UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GRANT YODER, ***et al.*****,**	:	**Case No. 3:17-2321**
Plaintiffs,	:	**Judge Zouhary**
v.	:	
CITY OF BOWLING GREEN, ***et al.*****,**	:	***PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT***
Defendants.	:	

Plaintiffs hereby move, pursuant to Federal Rule of Civil Procedure 65(b), for issuance of a temporary restraining order and preliminary injunction enjoining enforcement of the City of Bowling Green's unconstitutional Dwelling Prohibition, which, pursuant to impermissibly vague criteria, arbitrarily criminalizes and otherwise penalizes the habitation of certain private residences by any greater than three unrelated persons.

If Defendants' enforcement of the Prohibition is not immediately enjoined, Plaintiffs will suffer irreparable harm for which there is no adequate remedy at law, including but not limited to criminal punishment, extensive fines, and immediate ejection from their home.

I. BACKGROUND[1]

Plaintiffs initiated this civil rights action on November 5, 2017 by filing a Verified Complaint challenging, facially and as applied to them, the City of Bowling Green's Dwelling Prohibition.

A. The City of Bowling Green's Prohibition on Home-Sharing Absent a Qualifying Familial Relationship

In Bowling Green, no person can lease his or her home, regardless of size, to more than three individuals unless the City deems the individuals to be "family," or subject to another exception, in which case there is *no limit* on the number of individual that can occupy the home.

[1] Facts recounted herein are derived from Plaintiffs' Verified Complaint and attached Exhibits. Doc. 1; Doc. 1-1.

This prohibition is articulated in Sections 150.03, 150.19, and 150.20 of the City's zoning code. Section 150.19 and Section 150.20 limits the use of most residential houses within the City to "single-family dwellings," which are in turn defined as "a building designed for occupancy by one (1) family for living purposes and including not more than two (2) lodgers or boarders." Section 150.03. Amongst these terms, only "family" is defined: the City defines a "family" as "an individual or married couple and natural or adopted children thereof, or foster children placed by a duly constituted state or county agency, occupying a dwelling for purposes of habitation, and including other persons related directly to the individual or married couple by blood or marriage." Sect. 150.03.

Violation of the Dwelling Prohibition results in criminal prosecution and astronomical economic penalties that exceed the fair market value of most City of Bowling Green homes. Section 150.140(A) provides that "it shall be unlawful to . . . use any building or land in violation of any regulation . . . of this chapter. . ." Meanwhile, Section 150.999(A) insists that "any person . . . violating any regulation in . . . this chapter. . . *shall* be fined nor [sic] more than *five hundred dollars* for each offense. Each and every day during which such illegal . . .use continues, may be deemed a separate offense." And Section 150.999(B) declares that such a use can be deemed a second degree misdemeanor.

B. The City's Threat of Enforcement Against Plaintiffs

Plaintiff Maurice Thompson has owned 229 E. Merry since purchasing it for $137,500 in 2005. 229 E. Merry, built on or about 1920, is a 1,600 square-foot home with four bedrooms, two full bathrooms, a front and back yard, a garage, and three additional parking spots. The property consists of two dwellings: three bedrooms upstairs, and a separate basement apartment with its own entrance, bedroom, full bathroom and kitchen facilities. Mr. Thompson has consistently believed that the home was exempt from the Dwelling Prohibition.

Plaintiffs Grant Yoder, Grady Wildman, and Alex Kuczka are BGSU students, fraternity brothers, and tenants currently residing at 229 E. Merry who do not wish to relocate in the middle of the

school year. None of the tenants are "directly related by blood or marriage," and none wish to become directly related by marriage or otherwise at this time.

On October 28, 2017 Plaintiff received the October 25 letter of City of Bowling Green Code Enforcement Officer Jason Westgate. In the letter, Mr. Westgate indicates "currently four (4) people occupy this dwelling; therefore the dwelling unit is in violation. A violation of Chapter 150 of the Zoning Code of the City of Bowling Green is a minor misdemeanor and is punishable by a fine of $500.00. Each day is a separate violation." The City further threatens criminal charges, indicating "If the violation is corrected by November 3, 2017 and you have allowed a walk-through inspection of the single-family dwelling, the matter will be considered resolved. If not, charges will be filed at the Municipal Court.

