STATE OF RHODE ISLAND
SUPREME COURT

FEDERAL HILL CAPITAL, LLC, CHRISTOPHER MUSACCHIO, ALEJANDRO AMAYA, WILLIAM SMITH, AND COREY KOSSIN,	)	
Appellants,	)	
v.	)	SU-2018-0114-A
CITY OF PROVIDENCE by and through its Treasurer, James Lombardi, JORGE ELORZA, in his official capacity as Mayor of Providence, and JEFFREY L. LYKINS, in his official capacity as Director of the Providence Department of Inspection and Standards,	)	Appeal from Superior Court C.A. No. PC-2016-0808
Respondents.	)	

BRIEF FOR APPELLANTS

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Table of Contents

TABLE OF AUTHORITIES

CASES

LAW REVIEW ARTICLE

Introduction

This appeal concerns the constitutionality of a Providence ordinance that prohibits more than three college students from living together in certain single family homes. The ordinance restricts the rights of Rhode Islanders to choose where and with whom they wish to live, discriminates against a class of citizens based on their status as college students, and diminishes the property rights of landlords. The Superior Court agreed with the City of Providence that the ordinance is not subject to a strict scrutiny analysis because the ordinance does not implicate a previously recognized protected class or fundamental right. Applying a lower level of scrutiny, the Court found that the ordinance is rationally related to the City's stated desire to address noise, litter, and other perceived problems in neighborhoods around college campuses. Nevertheless, the Court also called the ordinance "nonsensical" and expressed skepticism that the ordinance would "serve its intended purpose."

This appeal raises important and novel issues regarding the rights of college students, tenants and landlords in the City of Providence. For a State and a community that values education as Rhode Island does, there is something fundamentally troubling about a law that deprives college students of a right that every other citizen enjoys, simply because they are pursuing higher education. Moreover, as the Superior Court correctly noted, the ordinance is unlikely to have any effect on the perceived nuisances it was purportedly enacted to mitigate. The Rhode Island Constitution should protect citizens from the erosion of their right to choose where and with whom they live,

especially when there is no reason to believe that the challenged law will provide any benefit to the larger community.

Statement of Facts and Prior Proceedings

This case presents a constitutional challenge to a September 2015 amendment to the City of Providence Zoning Ordinance (the "Student Housing Ordinance" or simply the "Ordinance"). The Student Housing Ordinance prohibits more than three "College Students" from living together in a non-owner-occupied single-family dwelling in an area zoned R-1 or R-1A. The Student Housing Ordinance defines "College Student" as "[A]n individual enrolled in, or attending academic courses at, any college, university or other post-secondary education institution for academic credit, whether in an undergraduate or graduate capacity." No distinction is made between graduate, undergraduate, full-time and part-time students. All are merely "College Students" for the purposes of the Ordinance. *Superior Court Decision dated February 12, 2018 ("Decision")* (Appendix Tab 2) at pp. 2-3.

The City's stated purpose for enacting the Ordinance was to address resident concerns about student behavior in the Elmhurst and Mount Pleasant neighborhoods of Providence near Providence College. *Decision*, Appendix Tab 2, pp. 2-3. A press release issued by the Providence City Council on or about September 17, 2015, explains the rationale behind the new law according to Councilwoman Jo-Ann Ryan, its sponsor:

> Ryan introduced the legislation in response to concerns from residents in the Elmhurst and Mount Pleasant neighborhoods she represents, who are frustrated that single-family homes were being purchased and rented to numerous college students. Ryan, whose ward borders the Providence College campus, said that, "The change in intended use of single-family homes is undermining the character of our neighborhoods, diminishing the quality of life, and creating health and public safety concerns." She said, "The new zoning ordinance will give the City a

> critical tool in addressing the negative impacts of student housing in single-family districts."

A copy of the press release, obtained from the City Council's website, is attached to the Complaint in this action (Appendix Tab 3) as Exhibit B.

