, the Court finds that the ordinance does not violate substantive due process or the Equal Protection clause based on the authority of *Belle Terre*. The Court grants the motion to dismiss French's constitutional claims.[7]

C. State Claims

Lastly, Plaintiffs seek declaratory relief for noncompliance with the Kansas Zoning Enabling Act. They contend the ordinance exceeds the authority granted to municipal governments regarding the adoption of zoning regulations. Doc. 1 at ¶¶ 55-65. The stated basis for jurisdiction over this claim is supplemental jurisdiction under 28 U.S.C. § 1367. *Id.* ¶ 14. That statute states that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction . . . ." 28 U.S.C. § 1367(a). But a court may also decline supplemental jurisdiction if the issue is a novel question of state law or if the court has dismissed

[7] Even if HomeRoom had standing to assert the constitutional rights at issue, dismissal of those claims would be proper for the same reasons discussed above. Likewise, even if Gerber and Messick were properly named, the claims against them would still be dismissed.

all claims over which it has original jurisdiction. *Id.* § 1367(c); *see also Nielander v. Bd. of Cnty. Comm'rs of Cnty. of Republic, Kan.*, 582 F.3d 1155, 1172 (10th Cir. 2009). Courts have discretion to decide whether to exercise supplemental jurisdiction after considering such factors as "comity, convenience, economy, and fairness." *Birdwell v. Glanz*, 790 F. App'x 962, 963-64 (10th Cir. 2020). "When the federal claims disappear early in the litigation, a federal court should generally decline to exercise supplemental jurisdiction." *Id.* at 964.

Here, the Court has dismissed the federal constitutional claims against Defendants. The litigation is in the very early stages. Indeed, the magistrate judge has not yet convened the initial planning and scheduling conference. *See* Doc. 21 (deferring scheduling until after resolution of motion to dismiss). The remaining claim is a matter of state law regarding interpretation of the Kansas Zoning Enabling Act, which is an issue uniquely situated for resolution by a state court. Accordingly, the Court declines to exercise supplemental jurisdiction over Plaintiffs' state-law claim and dismisses that claim without prejudice for lack of subject-matter jurisdiction.

IV. CONCLUSION

THE COURT THEREFORE ORDERS that Defendants' Motion to Dismiss (Doc. 12) is GRANTED. The Court dismisses the constitutional claims and dismisses without prejudice the state-law claim.

IT IS SO ORDERED.

Dated: September 12, 2023

/s/ Holly L. Teeter
HOLLY L. TEETER
UNITED STATES DISTRICT JUDGE

ATTACHMENT 2

United States District Court

------------------------- DISTRICT OF KANSAS---------------------------

HOMEROOM, INC. and VAL FRENCH, **Plaintiffs,** **v.** **CITY OF SHAWNEE, KANSAS, DOUGLAS GERBER, and KEVIN MESSICK,** **Defendants.**	**Case No. 5:23-cv-02209-HLT-GEB**

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Memorandum and Order (Doc. 23), Defendants' motion to dismiss is granted. The Court dismisses the constitutional claims and dismisses without prejudice the state-law claim. This case is closed.

IT IS SO ORDERED.

SKYLER O'HARA
CLERK OF THE COURT

Dated: September 12, 2023

/s/ M. Deaton
By Deputy Clerk