Mr. Thompson immediately followed up with Mr. Westgate, who indicated the following: "one family plus two unrelated persons can occupy a single family unit," "this property was never allowed to be used as anything other than a single family dwelling," "this property at 229 E. Merry was never grandfathered in for anything," and that the deadline for compliance and proposed fines would be enforced. In response to Mr. Thompson's request for records demonstrating which properties are exempt due to grandfathering, Mr. Westgate provided only a 1997 Memorandum. In a later email, Mr. Westgate reiterated "Your property combined can only be used as a single family dwelling – Maximum of 3 unrelated persons can occupy entire structure."

II. LAW AND ANALYSIS

In determining whether to grant the present motion for issuance of a temporary restraining order and preliminary injunction, the Court is to consider four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the issuance of a temporary restraining order or preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of a temporary restraining order or preliminary injunction. *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997) (*en banc*). These factors are to be *balanced* against one another and should not

be considered prerequisites to the granting of a temporary restraining order or preliminary injunction. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,* 163 F.3d 341, 347 (6th Cir. 1998). This balance of interests weighs strongly in favor of the Plaintiffs and the granting of the present motion.

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs are likely to succeed on the merits of their claim because the City's Dwelling Prohibition in unconstitutionally vague, and particularly so for an ordinance carrying criminal penalties and fines of $500 per day and $182,500 per annual lease agreement. Even if this Court were to elect to construe the Prohibition as sufficiently precise, the ordinance would necessarily violate Plaintiffs' Due Process and Equal Protection rights under the Ohio Constitution by arbitrarily discriminating against a class of citizens on the basis of their identity, i.e. a lack of strict familial relation, rather than on the basis of the City's professed interest in limiting population density.

i. The Dwelling Prohibition is unconstitutionally vague.

The Dwelling Prohibition is impermissibly vague because it attaches severe criminal penalties to an entirely incomprehensibly-written proscription: the City's Dwelling Prohibition only applies to "single-family dwellings," which it defines as "a building *designed for* occupancy by one (1) family for living purposes *and including not more than two* lodgers or boarders." Section 150.03. Meanwhile, it is unclear whether certain houses are grandfathered in, and if so, which houses.

"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Norwood v.*

Horney, 2006-Ohio-3799, at ¶ 83, citing *Grayned v. Rockford*, 408 U.S. 104, 108–109 (1972). Accordingly, "Due process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached. *Id.*, at ¶81. "Implicitly, the law must also convey an understandable standard *capable of enforcement in the courts*, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct." *Id.*

"Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it." *State v. Tanner*, 15 Ohio St.3d 1, 472 N.E.2d 689 (1984); *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799. If the enactment "threatens to inhibit the exercise of constitutionally protected rights," such as property rights in Ohio, *a more stringent vagueness test is to be applied*. *Norwood*, supra., at ¶84.

In *Norwood*, the Ohio Supreme Court determined the term "deteriorating" to be impermissibly vague. The Court emphasized that "the term appears in the Norwood Code but is not defined," that "it offers so little guidance in application that it is almost barren of any practical meaning," and that it invited speculation. *Id.*, at ¶95, 97. The Court thus concluded that "[i]n essence, 'deteriorating area' is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement." *Id.*, at ¶ 99.

Ohio's Court of Appeals for the District in which the City is located has recently invalidated several zoning regulations similar to the City's Dwelling Prohibition on the basis of vagueness. In *Viviano v. Sandusky*, the Sixth District invalidated as vague a City of Sandusky prohibition on anything other than a "one-family dwellings" that defined "dwelling as a "building designed or occupied exclusively for non-transient residential use (including one-family, two-family, and multifamily buildings)." 2013-Ohio-2813, at ¶ 4. In holding this definition to be unconstitutionally vague the Sixth District explained as follows:

> To not run afoul of the second prong under *Grayned*, the ordinance must preclude arbitrary, capricious, or discriminatory enforcement. An ordinance cannot leave what constitutes a

> violation open to interpretation by relying on the enforcing body to use "common sense." Such an assessment is "exactly the kind of unfettered discretion that the vagueness doctrine prohibits." *State v. Collier*, 62 Ohio St.3d 267, 274, 581 N.E.2d 552 (1991). The concern here centers on the term "non-transient" as used in the Zoning Ordinances and notices. It is undefined within the ordinance and does not lend itself to a plain and unambiguous meaning. Absent a time scale, the term is rendered entirely subjective and incapable of providing guidance to either the citizen or the enforcing party.

Viviano, supra., at ¶ 18-20.