The Appellants are the owner and tenants of a single-family home located at 15 Oakdale Street in the Elmhurst neighborhood (the "Oakdale House"). The Oakdale House is located in the neighborhood that was primarily targeted by the Student Housing Ordinance because of the relatively large number of homes that are rented to college students. *Decision*, Appendix Tab 2, p. 3. Importantly, however, the neighborhood is not limited to only single family homes. The zoning in this area was only recently changed to R-1A and R-1. Many of the homes in the area near and around the Oakdale House are two-family homes that have been "grandfathered" into an R-1 zone. *Affidavit of Robert A. D'Amico II* ("D'Amico Affidavit"), ¶18. (The D'Amico Affidavit, which was submitted to the Superior Court in support of Appellants' Motion for Summary Judgment, is included in the Appendix at Tab 4). As noted in the D'Amico Affidavit, of the 103 homes on Oakdale Street and nearby Huxley Avenue, Vincent Street and Tyndall Avenue, 39 are two or three-family homes unaffected by the Student Housing Ordinance. These streets are all zoned R-1. This is important because even if the Student Housing Ordinance is strictly enforced on these streets, nearly forty percent of the houses are multi-family units, most of which are rented to large groups of college students, and which are not impacted by the Ordinance. *Decision*, Appendix Tab 2, p. 18. In the experience of Mr. D'Amico, one of the members of FHC, the vast majority of complaints, parties, problems and Public Nuisance Warnings against student tenants in

the Elmhurst neighborhood relate to multi-family homes. *D'Amico Affidavit*, Appendix Tab 4, ¶11.

Appellant Federal Hill Capital, LLC ("FHC") purchased the Oakdale House in 2013 from the Secretary of Housing and Urban Development. For an unknown period of time prior to FHC's purchase, the Oakdale House was a vacant, bank-owned property. *D'Amico Affidavit*, Appendix Tab 4, ¶3. FHC's purchase of the property and utilization of the same as a residential rental property has improved the status of the street and the neighborhood by removing the blight of a vacant bank owned property on a dead end street and bringing it back to life with its student occupants. *D'Amico Affidavit*, Appendix Tab 4, ¶4. FHC began renting the Oakdale House to groups of four student tenants in May 2014, and has continued to do so through the present lease to the four student plaintiffs in this action. *D'Amico Affidavit*, Appendix Tab 4, ¶6. The evidence presented to the Superior Court was that during the period that the Oakdale House has been occupied by four college students:

- The neighbors of the Oakdale House have been supportive of its use as a student rental;
- The Oakdale House has been well maintained inside and out;
- Neighbors have never complained to FHC about parking, noise, fighting, parties, general behavior or any other issue related to the student tenants of the Oakdale House;
- Mr. D'Amico is unaware of any incident where the Providence Police have been dispatched to the Oakdale House in response to any student tenant behavioral issues;
- The Providence Police have never issued a Public Nuisance Warning, violation or fine, nor has the City of Providence issued any environmental summons to FHC or its tenants.

D'Amico Affidavit, Appendix Tab 4, ¶¶5-10.

As noted in the press release cited above, the City's stated purpose in passing the Student Housing Ordinance was to "give the City a critical tool in addressing the negative impacts of student housing in single-family districts." Appendix, Tab 3. The press release does not, however, tell the full story of the history of the Student Housing Ordinance. In fact, the press release and subsequent statements by the City, including the City's Memorandum, inaccurately suggest that the Ordinance was always targeted specifically to single-family homes, which is simply not the case. Rather, it originated as an ordinance that targeted student tenants occupying all dwelling units in the City of Providence, including single family and multi-family homes. *D'Amico Affidavit*, Appendix Tab 4, ¶13.

