STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

FEDERAL HILL CAPITAL, LLC, CHRISTOPHER MUSACCHIO, ALEJANDRO AMAYA, WILLIAM SMITH, and COREY KOSSIN, *Plaintiffs,*	:	
vs.	:	C.A. No. PC-2016-0808
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, *Defendants.*	:	

DEFENDANT CITY OF PROVIDENCE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Defendant City of Providence ("the City" or "Defendant") submits this memorandum in support of its motion for summary judgment.[1] Due to the memorandum's length, the City provides a Table of Contents as a roadmap for the Court. See infra p.2.

[1] Defendant City of Providence brings this motion on behalf of all three named defendants, including the 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 capacity as Director of the Providence Department of Inspection and Standards, as they are but one real party in interest. It is well understood that suits against government officials in their official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent," and, therefore, are treated as suits against the governmental entity. Hafer v. Melo, 502 U.S. 21, 25 (1991) ("the real party in interest in an official-capacity suit is the governmental entity and not the named official") (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); see also Andrade v. Perry, 863 A.2d 1272, 1278 (R.I. 2004) (a suit against a governmental official in his or her official capacity "is not a suit against the official but rather is a suit against the official's office").

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I. INTRODUCTION

This is a declaratory judgment action challenging an amendment to the Providence Zoning Ordinance of December 24, 2014 (the "Zoning Ordinance"). The amendment, Providence Ordinance Ch. 2015-47, No. 455, (Sep. 18, 2015) ("the Single-Family Dwelling Amendment" or "the Amendment") regulates the use of single-family homes in the City's R-1A and R-1 (Residential) zoning districts. More specifically, the Amendment provides that no more than three (3) college students may reside in single-family dwellings unless the homes are owner-occupied. (See Amendment, attached as **Exhibit A**.) As its moniker reflects, the Amendment applies only to single-family dwelling units (not to two-, three-, or multi-family dwelling units). In addition, it applies only to single-family dwellings located in two of the City's twenty (20) zoning districts—the two districts the Zoning Ordinance specifically defines as intended for the lowest density residential uses.

Plaintiffs—a limited liability real estate investment company and four college students to whom it leases a single-family dwelling in an R-1 district—bring a facial challenge to the Amendment based on the due process and equal protection clauses of Article I, Section 2 of the Rhode Island Constitution. As explained in more detail below, the City is entitled to judgment as a matter of law because the Amendment is constitutionally sound.

II. SUMMARY OF ARGUMENT

Pursuant to well-established constitutional methodology, this Court must review the Single-Family Dwelling Amendment by applying "minimal-scrutiny," otherwise known as rational basis review, because the ordinance does not involve a suspect classification nor implicate a fundamental right. The rational basis test requires only that the Single-Family Dwelling Amendment be rationally related to a legitimate governmental interest. Under this

standard, which is highly deferential to the legislature, an ordinance may be underinclusive and overinclusive, and need not be supported by factual evidence. Rather, the Court ***must*** uphold the law as long as the Court can conceive of any reasonable basis that may justify the legislation.

Here, the regulation of the use of single-family dwelling units in just two of the City's zoning districts, by restricting the number of college students who may reside in non-owner occupied single-family dwellings, is rationally related to several valid governmental objectives. Those objectives include preserving the residential character of these neighborhoods, particularly as places for families and children to prosper; protecting the affordability and availability of single-family homes; fostering stability of neighborhoods while limiting transiency among residents; encouraging investment in the larger community; promoting low density development; reducing traffic and parking issues associated with the congestion of motor vehicles; protecting the scenic character of the areas; and otherwise exercising the municipality's authority to protect the health, safety, and welfare of its inhabitants through zoning regulation. As discussed infra, each of these objectives is recognized by the courts as a valid and rational basis for an ordinance such as the Single-Family Dwelling Amendment.

Based on the City Council's observations of college life, as well as their interactions with their constituents, it was conceivable and reasonable for the legislative body to conclude that limiting the neighborhoods in which large groups of college students may reside in leased single-family dwellings would advance their legitimate governmental objectives. It is indubitable that the off-campus living arrangements of college students are transient in nature, and that college students are less likely to be interested in forming roots in the community or otherwise contributing to its long-term viability. Furthermore, it is common knowledge that the living habits of groups of college students generally differ from those of families. Accordingly, it was

reasonable to prohibit the use of single-family dwellings by large groups of college students in certain neighborhoods where such use is incompatible with the residential character of those areas.

III. BACKGROUND

A. The Zoning Power and the Zoning Ordinance Generally

It has long been recognized that zoning statutes and ordinances are legislative exercises of the state's police power and that the primary objective of such laws is to protect the public health, safety, morals, and welfare. See Robinson v. Town Council of Narragansett, 199 A. 308, 313 (R.I. 1938); see also Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (seminal case upholding zoning legislation as constitutional unless unreasonable and without substantial relation to the public health, safety, morals, or general welfare).