Likewise, in *City of Toledo v. Ross*, the Sixth District invalidated as vague the City of Toledo's definition of "group rental house," which was also devised to limit occupancy of a home by unrelated persons. *City of Toledo v. Ross*, No. L-00-1337, 2001 WL 1001257, at 1–5 (Ohio Ct. App. Aug. 31, 2001) In finding the definition impermissibly vague, the Court explained as follows:

> We find, however, with respect to the phrase, "common living arrangement or basis for the establishment of the housekeeping unit is of transient, limited or seasonal duration," that the phrase is unconstitutionally vague, specifically with respect to the terms, "transient, limited, or seasonal duration." The Toledo Municipal Code does not define any of these terms.
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> Clearly, terms that require such subjective interpretation to determine their meaning are vague. It would be impossible for a person of common intelligence to be able to determine what conduct is prohibited, insofar as every person's interpretation of the meaning of "transient, limited, or seasonal" could vary so greatly. Moreover, because of the vague terms used, TMC 1103.64 allows for arbitrary and discriminatory application and enforcement of TMC 1167.01(28). Accordingly, we find that the language in TMC 1103.64, specifically, "common living arrangement or basis for the establishment of the housekeeping unit is of transient, limited or seasonal duration," does not provide fair notice to those who must obey the standards of conduct specified therein and does not provide constitutionally adequate guidelines for those charged with enforcing it. We therefore find that TMC 1167.01(28) and TMC 1103.64 are unconstitutionally vague, violate the Due Process Clauses of the United States and Ohio Constitutions, and are thereby rendered void.

Id., at 4-5.

Finally, the Ohio Supreme Court has confirmed in this very context that *doubt should be construed so as to permit the occupation of homes by unrelated individuals*. In *Saunders v. Clark Cty. Zoning Dep't*, the Court construed "single housekeeping unit" so as to permit "a group home for delinquent boys unrelated by affinity and consanguinity" as permissible in an "R-1 suburban residence district" 66 Ohio St. 2d 259, 259–65 (1981). In so doing, the Court cautioned that "Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he

would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed." *Id.*

*The Court further cautioned that "*In our view, any resolution seeking to define this term 'family' narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones," and "we now interpret the term 'family' broadly in order to permit appellees to operate a foster home in an "R-1 suburban residence district. Such a broad definition of "family" is mandated by . . . fundamental principles of zoning law, and immutable constitutional principles guaranteeing the right of every American to live with his family free from official harassment." *Id.*

Here, heightened scrutiny must be applied to the City's zoning code because it infringes upon protected property rights and imposes severe criminal and economic penalties. Pursuant to that scrutiny, and in light of the foregoing precedent, the City's imposition of the Dwelling Prohibition through its definition of a "single-family home" is impermissibly vague.

First, the City provides no criteria for determining whether or not a home is "*designed for*" a family, much less whether this test is subjective or objective. Instead, the phrase "designed for" is undefined and otherwise unexplained by the City's Code.

Meanwhile, the facts before this Court demonstrate that this definition lends the City arbitrary enforcement discretion: the City is claiming that a four bedroom two bathroom house with parking for four is *not* "designed for" four individuals, *unless* those four individuals are related by blood. And the home is located in an area full of students and just blocks away from Bowling Green State University, suggesting that the home may well have been designed to house unrelated persons.

Second, the City conclusively claims "the use of the property when Chapter 150 of the Codified Odinances of the City of Bowling Green was adopted on January 6, 1975 determines the legal use of the

property today. The legal use of the property is as a single family dwelling." The City's imposition of the Dwelling Prohibition as a function of the use of the property in 1975 is unconstitutionally vague: the City maintains no evidence as to the use of homes in 1974, unless such evidence is non-public.

Third, the Dwelling Prohibition is defined so that a home is only a "single family dwelling" if it is "designed" for a family *and* includes "not more than two lodgers or boaders." However, neither the term "lodger" nor "boarder" is defined. Likewise, Ohio Landlord-Tenant law fails to define either term. See R.C. 5321. Instead, R.C. 5321.01(A) defines "tenant": "'tenant' means a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." The City deliberately avoided using the term tenant, and instead chose the terms "lodger" and "boarder," each of which connote a residency more transient in nature, akin to that of a motel, i.e. less than a one year lease.