Prior to the Ordinance Committee meeting upon which the Student Housing Ordinance was voted on and approved for a vote by the full City Council, the prior iteration of the ordinance targeting student tenants in all dwelling units was referred to the City Plan Commission to consider the same in light of the city's comprehensive plan. Mr. D'Amico and many other landlords appeared at this meeting and voiced objection to the same. The members of the City Plan Commission stated that the ordinance seemed discriminatory and did not appear to be a solution to the problem of addressing noise and student behavior. The City Plan Commission voted unanimously ***against*** recommending the ordinance for approval by the Ordinance Committee. Rather, the City Plan Commission recommended that the City Council create a task force to include landlords, surrounding property owners, students, police and others to study the issues giving rise to noise and student behavior and to recommend solutions to solve this problem. *D'Amico Affidavit*, Appendix Tab 4, ¶15. It was only after this meeting and the many objections

from landlords and other property owners that Councilwoman Ryan decided to water the ordinance down to its present form, affecting only students occupying single family homes in an R-1A and R-1 zoning districts. *D'Amico Affidavit*, Appendix Tab 4, ¶14.

In short, the Student Housing Ordinance was not a carefully thought out response to problems of noise or overcrowding or parties in single-family homes in residential neighborhoods. It was, instead, a misguided effort to curtail all student housing in the Elmhurst neighborhood that was eventually watered down to apply only to single-family homes. In the course of its evolution, the Ordinance shifted from something that might have been effective but politically unachievable, to something that was palatable to the City Council but entirely unrelated to the goals that its sponsor originally set out to achieve.

The Appellants sued the Respondents in Providence County Superior Court on February 23, 2016, seeking a declaratory judgment pursuant to R.I.G.L 1956 §§ 9-30-1, *et seq.*, that the Ordinance violates Article 1, Section 2 of the Rhode Island Constitution. The parties filed cross motions for summary judgment, and on February 12, 2018, the Court (Keough, J.) granted the Respondent City of Providence's Motion for Summary Judgment and denied the Appellants' Motion for Summary Judgment. Final Judgment entered on March 26, 2018.

The Superior Court first considered which standard of review it should use to evaluate the constitutionality of the Ordinance. The Ordinance would be subject to heightened scrutiny if it affects a suspect class of people, or infringes on a fundamental right. *Decision*, Appendix Tab 2, p. 8. Without any Rhode Island Supreme Court precedent on the issue for guidance, the Superior Court declined to find that college

students are a protected class, relying largely on a South Carolina case holding that "college students have not faced a long history of discrimination, are not an insular minority, and have not been classified according to an immutable trait acquired at birth." *Decision*, Appendix Tab 2, p. 10, *citing SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla,* 781 S.E.2d 115, 123 (S.C. 2015).

In considering whether the Ordinance impacts a fundamental right – the right to choose one's own living companions – the Superior Court disagreed with an earlier decision by the same court holding that "one's choice of living location and apartment mates or housemates clearly is an option that has been exercised without governmental interference by countless people since the settling of this country." *DiStefano v. Haxton*, 1994 WL 931006 at *7 (R.I. Super. Dec. 12, 1994) (Fortunato, J.). Noting that the *DiStefano* decision is apparently at odds with the U.S. Supreme Court's decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the trial justice declared herself "hesitant to recognize the 'right of choice in housing' as a fundamental right." *Decision*, Appendix Tab 2, p. 14.

Having decided that the Ordinance does not implicate a protected class or a fundamental right, the Superior Court proceeded to consider whether the Ordinance is "rationally related to a legitimate government interest." *Decision*, Appendix Tab 2, p. 14. Even applying this "minimal scrutiny analysis," the court expressed skepticism "that this amendment will serve its intended purpose" and found that the Ordinance barely passed constitutional muster. *Decision*, Appendix Tab 2, p. 18. As the trial justice correctly noted, "the ordinance does not address the significant number of multi-family "party houses" located in the same zones, which presumably are the biggest contributors to the

ongoing issues." *Id.* Nor did the city present the court with any evidence – not a shred – that the ordinance would "correct the existing problems faced by the families living in the designated areas." *Id.* Finally, the court noted that the ordinance would prohibit four divinity students from living together in a single family home while it would not affect "four twentysomethings who have decided to forego enrollment in any one of the City's universities and instead play in a band, practicing at all hours of the day and night. . . . This seems nonsensical." *Decision*, Appendix Tab 2, p. 18-19.