In Rhode Island, the zoning power has been delegated to municipalities by virtue of the Rhode Island Zoning Enabling Act of 1991. See R.I. Gen. Laws § 45-24-27 et seq. The City passed its first Zoning Ordinance pursuant to said Act in 1992. After twelve years of amendments, the City recently enacted an entirely revised Zoning Ordinance. See Providence Ordinance Ch. 2014-39, No. 513 (November 24, 2014). In its present form, the Zoning Ordinance creates twenty (20) basic zoning districts in the City, six of which are residential.[2] See Zoning Ordinance §§ 300 (Districts) and 400 (Purpose Statements for Residential Districts) (attached as **Exhibit B** and **Exhibit C**, respectively). The uses permitted as of right in each zoning district are reflected in Zoning Ordinance § 1201 (Table 12-1: "Use Matrix") (attached as

[2] In addition to the twenty (20) basic zoning districts, the City has established eight "Special Purpose Districts," which are overlay districts. See Zoning Ordinance § 300.H (Districts) (**Exhibit B**). The overlay districts have no relevance to this case.

Exhibit D). Dwellings are permitted in fourteen (14) of the twenty (20) basic zoning districts.[3] See id.

B. The Single-Family Dwelling Amendment

The City Council enacted the Single-Family Dwelling Amendment in response to residents' concerns about the changing nature of neighborhoods in proximity to the City's colleges and universities, in particular the Elmhurst neighborhood near Providence College. On July 27, 2015, the City Council held a duly noticed and advertised public hearing on the Amendment, consistent with the requirements of § 45-24-53 of the General Laws. Numerous members of the community attended the hearing and expressed their concerns to the City Council's Committee on Ordinances. Additionally, members of the public submitted letters and written materials to the council for its consideration. (See documents, attached as **Exhibit E**.)

The public comments and letters revealed wide-ranging concerns that the fabric of certain residential communities was dramatically changing as a result of the conversion of single-family homes into off-campus student housing by profit-driven landlord companies—to the detriment of the families that have historically resided in those areas of the City. The complaints included the following concerns, among others:

- Loud and rowdy late-night parties that wake children and babies, not to mention adults;
- Families, including children, witnessing public drunkenness, public urination, and sexual intercourse in cars parked in close proximity to their homes;
- Increased crime related to drug-use and alcohol abuse (disorderly conduct, etc.)

[3] Other types of residential uses may be permitted in other zoning districts (such as community residences and group quarters). See Zoning Ordinance § 1201 (Table 12-1: "Use Matrix").

and the associated need for an increased police presence;

- Diminishing home values because of, *inter alia*, the prevalence of discarded liquor bottles, beer cans, and red cups strewn across yards, as well as overgrown lawns and poorly-maintained exteriors;
- Increased prevalence of motor vehicles, sometimes as many as eight to ten cars per single-family dwelling unit, resulting in increased traffic, lawns being used as parking areas and/or replaced with concrete to provide for additional parking, and difficulty obtaining street parking;
- Inability of young or low-income families to find affordable housing because of the rapid purchase of single-family houses in the neighborhood by landlord companies who can recoup their investment by maximizing the number of tenants; and
- The attraction of students who attend colleges *outside of the area* to single-family housing in certain neighborhoods because landlord companies have marketed these properties as desirable enclaves for the college experience.

Of course, all of these factors act as a deterrent to families who would otherwise wish to purchase affordable single-family homes in those neighborhoods, live and form roots in the community, and cultivate a high quality of life in family-oriented areas.

On September 18, 2015, as a reasonable response to these concerns, and to their negative effect on the health, safety, and general welfare of communities that the Zoning Ordinance designates as neighborhoods of traditional single-family dwelling units, the City Council enacted the Single-Family Dwelling Amendment, amending sections 201 and 1202 of the Zoning Ordinance. The Amendment provides that "[i]n the R-1A and R-1 districts, a single-family

dwelling, that is non-owner occupied, shall not be occupied by more than three college students," who are defined as "individual[s] enrolled as … undergraduate or graduate student[s] at any university or college educational institution who commute[] to a campus." (**Exhibit A**) Put differently, the Amendment prohibits the use of non-owner occupied, single-family dwellings in R-1A and R-1 (Residential) zones as housing for four (4) or more college students.

The R-1A and R-1 districts in Providence are the City's lowest-density residential districts, in which few non-residential uses are allowed. See Zoning Ordinance § 400 (Purpose Statements for Residential Districts) (**Exhibit C**). Apart from single-family dwellings, there are only ten other uses permitted as of right in R-1A and R-1 zoning districts, five of which are mandated by state law.[4] See Zoning Ordinance § 1201 (Table 12-1: Use Matrix) (**Exhibit D**); R.I. Gen. Laws § 45-24-37(b).