Consequently, the definition of "single-family dwelling," hinging on what a building is supposedly "designed for," must likewise be deemed impermissibly vague or broadly construed in the favor of property owner so as to permit occupancy of an otherwise suitable four-bedroom home by four law students, nuns, widows, missionaries, or others unrelated by blood.

ii. If not vague, the Dwelling Prohibition violates the Ohio Constitution.

The Dwelling Prohibition is not narrowly tailored to the avowed governmental purpose and is impermissibly arbitrary: through the limit the City claims to be effectuating a governmental interest in limiting population density, but the prohibition does so *by targeting disfavored relationships between those living together in any particular home*. To be sure, the United States Supreme Court has indicated that regulations such as the City's Dwelling Prohibition may not violate the *federal* Equal Protection Clause. But the Ohio Constitution is *more protective* of private property rights than its federal counterpart, the Ohio Supreme Court insists upon *more exacting* Equal Protection analysis, and Ohio precedents demand that Ohio join the many states that have invalidated regulations that claim to address *density* but instead target the *identity* of a home's inhabitants.

a. The Ohio Constitution is more protective of the private property rights at issue here.

The Ohio Constitution may be applied without adherence or deference to federal constitutional precedent -- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by state citizens."[2] Put another way, "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections*."[3]

The Ohio Supreme Court has not hesitated to recognize this capacity: [W]e believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. * * * *[S]tate courts are unrestricted in according greater civil liberties and protections to individuals and groups*.[4] Consequently, this Court is in no manner bound by federal precedent such as *Village of Belle Terre* when protecting rights under the Ohio Constitution.

This is particularly true within the context of private property rights, including the right to use property without creating a private nuisance. Section 1, Article 1 of the Ohio Constitution provides "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." And Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare."[5] In aggregating this provision with Section 1, Article I, "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that

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[2] *Arnold v. Cleveland*, (1993), 67 Ohio St.3d 35citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.* (1982), 455 U.S. 283, 293 (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); and *California v. Greenwood* (1988), 486 U.S. 35, 43 ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."); *PruneYard Shopping Ctr. v. Robbins* (1980), 447 U.S. 74; *State v. Brown* (1992), 63 Ohio St.3d 349. *Direct Plumbing Supply v. City of Dayton* (1941), 138 Ohio St. 540.

[3] *Arnold*, supra.

[4] *Arnold*, supra.

[5] Section 19, Art. I, Ohio Constitution.

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."[6]

In Ohio, these "venerable rights associated with property" are not confined to the mere ownership of property: "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions."[7] And this is as it must be: merely protecting *ownership* of property becomes a hollow and illusory right when regulations of that same property are permitted to eat away at the owner's capacity to use the property, while concomitantly diminishing its value. In sum, "the free use of property is guaranteed by Section 19, Article I of the Ohio Constitution."[8]

In addition, a regulation of property violates the Ohio Constitution's guarantees of Due Process and Equal Protection when it is "arbitrary," "unduly oppressive upon individuals," or where not "necessary for the public welfare" See *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941); *Pizza v. Rezcallah*, 1998-Ohio-313; *Froelich v. Cleveland*, 99 Ohio St. 376 (1919); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943).

b. Pursuant to the Ohio Constitution, this Court must carefully scrutinize the City's disparate treatment of Plaintiffs' property rights.

Article I, Section 2 of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." In *State v. Mole*, the Ohio Supreme Court indicated that the Ohio Constitution's equal protection guarantees can be applied to provide greater protection than their federal counterparts: "Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent and that the same review is required, we also have made clear that the Ohio Constitution is a document of independent force." *State v. Mole*, 2016-Ohio-5124, ¶¶ 14, citing *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42 (1993).

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6 *Norwood v. Horney* (2006), 110 Ohio St.3d 353, at 361-62 (internal citations omitted).

7 *Id.*

8 *State v. Cline*, 125 N.E.2d 222, 69 Ohio Law Abs. 305.

Nowhere is this "independent force" of Ohio's equal protection clause more relevant than with *protection of private property rights*, since those rights are "fundamental rights" in Ohio but not so pursuant to federal constitutional precedent. When disparate treatment burdens a fundamental right, strict scrutiny applies. *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir.2010). What this means is that the state action is permissible only if it is narrowly tailored to a compelling governmental interest. *Cf. Does v. Munoz*, 507 F.3d 961, 964 (6th Cir.2007); *In re Ohio Execution Protocol Litig.*, 868 F. Supp. 2d 625, 637 (S.D. Ohio 2012). Accordingly, the Ohio Supreme Court recently applied exacting scrutiny to an Ottawa Hills zoning restriction, ultimately invalidating its application to a landowner due to "disparate treatment." *Boice v. Ottawa Hills*, 2013-Ohio-4769, ¶17-19 (observing "there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet," that the situation there involved a *de minimus* difference, and that other similarly situated houses were "grandfathered in.").