In the end, however, the court found that the Ordinance's effectiveness was "at least debatable." Despite the trial justice's self-proclaimed "strong reservations," given the highly deferential standard of review, the court found that the Ordinance "comports with constitutional requirements." *Decision*, Appendix Tab 2, p. 19. In summary, the Superior Court held that:

- An ordinance may constitutionally restrict the rights of a class of people who have chosen to pursue higher education, largely because that characteristic is not immutable (i.e., they are free to drop out of college);

- An ordinance may constitutionally restrict the rights of Rhode Islanders to choose with whom they share their home, because that freedom in housing choice is not a fundamental right;

- An ordinance that is almost certainly going to be ineffective, and which the trial justice deemed "nonsensical," is constitutional under a "rational basis" analysis.

It is now up to this Court to determine whether the City of Providence can discriminate against some residents simply because they are enrolled in an institution of higher learning, whether Rhode Islanders have a fundamental right to choose their living companions, and whether the City can enact and enforce a blatantly discriminatory

ordinance merely to placate frustrated local residents, even if the ordinance itself is "nonsensical" and will almost certainly be ineffective.

Statement of Issues

1. Did the trial court err in deciding that the Ordinance is not subject to strict scrutiny review, either because college students should be treated as a protected class, or because the Ordinance implicates a fundamental right? *Decision*, Appendix Tab 2, pp. 10, 14

2. Did the trial court err in deciding that the Ordinance is rationally related to a legitimate government interest, especially in light of the trial court's finding that the Ordinance "seems nonsensical?" *Decision*, Appendix Tab 2, p. 19.

Standard of Review

This Court applies a *de novo* standard of review to questions of law or mixed questions of fact and law that implicate a Constitutional right. *State v. Wiggins*, 919 A.2d. 987, 989 (R.I. 2007).

Argument

The Plaintiffs do not dispute that there is a split among jurisdictions that have considered similar ordinances, and that a majority have found them to be constitutional. Rather, the Plaintiffs submit that Rhode Island should stand with states that have interpreted their state constitutions to protect the right of citizens to live where and with whom they choose (*see, e.g., City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980); *McMinn v. Town of Oyster Bay, 488 N.E.2d 1240* (N.Y. 1985); *Kirsch v. Prince George's County*, 626 A.2d 372 (Md. 1993)), and not with states that have taken a more

restrictive view of their citizens' rights (*see, e.g., McMaster v. Columbia Bd. Of Zoning Appeals*, 719 S.E.2d 660 (S.C. 2011); *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 145 So.3d 320 (La. 2014)). Although most courts have used the rational basis test when analyzing "unrelated party" zoning laws, there is ample justification to apply a heightened standard of review, especially where the challenged law affects fundamental liberty interests and diminishes the rights of an entire class of citizens based solely on their educational status.

Even under a rational basis standard that largely gives the City the benefit of the doubt in enacting zoning legislation, the Student Housing Ordinance cannot pass constitutional muster. As will be discussed below, the City Council could not reasonably believe that the Ordinance will be effective in addressing the concerns that purportedly led to its enactment. There is no reason to believe that in a neighborhood with a mix of single family homes and multi-family homes, enacting legislation that targets only the single family homes will have any appreciable impact on noise, parking, public drinking, or other problems that might sometimes be associated with student housing. The Ordinance also discriminates against Rhode Islanders solely on the basis of their decision to pursue higher education, in clear violation of the equal protection clause of the Rhode Island Constitution.