Plaintiffs brought this action on February 23, 2016 claiming the Amendment is facially unconstitutional. According to the complaint, plaintiff Federal Hill Capital, LLC ("FHC") owns a single-family home at 15 Oakdale Street in Providence that it leased to the four individually-named plaintiff-tenants from June 1, 2016 until May 24, 2017.[5] All four plaintiff-tenants are

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[4] The Zoning Enabling Act requires all municipalities allow the following uses in all zoning districts: community residences (Type 1), day care centers, accessory dwelling units, places of worship, and plant agriculture. See R.I. Gen. Laws § 45-24-37(b). Providence also permits as of right in R-1A and R-1 zoning districts community centers, conservation areas, cultural facilities, primary or secondary schools (grades K-12), and parks and playgrounds. See Zoning Ordinances § 1201 (Table 12-1: Use Matrix) (**Exhibit D**).

[5] Pursuant to the Rhode Island Secretary of State's public records, FHC was incorporated in Rhode Island in 2009 for the purpose of "providing real estate investment capital." Its purpose was amended in 2010 to "providing real estate investment capital and real estate holdings." FHC acquired the Oakdale Street property without financing on or about June 18, 2013, paying $100,000 cash. From October 1, 2013 to May 25, 2014, FHC leased the Oakdale Street property to four college students at a rate of $1,600 per month. From June 1, 2014 to May 25, 2015, FHC leased the property to four college students at a rate of $2,300 per month. From June 1, 2015 to May 24, 2016, FHC leased the property to four college students at a rate of $2,600 per month. From June 1, 2016 to the present, FHC leased the property to the four plaintiff-tenants at a rate of

currently college students. The Oakdale Street property is located in an R-1 zoning district. Accordingly, pursuant to the complaint, the use of the Oakdale Street property is in violation of the Zoning Ordinance.

Plaintiffs allege that the Single-Family Dwelling Amendment is an unconstitutional intrusion into the rights of college and graduate students to choose with whom they wish to live, and infringes on the rights of property owners to rent to tenants of their choice. Plaintiffs further allege that restricting the number of student tenants who reside in single-family homes in R-1A and R-1 zones will not make the affected neighborhoods any quieter, safer, or cleaner. The City has denied their allegations and, having engaged in limited discovery, now brings this motion for summary judgment in its favor.[6]

IV. STANDARD OF REVIEW

Motions for summary judgment are governed by Rule 56 of the Superior Court Rules of Civil Procedure. Summary judgment is appropriate if the Court concludes, "after viewing the evidence in the light most favorable to the nonmoving party, that there is no genuine issue of material fact to be decided and that the moving party is entitled to judgment as a matter of law." Pereira v. Fitzgerald, 21 A.3d 369, 372 (R.I. 2011).

Because this case involves a facial challenge to an ordinance, the City does not anticipate,

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$2,400 a month. ***By the end of the current lease term, FHC will have recouped the purchase price for the property, in four years' time.***

[6] The City notes at the outset that it anticipates Plaintiffs will rely principally on DiStefano v. Haxton, 1994 WL 931006, WC-1992-0589 (Super. Ct. Dec. 12, 1994) (Fortunato, J.), an unpublished Superior Court decision, in support of their position that the Amendment is unconstitutional. Were it not for DiStefano, the City might have been comfortable submitting a more concise memorandum. The errors in the court's reasoning in DiStefano, and its distinguishing characteristics, however, become apparent with a complete understanding of the constitutional methodology to be employed in zoning matters and upon reviewing decisions in the overwhelming majority of jurisdictions, including the United States Supreme Court, that have upheld similar zoning ordinances as constitutional.

or raise, any genuine issues of material fact. Rather, this case presents a legal question regarding the constitutionality of the Amendment. In the interest of being thorough, however, the City notes that, in ruling on a motion for summary judgment, the hearing justice applies a perspective most favorable to the nonmoving party, and "the party who opposes a summary judgment motion 'bears the burden of proving, by competent evidence, the existence of facts in dispute.'" DeMarco v. Travelers Ins. Co., 26 A.3d 585, 605 (R.I. 2011) (citing Cullen v. Lincoln Town Council, 960 A.2d 246, 248 (R.I. 2008)). Further, the non-moving party "cannot rest upon mere allegations or denials present in the pleadings, mere conclusions, or legal opinions." Id. (citing Industrial Nat'l Bank of Rhode Island v. Patriarca, 502 A.2d 336, 228 (R.I. 1985)).