Even under a lower standard, the classification at issue cannot be arbitrary: "the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *State v. Mole*, 2016-Ohio-5124, ¶¶ 12-29. And "[d]iscrimination[ ] of an unusual character especially suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.*

Similarly, under the Ohio Constitution, "the method or means by which the state has chosen to advance [its governmental] interest [must be] rational." *Id*, citing *McCrone v. Bank One Corp.*, 2005-Ohio-6505, ¶ 9, citing *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* 73 Ohio St.3d 260, 267 (1995). "Thus, although we respect that the General Assembly has the power to classify, we insist that its classifications must have a reasonable basis and may not 'subject individuals to an arbitrary exercise of power." *Id*., citing *Conley v. Shearer*, 64 Ohio St.3d 284, 288 (1992). "[E]ven in the ordinary equal

protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Id*., citing *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Thus, in Oho, "equal protection requires * * * that reasonable grounds exist for making a distinction between those within and those without a designated class." *Mole*, at ¶ 61, citing *State v. Buckley*, 16 Ohio St.2d 128, 134 (1968). And when criminalization is based solely on the status of the classified group without any relationship to a legitimate state interest, the classification may be found to be unconstitutionally arbitrary. *Mole*, at ¶ 61.

c. The Dwelling Prohibition fails equal protection scrutiny pursuant to the Ohio Constitution because it is not narrowly tailored and is arbitrary.

The City's Dwelling Prohibition is arbitrary and insufficiently tailored to the City's interest in limiting population density. Accordingly, it must be enjoined.

The Ohio Supreme Court has recently affirmed both that "we are not confined by the federal courts' interpretations of similar provisions in the federal Constitution" and "[w]e can and should borrow from well-reasoned and persuasive precedent from other states." *State v. Mole*, supra, at ¶21-22. Subsequent to the Supreme Court's decision in *Village of Belle Terre*, numerous states have concluded that analogous prohibitions arbitrarily violate *state* constitutional limits akin to those here. "Courts, including state courts of last resort, around the country have relied on state constitutions to invalidate such prohibitions. Most of these acknowledged the existence of *Village of Belle Terre*, but found it irrelevant to state constitutional interpretation or otherwise inapposite." *Distefano v. Haxton*, No. C.A. NO. WC 92-0589, 1994 WL 931006, at 14 (R.I. Super. Dec. 12, 1994). "Indeed, one State Supreme Court wondered even within six years after the decision in *Belle Terre* as to whether the opinion 'still does declare federal law ...'". *Distefano* , supra., citing *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440, n. 3 (Cal. 1980).

In *Charter Township of Delta v. Dinolfo*, the supreme court of Michigan held that the ordinance at issue violated the state constitutional guarantee of due process. 419 Mich. 253 (1984). The ordinance at issue stated that single family residences could only be occupied by an individual, or a group of two or more persons related by blood, marriage, or adoption, and not more than one other unrelated person.

Id. at 833. The court agreed that preservation of the residential nature of a neighborhood is a proper subject for legislative protection; however, it found that there was no rational relationship between that goal and the means chosen to address it. It held that the classification created by the ordinance was not reasonably related to the achievement of the stated goals, and was arbitrary and capricious, thereby depriving six unrelated persons who wished to live with a biological family of the use of their property without due process of law. *Id.* at 840-41.

The New York Supreme Court likewise explained that a "four unrelated persons limit" violated the Due Process and Equal Protection clauses of its state constitution. *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 942–44 (1989). The *Baer* court relied on the New York Supreme Court's prior decision in *McMinn v. Town of Oyster Bay*, which astutely explained why relationships between the household's individuals is an arbitrary basis upon which to regulate population density:

> 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 *(see, Moore v East Cleveland,* 431 US 494, 499-500; *id.,* at p 520, n 16 [Stevens, J., concurring]; *City of Santa Barbara v Adamson,* 27 Cal 3d 123, 610 P2d 436, 441; *State v Baker,* 81 NJ 99, 405 A2d 368, 373). Their achievement depends not upon the biological or legal relations between the occupants of a house but generally upon the size of the dwelling and the lot and the number of its occupants. Thus, the definition of family employed here is both fatally overinclusive . . . in failing to prohibit occupancy of a two-bedroom home by 10 or 12 persons who are related in only the most distant manner and who might well be expected to present serious overcrowding and traffic problems.