1. The Court Erred In Finding That The Ordinance Need Not Be Reviewed Using a Strict Scrutiny Standard.

Appellants recognize that this is an issue of first impression for the Rhode Island Supreme Court, which has not previously recognized college students as a protected class, or the right to choose one's living companions as a fundamental right. Although

some courts have used the rational basis test when analyzing similar zoning laws, there is ample justification to apply a heightened standard of review, especially where the challenged law affects fundamental liberty interests and diminishes the rights of an entire class of citizens based solely on their educational status.

In its decision to reject the strict scrutiny standard in this case, the Superior Court relied heavily on the United States Supreme Court decision in *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974), in which the Court held that a suburb could enact an ordinance restricting land use to single-family dwellings, with "family" defined as any number of related persons but not more than two unrelated people. *Id.* at 2. *Belle Terre*, however, is distinguishable because the challenged ordinance did not target college students as a group, which raises an especially troubling equal protection issue. Nor is *Belle Terre* binding precedent in this case, which was brought solely under the Article 1, Section 2 of the Rhode Island Constitution.

This Court has been very clear that "the equal-protection guarantees secured by the Fourteenth Amendment in no way limit those protections Rhode Island citizens possess by nature of article 1, section 2 [of the Rhode Island Constitution]." *Providence Teachers' Union Local 958, AFL-CIO v. The City Council of the City of Providence*, 888 A.2d 948, 956 (R.I. 2005). As the Court noted, "[t]he drafters' rationale for including a parallel yet independent equal-protection clause was presumably to protect the citizens of this state should the federal judiciary adopt a more narrow interpretation of the Fourteenth Amendment." *Id. See also East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006) (recognizing "the autonomous character of each constitution's inviolable guarantees" of equal

protection and due process). It is within this Court's discretion to interpret our state constitution more broadly than the U.S. Constitution has been interpreted in similar cases elsewhere.

The only other Rhode Island court to consider the constitutionality of a law similar to the Student Housing Ordinance was the Superior Court in *DiStefano v. Haxton*, 1994 WL 931006, WC-1992-0589 (Super. Ct. Dec. 12, 1994) (Fortunato, J.) (Appendix Tab 5). In *DiStefano*, Judge Fortunato held that a Narragansett ordinance prohibiting more than three unrelated people from sharing a residential unit violated the equal protection and due process guarantees of the Rhode Island Constitution. Judge Fortunato correctly anticipated the later-issued decisions of the Supreme Court in *Providence Teachers' Union* and *East Bay Community Development Corp.*, *supra*, writing that even if the analysis of a law under the US and Rhode Island Constitutions is similar, "there is no need to conclude that the results will be identical," and that the Rhode Island Constitution affords "a greater protection than that which might be provided by the Fourteenth Amendment in the federal charter." *DiStefano* at 5.

Ultimately, with respect to the substantive due process analysis, Judge Fortunato concluded that:

> [P]laintiffs in the instant matter have a liberty interest which permits the landlord plaintiffs to allow occupancy of their single units by more than three unrelated individuals and the tenant plaintiffs have a concomitant liberty interest to come together in groups larger than three to rent and occupy such units. . . . It is clear that liberty of choice in such matters is a <u>fundamental right</u> protected by the due process clause of the Rhode Island Constitution.

DiStefano at 7-8 (emphasis added). The Court also concluded that it could apply a "strict scrutiny" standard to the equal protection analysis, i.e., whether Narragansett could treat unrelated cohabitants differently from those related by blood.

The California Supreme Court reached a conclusion similar to Judge Fortunato's in *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980), holding that the City could not infringe on its residents' fundamental right to privacy without a compelling governmental interest (i.e., "strict scrutiny"). Consequently, the court struck down an ordinance prohibiting more than five unrelated parties from living together in a single family home. *Id.*, 610 P.2d at 440-442. Just as the California Constitution expressly protects the right to privacy, such a right can also be implicit in a state constitution, and Judge Fortunato found just such a right to exist in Rhode Island's Constitution. *DiStefano* at 7 (finding that "liberty of choice" for both tenants and landlords is a fundamental right).