When interpreting an ordinance, the Court employs the same rules of construction that it applies when interpreting statutes. See State ex rel. City of Providence v. Auger, 44 A.3d 1218, 1226 (R.I. 2012); Pierce v. Providence Ret. Bd., 15 A.3d 957, 963 (R.I. 2011). Importantly, when faced with a challenge to the constitutional validity of an ordinance, it is well established that the Court "***begin[s] with a presumption that the enactment is constitutional***." Auger, 44 A.3d at 1226 (emphasis added); see State v. Germane, 971 A.2d 555, 573 (R.I. 2009) ("legislative enactments … are presumed to be valid and constitutional"); Mesolella v. City of Providence, 439 A.2d 1370, 1373-74 (1982) (amendments to zoning ordinances are presumed valid). The Court is to "***approach[] constitutional questions with great deliberation, caution, and even reluctance***, and … do[es] not declare a statute void unless [the Court] find[s] it to be constitutionally defective beyond a reasonable doubt." Moreau v. Flanders, 15 A.3d 565, 573-74 (R.I. 2011) (citing Gorham v. Robinson, 186 A. 832, 837 (R.I. 1936) (emphasis added)). Indeed, the Court "attach[es] to the enactment every reasonable intendment in favor of constitutionality." Moreau, 15 A.3d at 574; Gem Plumbing & Heating Co. v. Rossi, 867 A.2d 796, 808 (R.I. 2005)

(the "Court will attach every reasonable intendment in favor of constitutionality in order to preserve the statute") (internal quotation marks and alterations omitted).

Furthermore, "it is well settled that '***the party challenging the constitutional validity of an act carries the burden*** of persuading the court that the act violates an identifiable aspect of the Rhode Island … Constitution." Moreau, 15 A.3d at 574 (quoting Newport Court Club Associates, 800 A.2d 405, 409 (R.I. 2002) (emphasis added)). "Unless the party challenging the statute's constitutionality can 'prove beyond a reasonable doubt that the act violates a specific provision of the [state] constitution …, [the] Court will not hold the act unconstitutional.'" Id. (quoting Mackie v. State, 936 A.2d 588, 595 (R.I. 2007)) (first set of brackets in original). See also E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Town of Barrington, 901 A.2d 1136, 1149-50 (R.I. 2006) ("Court will not invalidate a statute on constitutional grounds 'unless the challenging party can prove beyond a reasonable doubt that the statute at issue is repugnant to the provision of the Rhode Island Constitution.'").

V. ARGUMENT

A. The Single-Family Dwelling Amendment Does Not Violate the Equal Protection or Due Process Guarantees of the Rhode Island Constitution

i. *State Constitutional Guarantees Are Similar to Federal Constitutional Guarantees*

Although Plaintiffs' complaint challenges the Single-Family Dwelling Amendment under the due process and equal protection clauses of the state constitution, "article 1, section 2 of the Rhode Island Constitution is parallel to section 1 of the Fourteenth Amendment" of the United States Constitution.[7] E. Bay Cmty. Dev. Corp., 901 A.2d at 1150; see, e.g., Kleczek v. Rhode

[7] Compare U.S. Const. Amend. XIV, § 1 ("No state shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.") with R.I. Const., art. 1, § 2 ("No person shall be deprived of life,

Island Interscholastic League, Inc., 612 A.2d 734, 740 (R.I. 1992) (noting that article 1, section 2 of the Rhode Island Constitution contains protections similar to the guarantees in the Fourteenth Amendment to the United States Constitution).[8] Accordingly, Rhode Island Supreme Court precedent interpreting these provisions of the state constitution routinely looks to federal jurisprudence analyzing the due process and equal protection clauses in the Fourteenth Amendment—noting, of course, "the autonomous character of each constitution's inviolable guarantees." E. Bay Cmty. Dev. Corp., 901 A.2d at 1150 (conducting "a hybrid analysis" in interpreting an act under the due process and equal protection clauses of both the federal and state constitutions); Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of City of Providence, 888 A.2d 948, 956 (R.I. 2005) ("borrow[ing] a standard articulated and applied in related federal appellate cases to analyze plaintiff's claim under our state constitution," but noting that the drafters of the 1986 Rhode Island Constitution created an independent state foundation for individual rights presumably in case the federal judiciary should adopt a narrower interpretation of the Fourteenth Amendment).

While states are free to adopt higher standards of protection than those guaranteed by the federal constitution, see R.I. Const., art. 1, § 24 ("The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States."); Moreau, 15 A.3d at 588 ("a state may choose to create stronger constitutional protections than those afforded by the federal constitution"), the Rhode Island Supreme Court consistently follows the methodology

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liberty or property without due process of law, nor shall any person be denied equal protection of the laws.").

[8] See also State v. Germane, 971 A.2d 555, 583 (R.I. 2009) (noting that the due process clause of the federal constitution is "the parallel provision of our state constitution"); Rhode Island Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995) ("Article 1, Section 2, of the Rhode Island Constitution provides individuals with equal protection guarantees similar to those contained in the United States Constitution.").

employed by the United States Supreme Court in substantive due process and equal protection matters. See, e.g., In re Advisory From the Governor, 633 A.2d 664, 669 (R.I. 1993) ("by applying the federal analysis …, we shall answer the … question under both the United States and Rhode Island Constitutions"); Kleczek, 612 A.2d at 740 ("we shall continue to employ analysis on the basis of strict, intermediate, and rational-basis review…").

ii. *The Court Must Apply Rational Basis Review Because the Amendment Does Not Implicate a Suspect Class or Fundamental Right*