66 N.Y.2d 544, 546–54 (1985). On that basis, the Court found no "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" *Id.* In sum, "zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings . . . This ordinance, by limiting occupancy of single-family homes to persons related by blood, marriage or adoption or to only two unrelated persons of a certain age, excludes many households who pose no threat to the goal of preserving the character of the traditional single-family neighborhood, . . . and thus fails the rational relationship test." *Id.* "Such differentiation, we said, was not reasonably related to a legitimate zoning purpose and, therefore, violated the State Due Process Clause *(see, id.,* at

550-551). Because the ordinance here similarly restricts the size of a functionally equivalent family but not the size of a traditional family, it violates our State Constitution." *Baer*, supra, at 944

Similarly, the New Jersey Supreme Court reasoned as follows:

> Recognizing that the municipality's goal of preserving stable, single-family residential areas was entirely proper, we nevertheless held that the ordinance was violative of our state constitution because "the means chosen [did] not bear a substantial relationship to the effectuation of that goal." We observed: The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors-or even of judges" from residing in a single unit within the municipality. [*Id.* at 107, 405 *A.*2d 368 (citation omitted). We noted that municipalities could appropriately deal with overcrowding or congestion by ordinance provisions that limit occupancy "*in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant.*" Declining to follow the United States Supreme Court's decision in *Village of Belle Terre v. Boraas,* 416 *U.S.* 1 (1974), which upheld a comparable ordinance, we concluded that "[r]estrictions based upon legal or biological relationships such as Plainfield's impact only remotely upon [overcrowding and congestion] and hence cannot withstand judicial scrutiny."
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> It also bears repetition that noise and other socially disruptive behavior are best regulated outside the framework of municipal zoning. As we observed in *State v. Baker*, "Other legitimate municipal concerns can be dealt with similarly. Traffic congestion can appropriately be remedied by reasonable, evenhanded limitations upon the number of cars which may be maintained at a given residence. Moreover, area-related occupancy restrictions will, by decreasing density, tend by themselves to reduce traffic problems. Disruptive behavior-which, of course, is not limited to unrelated households-may properly be controlled through the use of the general police power." As we stated in *Kirsch v. Borough of Manasquan*, "Ordinarily obnoxious personal behavior can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes * * *. Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations."

Borough of Glassboro v. Vallorosi, 117 N.J. 421, 421–33, 568 A.2d 888, 893, 895 (1990), quoting *Kirsch Holding Co. v. Borough of Manasquan, supra,* 59 *N.J.* at 254, 281 *A.*2d 513 (invalidating ordinances in two shore communities that restrictively defined "family" and prohibited seasonal rentals by unrelated persons, explaining that the challenged ordinances "preclude so many harmless dwelling uses * * * that they must be held to be so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety.") and *State v. Baker, supra,* 81 *N.J.* at 111, 405 A.2d 368.

In Rhode Island, the Court succinctly explained the issue and applicable rule of law now before this court: "The issue in this matter, however, is whether Narragansett may seek to curb or eliminate behavior it considers offensive by limiting not the number of persons who may occupy a particular dwelling but by delineating the type of relationship that must exist among the occupants of a unit in order for them to lawfully reside within it," and "[t]his Court declares that the prohibition in the Narragansett Zoning Ordinance forbidding occupancy of otherwise suitable residential units by more than three persons not related by blood, marriage, or adoption is violative of the mandates of the due process and equal protection clauses of Article 1, Section 2 of the Rhode Island Constitution. The prohibition bears no reasonable relationship to the stated goals of the town regarding public safety, noise abatement, parking or density. The Ordinance unlawfully burdens the fundamental right of otherwise competent adults to live with whom they choose; and additionally, the category relative to blood relations is an invidious classification." *Distefano v. Haxton*, No. C.A. NO. WC 92-0589, 1994 WL 931006, at 15 (R.I. Super. Dec. 12, 1994). The Court provided compelling reasoning in support of its result:

> How can this ordinance be anything but arbitrary and capricious as the Town of Narragansett seeks to regulate not the use to which parcels of land are put but the behavior of occupants of residential dwellings by defining the nature of the relationship among people occupying single units . . . There is nothing on the record to suggest - nor does common sense or any legislative facts that can be judicially noticed lead to the conclusion - that Narragansett 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 situated in residential zones. There is nothing on this record to suggest that teenagers living with their parents will play their Metallica or their Beethoven at lower decibel levels in the wee hours of the morning than would four unrelated monks (or nuns) - or unrelated widows (or widowers) or four unrelated Navy lieutenants. It is a strange - and unconstitutional - ordinance indeed that would permit the Hatfields and the McCoys to live in a residential zone while barring four scholars from the University of Rhode Island from sharing an apartment on the same street. Certainly a rational-basis analysis requires a modicum of logic to inhere within the ordinance, but this ordinance is based upon a flawed premise. The legislation operates on the assumption that if some unrelated individuals sharing an apartment or house - be they students or otherwise are rowdy and disorderly, then all unrelated persons necessarily act in that fashion and must be barred from residential zones.

Distefano, supra, at 13-14. Other courts have reached a similar result. See *Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (invalidating ordinance defining family as related persons or not more than five unrelated persons on state privacy grounds); *Kirsch v. Prince George's Co.*,

Maryland, 331 Md. 89, 626 A.2d 372 (1993) (invalidating ordinance imposing special restrictions on properties occupied by three to five unrelated persons registered as students at educational institutions on state and equal protection grounds).

Here, the City's Dwelling Prohibition expressly claims its interest to be as follows: "to create living areas of moderate population density for single-family dwellings." Section 150.20(A). However, just as in the cases above, the City's restriction focuses on social engineering instead of population density. As such it is unconstitutionally arbitrary and untailored for numerous reasons.

First, rather than regulating a *land use*, the ordinance instead regulates *the identity* of who can use the land for otherwise legal and acceptable purposes. Rather than *actually limiting* population density, the Prohibition targets disfavored individuals. There is nothing preventing ten or more family members from occupying a single-family home so long as they are related, even though four unrelated scholars cannot. Greater than four adult children (who may or may not be BGSU students) could reside in one home, even if they are unruly, abuse drugs and alcohol, blare loud music, and have cars for which there is insufficient parking. Thus, the ordinance targets *identity* rather than *density*. But unrelated individuals do not create any more density than related individuals. Four people are four people, irrespective of their connection to one another. And social engineering should not take place through the zoning process - - a process reserved to regulate land use rather than interpersonal relations and household composition.

Second, the ordinance fails to *directly* target externalities that may be associated with population density. For instance, the City could no doubt require a number of individuals per square foot or per bedroom. The City could also require a certain number of parking spaces be provided per habitant. However, the City instead targets the relationship of the inhabitants to one another. The arbitrariness of this regulation is best demonstrated by the regulation of the home at issue in this case. The house located at 229 E. Merry contains four bedrooms, four parking spaces, two full bathrooms, a front and rear yard, and two separate dwellings amongst approximately 1,600 square feet. Thus, permitting four occupants to

reside together, in and of itself, utterly fails to trigger any population-density-related externalities, much less other health, safety, or habitability concerns.

Third, the number of innocuous household arrangements forbidden by the Dwelling Prohibition is endless. A four-bedroom home such as 229 E. Merry could never be leased to four elderly widows. Nor four nuns. Nor four Mormon missionaries. Nor four medical residents or travel nurses working at Wood County Hospital. Nor four judges or law students. Meanwhile, six felons previously convicted of rape or child predation can live comfortably in the same home, so long as they are brothers or cousins.

Fourth, the City prohibits arrangements that have no greater impact on density even if the arrangements are the functional equivalent of a family. For instance, the tenants at 229 E. Merry are fraternity brothers who share common areas, meals, bills, household chores, grocery shopping, and yard work. Citing such attributes, courts have found regulations that discriminate against such "functional" families as opposed to blood-related families to be arbitrary violations of equal protection. See *Armstrong v. Mayor & City Council of Baltimore*, 410 Md. 426, 450–59, 979 A.2d 98, 112–18 (2009).