At least one commentator has argued that the rational basis test provides inadequate constitutional protection in zoning cases, and the burden of justifying the need for "single-family" housing ordinances should be shifted to the government. *See* Katia Brener, *Belle Terre and Single-Family Hole Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. Law Review 447 (1999). A copy of Ms. Brener's article is included in the Appendix at Tab 6. Based on a through analysis of *Belle Terre* and subsequent state court cases, Ms. Brener argues that:

> "[S]tate courts examining single-family home ordinances can and should apply heightened scrutiny, or 'second-order' rational basis review, which requires the government to establish that the classification is substantially related to important and legitimate objectives, so that valid and sufficiently weighty policies actually justify the ordinance."

Id. at 482. In short, there is solid precedent for this Court to apply a higher standard of review to the Student Housing Ordinance than the "rational basis" analysis. State and

local governments must offer compelling justification before restricting one group of citizens' constitutional rights to due process and equal protection.

The Student Housing Ordinance is different from the ordinances considered in *Belle Terre*, *DiStefano*, and most of the other cases cited in the City's Memorandum because it treats an entire class of citizens differently based on their status as "college students." This raises a difficult issue for the City, one not touched upon in cases concerning "unrelated parties" ordinances: Does the Rhode Island Constitution permit the City to discriminate against residents based on their educational status? The City attempts to downplay this question by referring to the Student Housing Ordinance as the "Single-Family Dwelling Amendment," but whatever its name, the unequivocal goal and impact of the Ordinance is to create a separate set of laws that applies only to individuals "enrolled in, or attending academic courses at, any college, university or other post-secondary education institution for academic credit, whether in an undergraduate or graduate capacity."[1]

One of the few courts to consider a zoning ordinance specifically targeted at college students held that "[t]o differentiate between permissible residential classes by creating more strenuous zoning requirements for some and less for others based solely on the occupation which the tenant pursues away from that residence is the sort of arbitrary classification forbidden under our constitutions." *Kirsch v. Prince George's County*, 626 A.2d 372, 380 (Md. 1993). Consequently, the Maryland Court of Appeals invalidated an

[1] The Student Housing Ordinance broadly defines college students to apply to graduate students and part-time students. Using the City's definition, 18-year-old college freshmen are viewed identically to a 25-year-old medical student at Brown and a 70-year-old senior citizen taking part-time courses at CCRI. The impact of this inclusiveness is discussed further in the Appellants' rational basis analysis, *infra.*

ordinance that prohibited "mini-dormitories," which were defined as one-, two-, or three-family dwellings occupied by three to five unrelated individuals, "all or part of whom. . . are registered full-time or part-time students at an institution of higher learning." *Id.* at 373. The court distinguished its case from the facts of *Belle Terre* on these grounds, noting that the Maryland ordinance "does not differentiate based on the nature of the use of the property, such as a fraternity house or a lodging house, but rather on the occupation of the persons who would dwell therein." *Id.* at 381. This distinction between the facts of *Belle Terre* and the facts of the *Kirsch* case proved constitutionally fatal to the challenged Prince George's County ordinance.

One of the questions before this Court, therefore, is whether the City of Providence should be permitted to legislate college students – including part-time and graduate students – into a kind of second-class citizen without all of the rights afforded to other residents of the City. Rhode Island's public policy should favor education; we should be encouraging our young people to pursue higher education, just as we should be encouraging mid-career adults to return to school part-time to expand their career opportunities. We should be smoothing the path to the pursuit of education, not erecting obstacles that will limit the housing choices available to a resident simply because she is enrolled in a course at CCRI or is a full-time undergraduate at Providence College. Instead, the City would permit four unrelated and unemployed eighteen year olds to live together in a single-family home, but should they decide to enroll in a college course, their cohabitation would immediately become illegal.