Plaintiffs have raised both an equal protection and due process challenge to the Amendment; however, because of the similarities between the two arguments, only one analysis is required. See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981) (remarking that if a statute does not violate equal protection, "it follows a fortiori" that it does not violate due process); Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 46 (1st Cir. 2003); Montalvo-Huertas v. Rivera-Cruz, 885 F.2d 971, 976 n. 7 (1st Cir. 1989) (noting that "the type and kind of scrutiny applied, and the result, would be no different on either theory"); see also Riley v. The Rhode Island Dept. of Env. Mgmt., 941 A.2d 198, 206 (R.I. 2008) (articulating the same analytical approach to both a substantive due process and equal protection claim).[9]

The state constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws." R.I. Const. art. 1, sec. 2. Nonetheless, the Rhode Island Supreme Court "consistently has held that the [l]egislature enjoys a wide scope of discretion in enacting laws that affect some

[9] From the Plaintiff's complaint, Defendant presumes that Plaintiffs are advancing a substantive due process challenge only, and not a procedural due process claim. "Procedural due process ensures that notice and an opportunity to be heard precede any deprivation of a person's life, liberty, or property." Moreau v. Flanders, 15 A.3d 565, 587-88 (R.I. 2011). See also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); State v. Germane, 971 A.2d 555, 574 (R.I. 2009). Plaintiff's complaint does not allege any deficiencies in the legislative process resulting in the passage of the Amendment.

classes of citizens differently from others" and that "not all legislative classifications are impermissible." Mackie v. State, 936 A.2d 588, 596 (R.I. 2007) (quoting Cherenzia v. Lynch, 847 A.2d 818, 823 (R.I. 2004)) (internal quotation marks omitted).

Equal protection of the laws generally "proscribes governmental action which treats one class of people less favorably than others similarly situated." Moreau v. Flanders, 15 A.3d 565, 587 (R.I. 2011) (quoting Perrotti v. Soloman, 657 A.2d 1045, 1049 (R.I. 1995)). However, equal protection "does not 'demand that a statute necessarily apply equally to all persons.'" Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 737 (R.I. 1992).

With regard to due process, "the substantive component of due process 'guards against arbitrary and capricious government action.'"[10] Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 794 (R.I. 2014). To prevail on such a claim, the statute must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." E. Bay Cmty. Dev. Corp., 901 A.2d at 1150 (quoting Cherenzia, 847 A.2d at 826).

In determining the appropriate level of scrutiny when a party challenges the constitutionality of legislation under equal protection and due process guarantees, the Court "must examine both the nature of the classification established by the legislation and the individual rights that may be infringed upon by the legislation." City of Pawtucket v. Sundlun, 662 A.2d 40, 60 (R.I. 1995) (citing Kennedy v. State, 654 A.2d 708, 712 (R.I. 1995)). "If a statute impinges on a fundamental right or creates a suspect classification, [the] court must examine the statute with 'strict scrutiny.'" Cherenzia, 847 A.2d at 823 (citing Kennedy, 654 A.2d at 712)). If the legislation involves neither a fundamental right nor a suspect classification,

[10] Additionally, "substantive due process prevents the use of governmental power for purposes of oppression, or abuse of governmental power that is shocking to the conscience." Moreau, 15 A.3d 565, 581 (quoting L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 211 (R.I. 1997)).

however, the appropriate level of scrutiny is "minimal scrutiny, which requires [only] that the legislative classification be 'rationally related to a legitimate state interest.'" Sundlun, 662 A.2d at 60 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)); Riley, 941 A.2d at 206 (where "neither a suspect class nor a fundamental right is implicated, then the legislation properly is analyzed under a minimal-scrutiny test"); Cherenzia, 847 A.2d at 823 (the Court is to "employ a 'minimal-scrutiny' analysis … when assessing social and economic regulations that neither infringe on a fundamental right, nor result in a classification that is 'suspect'").

"A statute will survive this minimal scrutiny if 'a rational relationship exists between the provisions of [the statute] and a legitimate state interest." State v. Faria, 947 A.2d 863, 868 (R.I. 2008)) (brackets in Faria) (quoting Riley, 941 A.2d at 206). Under federal jurisprudence, this is known as "rational basis review." See, e.g., Vacco v. Quill, 521 U.S. 793, 799 (1997) (noting rational basis test applied under federal constitution when no suspect class or fundamental right involved). Compare Mackie, 936 A.2d at 596 (when "the challenged statute does not impinge on a fundamental right, nor does it create a suspect classification, [the] Court will employ a *rational basis test* to determine whether it violates the Rhode Island Constitution") (emphasis added).