Fifth, the arbitrariness of the law is demonstrated by the fact that, pursuant to the City's definition of family, if two of the Plaintiffs were to *marry one another*, then all of the current tenants could remain in the home. See Sect. 150.03. However, the population density of the home would remain the same irrespective of whether such an intimate and important decision is made. Likewise, the "fourth tenant" who is a fraternity brother would be free to spend all day every day at the home as a guest, even if he or she were to go home to sleep at another residence every night. In this sense, the ordinance simply controls how many unrelated individuals *sleep* at a home, and nothing more.

Sixth, there is no limiting principle governing the extent of the City's power if the Dwelling Prohibition were upheld. In other words, the City would remain free to limit the occupancy of four-bedroom homes to just *one* individual, or to just *two,* even if to be engaged but not yet technically family.

Finally, the City wholly permits a plethora of uses within R-2 Single-Family Residential Districts that dramatically expand population density beyond the occupation of a four-bedroom house by four

unrelated adults. For instance, the City permits Churches, "adult family homes," "group homes," and "community residences." See Section 150.19(B). Also permitted are "Day-Care Homes" and Bed and Breakfasts. See 150.19(C); 150.20(C). The City permits such "adult family homes" to "accommodate …five unrelated adults" and "group homes" to "accommodate from six to sixteen unrelated adults." Likewise, homes otherwise identical to Plaintiffs' home occupied by greater than unrelated three individuals prior to January 6, 1975 are "grandfathered in" and continue to maintain the right to house greater than three unrelated individuals. Given these massive exceptions, the City's professed "population density" measure turn out to be nothing more than social engineering policies designed to discriminate against disfavored residents on the basis of their identity and relationship with one another.

In sum, Plaintiffs are likely to succeed on the merits because the Dwelling Prohibition is an arbitrary means of effectuating the City's professed interest in population density that is neither direct nor coherent, much less a narrowly tailored. Meanwhile, the prohibition disparately impacts Plaintiffs' *de minimus* use of their property: the habitation of a four-bedroom house by four individuals.

B. Plaintiffs are confronted with irreparable injury.

A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir.1992). Courts have also held that a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights. *See, e.g., Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir.1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm).

Meanwhile, satisfaction of the first prong of the preliminary injunction standard – demonstrating a strong likelihood of success on the merits – also satisfies the irreparable injury standard. *See Elrod v. Burns*, 427 U.S. 347, 373 (1973) (holding that if a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated).

Here, Plaintiffs have demonstrated a substantial likelihood of success on the merits. Thus, Plaintiffs will suffer irreparable injury if Defendant is not immediately enjoined from enforcing its unconstitutional policy. Further, Plaintiffs here face imminent criminal prosecution and sanction in response to the exercise of very basic rights. They also face severe economic penalty that grows larger by the day. Finally, Tenant-Plaintiffs are forced with the prospect of vacating their home in the middle of their college semester, just prior to or during their final exams.

C. No public interest is served by continued enforcement of the Dwelling Prohibition, nor would private harm accrue.

Neither the City nor any private residents will suffer any harm should an injunction be issued. The vast majority of Ohioans live in locales without such dwelling limits without chaos ensuing as a result. Indeed, the City of Bowling Green itself makes numerous exceptions to the Dwelling Prohibition, thereby demonstrating there is nothing intrinsically dangerous regarding the cohabitation of four unrelated persons. Meanwhile, the City is free to directly address externalities related to noise, traffic, health, and safety through regulations directly targeting those issues as they arise.

III. CONCLUSION

Perhaps the Dwelling Prohibition is, politically, the *easiest* way to limit population density: after all, students tend not to engage with local government when their rights are violated, and others are more likely to complain. "It is the role of the judiciary, however, to ensure the protection of individual rights." *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 710 F.Supp.2d 637 (N.D.Ohio, 2010); *E.g., Trop v. Dulles*, 356 U.S. 86, 103, (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away [fundamental rights] ..., the safeguards of the Constitution should be examined with special diligence.").

For the foregoing reasons, this Court must issue a preliminary injunction prohibiting Defendants from (1) enforcing Section 150.03, in conjunction with Sections 150.19 and 150.20 so as to prohibit the otherwise-legally-compliant occupation of private residential homes on the basis of the identity of the habitants; and (2) enforcing Section 150.03, in conjunction with Sections 150.19, 150.20, 150.140, and/or

150.999 to retaliate against Plaintiffs through criminal prosecution, issuance of fines for violation of the City's Dwelling Prohibition or otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion and memorandum in support, as well as the verified complaint filed in this action has been served upon the following, via e-mail, on the date of filing:

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