In short, there is ample precedent for this Court to apply a higher standard of review to the Student Housing Ordinance than the "rational basis" analysis. State and local

governments must offer a compelling justification before restricting one group of citizens' constitutional rights to due process and equal protection.[2] The Superior Court erred in its finding to the contrary.

2. The Court Erred In Finding That The Ordinance Is Rationally Related To A Legitimate Government Interest.

The Student Housing Ordinance is an unconstitutional infringement on the due process and equal protection rights of landlords and students even if only minimal scrutiny is applied. The Superior Court erred in finding that the Ordinance is rationally related to a legitimate government interest, *Decision*, Appendix Tab 2, p. 19, because it is not credible that the Ordinance will have any impact on the problems it was purportedly enacted to address, or that the problems themselves actually exist.

The City alleges that the purpose of the Ordinance was to aid the City in preserving the residential, family character of the Elmhurst and Mount Pleasant neighborhoods near Providence College and Rhode Island College. Nevertheless, the City did not provide any credible evidence that single family homes housing more than three college students have been a significant source of complaints about noise, parking, public drinking or other similar issues. For example, even though the Ordinance is written to apply only to streets zoned R-1 and R-1A (i.e., residential single-family homes), these neighborhoods in Elmhurst include many multi-family homes that were grandfathered into the single-

[2] The City argued below that college students do not meet the traditional requirements of a "protected class" entitled to the highest level of protection under the Constitution in part because "[s]tatus as a college student is not a trait that is immutable or unalterable." In essence, the City's position is that if a college student wants to enjoy full citizenship status in Providence, including the right to live in a single-family home with three housemates of her choosing, all she has to do is drop out of college. The absurdity of this argument is apparent on its face.

family zones during a recent change in zoning. *D'Amico Affidavit*, Appendix Tab 4, ¶18. The area within approximately 750 feet of the Oakdale House includes 39 multi-family homes and 64 single-family homes. *D'Amico Affidavit*, Appendix Tab 4, ¶19. Many of the multi-family homes are rented to large groups of college students, and are unaffected by the Student Housing Ordinance.

The City certainly has other tools in its arsenal to "preserve the residential character" of Elmhurst and Mount Pleasant. There are existing laws that, if strictly enforced, would curtail problems of late-night parties and rowdy behavior: noise ordinances, drug and alcohol laws, and disorderly conduct laws to name just a few. Residents (whether students or non-students) can be cited for environmental violations if their premises are not well maintained or littered with rubbish. The City could employ all of these remedies based on actual conduct, rather than educational status, without treating one group of residents differently from another based solely on their educational status.

There is a split among jurisdictions that have considered "unrelated parties" zoning ordinances (and, in rare cases, ordinances targeted at college students) using a rational basis analysis. The essence of the split is really between courts that show extreme deference to local lawmakers, and those that are more reluctant to allow the government to zone neighborhoods based on the residents' characteristics rather than their conduct. *See* Brener, *Belle Terre and Single-Family Hole Ordinances*, 74 N.Y.U. Law Review at 463 (Appendix Tab 6). State courts in Rhode Island, Michigan, New York, and New Jersey have all invalidated "unrelated party" zoning ordinances using a rational basis test and, as discussed above, the Maryland Court of Appeals relied on a rational basis analysis

to strike down a zoning law targeted at college students in *Kirsch v. Prince George's County*, 626 A.2d 372 (Md. 1993).