"Under this analysis, if [the Court] can ***conceive*** of any reasonable basis to justify the classification, [the Court] will uphold the statute as constitutional." Mackie, 936 A.2d at 596 (quoting Cherenzia, 847 A.2d at 825) (emphasis added); see Germane, 971 A.2d at 582. In conducting such a review, it is improper for the Court to "delve into the Legislature's 'motives' for passing legislation." Mackie, 936 A.2d at 596 (quoting Power v. City of Providence, 582 A.2d 895, 903 (R.I. 1990)). Rather, "[e]ven if the Legislature had a constitutionally improper 'motive' when it passed legislation, the legislation would still hold up to rational basis scrutiny if [the] [C]ourt [can] find ***any*** legitimate objective." Id. (emphasis added); see Power, 582 A.2d at

902 (an enactment will not be set aside under minimal-scrutiny "if any state of facts reasonably may be conceived to justify it"). Furthermore, "in conducting this review, it is wholly irrelevant whether [the] Court can rationally conclude that the legislation would resolve a legitimate problem." Mackie, 936 A.2d at 596. "Rather, the proper inquiry is whether the [***legislature***] rationally could conclude that the legislation would resolve a legitimate problem." Id. (citing Weinberger v. Salfi, 422 U.S. 749, 777 (1975) (emphasis added)).

In accordance with these standards, a party challenging legislation bears the burden of negating "***every*** conceivable basis that might support it." Id. (quoting Medeiros v. Vincent, 431 F.3d 24, 32 (1st Cir. 2005) (emphasis in original); see Moreau, 15 A.3d at 574 (the party challenging the constitutionality of a statute bears the burden of proving its unconstitutionality). This is a heavy burden to meet. See Kleczek, 612 A.2d at 737 (in the majority of cases applying the rational basis test, the statute is upheld); Edward D. Crane, *Five Is a Crowd: A Constitutional Analysis of the Boston Zoning Amendment Prohibiting More Than Four College Students From Living Together*, 43 Suffolk U. L. Rev. 217, 223 (2009) ("Courts are far more likely to overturn legislation when applying … heightened levels of scrutiny, so the success of a constitutional challenge often depends on whether the court applies heightened scrutiny instead of rational basis scrutiny.").[11] See also standard of review on constitutional challenge, supra p.10-11.

Here, the Single-Family Dwelling Amendment neither infringes on a fundamental constitutional right nor creates a suspect classification. Accordingly, this Court is to employ "minimal-scrutiny" or "rational basis" review to the task at hand. As explained below, because of the inherently transient nature of off-campus student housing and the well-known fact that

[11] Defendant submits that this law review article is very instructive on the very issues before this Court. See Crane, supra, 43 Suffolk U. L. Rev. at 223.

groups of college students often have different living styles than traditional families,[12] the zoning amendment is rationally related to several legitimate zoning objectives, including preserving the residential character of the neighborhood, fostering zones where family and youth values can thrive, encouraging stability, availability, and affordability of single-family homes, decreasing congestion of motor vehicles, and protecting the aesthetically-pleasing character of certain areas within the City.

1. The Single-Family Dwelling Amendment Does Not Implicate a Suspect Classification

The Amendment establishes a use standard for single-family homes that differentiates between college students and non-college students (and groups of 3 or less and four or more). Such "classification" does not warrant protected class status. The United States Supreme Court has elucidated a number of factors to consider when determining whether a particular classification deserves heightened scrutiny. See Erwin Chemerinsky, Constitutional Law; Principles and Policies 672-73 (3d ed. 2006) (discussing criteria considered); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. Pa. L. Rev. 1, 16 (2000) (listing characteristics Supreme Court considers when analyzing classifications). Such factors include the immutability of the classification,[13] the group's ability to protect itself through the political process,[14] and whether

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[12] The City recognizes that what is thought of as a "traditional family" has evolved over time. Notwithstanding, there remains a distinction between the "modern" family and groups of college students living together.

[13] See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 496 (1980) (Powell, J., concurring) (using strict scrutiny because of race's immutability).

[14] See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing the "traditional indicia of suspectness," including being "relegated to such a position of political powerfulness as to command extraordinary protection from the majoritarian political process").

the class historically has been the subject of discrimination.[15] See Crane, supra, 43 Suffolk U. L. Rev. at 225. None of these factors suggest that college students are a protected class.

Rather, based on these factors, the United States Supreme Court has recognized only race, national ancestry, ethnic origin, gender, and illegitimacy as suspect classes.[16] See Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (listing United States Supreme Court cases); Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 313 (D. Conn. 2012) (same). The Court has declined to deem age, wealth, sexual orientation,[17] and mental retardation as classifications that are "suspect", see Crane, supra, 43 Suffolk U. L. Rev. at 225, and has been reluctant to expand the list of suspect classifications. See Thomasson, 80 F.3d at 928 ("because heightened scrutiny requires an exacting investigation of legislative choices, the [United States] Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes") (quoting Cleburne, 473 U.S. at 441).

The Rhode Island Supreme Court rarely has expanded protections under the state constitution beyond that of the federal constitution.[18] See State v. Bjerke, 697 A.2d 1069, 1073

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[15] See, e.g., United States v. Virginia, 518 U.S. 515, 531 (1996) (noting history of discrimination against women).

[16] Classifications based on gender and illegitimacy are subject to intermediate scrutiny, rather than strict scrutiny. See Clark v. Jeter, 486 U.S. 456, 461 (1988); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982).

[17] Obergefell v. Hodges, 135 S. Ct. 2584 (2015), legalizing same-sex marriage, does not appear to recognize sexual orientation as a suspect class. Rather, Obergefell appears based on the fundamental right to marry and possibly suspect gender classifications.

[18] See Thomas R. Bender, *For A More Vigorous State Constitutionalism*, 10 Roger Williams U. L. Rev. 621, 622 (2005) (suggesting that the Rhode Island Supreme Court has adopted a philosophy of "deference to decisions of the United States Supreme Court interpreting corresponding rights in the federal Bill of Rights"). But see State v. Maloof, 333 A.2d 676, 681 (R.I. 1975) (imposing higher search and seizure standards for electronic eavesdropping than the federal constitution); In re Advisory Opinion to the Senate, 278 A.2d 852, 854-55 (R.I. 1971) (although federal constitution requires a six person jury for criminal prosecutions, state constitution requires a twelve person jury). See also State v. Benoit, 417 A.2d 895, 900-01 (R.I. 1980) (declining to adopt the United States Supreme Court's automobile exception to the warrant

(R.I. 1997) (declining to afford greater constitutional protection under the state constitution, stating "[t]he decision to depart from minimal standards and to increase the level of protection should be made guardedly and should be supported by a principled rationale"). Consistent with federal jurisprudence, race, alienage, national origin, gender, and illegitimacy are recognized as suspect classes entitled to heightened scrutiny in Rhode Island.[19] See, e.g., In re Advisory From the Governor, 633 A.2d 664, 669 (R.I. 1993).

Clearly, college students as a class do not meet the "traditional indicia of suspectness." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Status as a college student is not a trait that is immutable or unalterable; college students, the large majority of whom are of legal voting age, are not disenfranchised or otherwise removed from the political process;[20] nor has society been historically prejudiced against college students. Indeed, federal and state courts have rejected arguments that college students are a "protected class." See Crane, supra, 43 Suffolk U. L. Rev. at 225; see, e.g., Bloomsburg Landlords Ass'n v. Bloomsburg, 912 F. Supp. 790, 804-05 (M.D. Pa. 1995) aff'd, 96 F.3d 1431 (3d Cir. 1996) (declining to apply heightened scrutiny to college students as a class); Davis v. Churchill Cty. Sch. Bd. of Trs., 616 F. Supp. 1310, 1313 (D. Nev. 1985) (concluding students not suspect classification); Smith v. Lower Merion Twp., Civ. A. No. 90-7501, 1992 WL 112247, *2 (E.D. Pa. May 11, 1992) (reasoning student classification does not warrant heightened scrutiny); Kirsch v. Prince George's Cty., 626 A.2d 372, 379 (Md. 1993) (no suspect class involved where ordinance regulated off-campus

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requirement), abrogated by State v. Werner, 615 A.2d 1010 (R.I.1992) (adopting automobile exception in order to "bring ourselves into conformity with Supreme Court precedent).

[19] Like federal jurisprudence, classifications based on race, alienage and national origin are subject to strict scrutiny, and classifications based on gender and illegitimacy are subject to intermediate scrutiny. See In re Advisory From the Governor, 633 A.2d 664, 669 (R.I. 1993).

[20] See Crane, supra, 43 Suffolk U. L. Rev. at 236 n.137 (97% of undergraduate students were above the legal voting age of 18 in 2007, and college student turnout in the 2004 presidential election was 60%, compared to 64% for the national population).

housing of college students); Lantos v. Zoning Hearing Bd., 621 A.2d 1208, 1212 (Pa. Commw. Ct. 1993) (holding students not protected class); Rosenberg v. City of Boston, No. 08-MISC-377101, 2010 WL 2090956, *6 (Mass. Land Ct. May 25, 2010) (undergraduate students do not constitute suspect class). Thus, the ordinance's classification of "college students" does not implicate a suspect class.[21] Accordingly, the Court should apply minimal-scrutiny or rational basis review to the challenged ordinance.

2. The Single-Family Dwelling Amendment Does Not Infringe on Fundamental Rights

The Amendment affects landlords as well as tenants who are also college students, but it does not infringe upon any fundamental rights. The primary source of fundamental rights is the text of the applicable constitution, where the right is explicitly or implicitly stated. See Crane, supra, 43 Suffolk U. L. Rev. at 226-27; Chemerinsky, supra at 795 (noting some scholars believe rights fundamental only if stated in text of constitution).[22] In addition, the United States Supreme