In Rhode Island, even though Judge Fortunato found that the right to choose your living situation (or in the case of landlords, to choose your tenants) were "liberty interests" that required heightened scrutiny of the challenged ordinance, he ultimately decided the case using a rational basis analysis. *DiStefano* at 7 (Holding that "Narragansett has no rational reason, let alone a compelling one, to curtail such living arrangements . . . .").[3] Similarly, the Court of Appeals of New York held that "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." *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1243 (N.Y. 1985). *See also State v. Baker*, 405 A.2d 368, 375 (N.J. 1979) (declaring that an "unrelated parties" zoning ordinance did not pass a rational basis test under the New Jersey Constitution because it was insufficiently related to the city's goals of preventing congestion and overcrowding); *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831, 844 (Mich. 1984) (holding an "unrelated parties" ordinance violated Michigan Constitution's guarantee of due process because it was not rationally related to health and safety concerns).

[3] In reaching this conclusion, Judge Fortunato relied in part on statements by law enforcement officials in Narragansett that "neither the number of occupants in a dwelling place nor marital status nor consanguinity affects disorderly conduct." *DiStefano* at 7. While those statements are not evidence in the instant case, Plaintiffs suggest that this Court can and should take judicial notice of them.

Although Appellants contend that the Court should apply strict scrutiny to the Student Housing Ordinance (or at least the "heightened scrutiny" proposed in the N.Y.U. Law Review article cited above), the fact is that the Ordinance cannot survive a rational basis analysis, and indeed bears even less of a relationship to the City's stated goals than the ordinances invalidated in the cases discussed above, for at least two reasons. First, the Student Housing ordinance defines "college student" to include both graduate students and part time students. The City would like to paint a picture of off-campus college life similar to the movie *Animal House*, but in addition to full-time students, the Ordinance prohibits four divinity students from renting a single-family home together, or four unrelated adults who are taking part time college courses. There is absolutely no evidence that tenants in Providence are more likely to cause a disturbance merely because they are enrolled at an institution of higher learning.

Second, The City would lead the Court to believe that neighborhoods zoned R-1 and R-1A (those affected by the Ordinance) are purely "family" neighborhoods filled with single-family homes. This is simply untrue. In the area of Elmhurst immediately surrounding the Oakdale House, only 64 of 103 homes are actually zoned as single-family properties. *D'Amico Affidavit*, Appendix Tab 4, ¶18-19. The rest are two- and three-family homes, which are the source of the vast majority of complaints, parties, problems and Public Nuisance warnings in the neighborhood. *D'Amico Affidavit*, Appendix Tab 4, ¶11. In other words, restricting the ability of more than three college students to live in single family homes will not in any way change or improve the "character" of the neighborhood. The parties will continue unless and until the City

effectively employs the other legal mechanisms at its disposal (such as noise, alcohol and public nuisance ordinances).

Significantly, the Superior Court expressed great skepticism that the Ordinance would "serve its intended purpose," noting that "the City has failed to articulate the evidence upon which it relies to support the conclusion that… [the Ordinance] will correct the existing problems faced by the families living in the designated areas," and concluding that the Ordinance "seems nonsensical." *Decision*, Appendix Tab 2, pp. 18-19. The City argued that an ordinance should not fail the rational basis test merely because it is under-inclusive or over-inclusive. This may be true, but the Superior Court erred in allowing an ordinance to stand that is both discriminatory and obviously ineffective. The rational basis test may give deference to the legislative body, but it cannot be construed so leniently as to render Constitutional review effectively meaningless.

Conclusion

The Student Housing Ordinance relegates anyone enrolled in college or graduate school to the status of second-class citizen within the City of Providence, without the rights guaranteed to all other residents of the City. It also diminishes the rights of property owners to rent their homes to the tenants of their choice. Worst of all, there is no reasonable connection between the Ordinance and the City's stated goal of preserving the "family" character of the targeted neighborhoods. The Superior Court erred in holding that the Ordinance is not subject to a strict scrutiny analysis, and further erred in its holding that the ordinance is rationally related to a legitimate state interest. The Court should reverse the Superior Court decision and find that the Student Housing

Ordinance violates the Due Process and Equal Protection Clauses of the Rhode Island Constitution.

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