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[21] Additionally, because the ordinance only limits occupancy in dwellings that are non-owner occupied, the City notes that distinguishing between occupying and non-occupying owners also does not amount to a suspect classification. See, e.g., Anderson v. Provo City Corp., 108 P.3d 701 (Utah 2005) (zoning ordinance that allowed only homeowners who reside in their homes to rent out "accessory" apartments in certain residential zones did not create a classification considered impermissible or suspect); City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320, 332 (La. 2014) (finding no merit in equal protection claim that homeowners who choose to rent their homes are treated differently than homeowners who do not). Nor have landlords or tenants been recognized as suspect classes. See, e.g., Pennell v. City of San Jose, 485 U.S. 1, 14–15 (1988) (applying rational basis review to rent control ordinance); Lindsey v. Normet, 405 U.S. 56, 73-74 ("[w]e are unable to perceive … any constitutional guarantee … or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease"); Schnuck v. Santa Monica, 935 F.2d 171, 176 (9th Cir. 1991) (landlords are not suspect class). Further, status as a landlord (occupying the premises or otherwise) or tenant is not an immutable trait; neither group is limited in its ability to participate in the political process; and neither have historically been the subject of discrimination. See Crane, supra, 43 Suffolk U. L. Rev. at 225.

[22] See also Saenz v. Roe, 526 U.S. 489, 498 (1999) (although "the word 'travel' is not found in the text of the Constitution," the fundamental right to interstate travel "is firmly embedded" in United States Supreme Court jurisprudence).

Court has deemed certain un-enumerated rights to be fundamental based on historically and traditionally understood liberty interests, or as encompassed within the implied fundamental right to privacy.[23] See Crane, supra, 43 Suffolk U. L. Rev. at 227; Chemerinsky, supra at § 10 (outlining Supreme Court's protection of fundamental rights under due process and equal protection). As with recognized categories of "suspect" classifications," the Court has been "reluctant to expand" the list of implied fundamental rights.[24] See id.

As mentioned above, the Rhode Island Supreme Court is disinclined to expand protections under the state constitution beyond those afforded by the federal constitution. Based on the due diligence of Defendant's counsel, it appears the Rhode Island Supreme Court has not recognized any additional fundamental rights under the state constitution—apart from those recognized by the United States Supreme Court—other than the expressly guaranteed "rights of fishery" and "privileges of the shore."[25] Accordingly, the City suggests that our Supreme Court

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[23] See Washington v. Glucksburg, 521 U.S. 702, 720 (1997) ("In a long line of cases, [the Court has] held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.") (internal citations omitted).

[24] In explaining its reluctance, the United States Supreme Court stated as follows:

> "[W]e ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. ***We must therefore exercise the utmost care whenever we are asked to break new ground in this field***, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." Washington, 521 U.S. at 720 (internal citations and quotations omitted) (emphasis added).

[25] See R.I. Const., art. 1, § 17; Riley v. Rhode Island Dep't of Envtl. Mgmt., 941 A.2d 198, 208–09 (R.I. 2008) (Rhode Island Constitution expressly guarantees a "right of fishery" that belongs to the general public); New England Naturist Ass'n Inc. v. Larsen, 692 F. Supp. 75, 78 (D.R.I. 1988) (under Rhode Island Constitution, "the intertidal zone is held, in trust, for the use

will follow the federal precedent set by Village of Belle Terre v. Borass, 416 U.S. 1 (1974)—a case strikingly similar to the one at bar.

In Belle Terre, the United States Supreme Court held that zoning ordinances limiting the number of unrelated people who may live together in one household do not impinge upon a fundamental right.[26] In Belle Terre, the Court considered the constitutionality of a zoning ordinance that prohibited more than two unrelated persons from living together in the same house. Id. at 2. After the village issued an "Order to Remedy Violations" to the owners of a house leased to six unrelated college students, id. at 2-3, the landlord and students challenged the ordinance as unconstitutional. Id. at 7. In reviewing the ordinance under equal protection and due process analyses, the Court held that the ordinance "involve[d] no 'fundamental right' guaranteed by the Constitution," specifically stating that it did not infringe on the fundamental rights of association, travel, or privacy.[27] Id. at 7-8. Applying rational basis review, the Court upheld the ordinance as constitutional (discussed infra).

Most state courts similarly have rejected the notion that unrelated persons have a fundamental right to live together under their respective constitutions—often explicitly adopting the United States Supreme Court's reasoning in Belle Terre. See Crane, supra, 43 Suffolk U. L. Rev. at 228-29. See also, e.g., Schwartz v. Philadelphia Zoning Bd of Adjustment, 126 A.3d

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of the people who are guaranteed, among other things, the right of passage across the area, the right of access to the shore, and the right to swim in the sea") (citing State v. Ibbison, 448 A.2d 728, 730 (R.I. 1982) and Jackvony v. Powel, 21 A.2d 554 (R.I. 1941)).

[26] In comparison, the United States Supreme Court has held that extended family members have a fundamental right to live with one another. Moore v. City of East Cleveland, 431 U.S. 494, 503-05 (1977) (family sanctity fundamental based on the history and tradition of recognized liberty interests). In reaching its decision, the Court, in Moore, discussed and distinguished its decision from Belle Terre. Accordingly, Belle Terre is recognized as good law to date.

[27] In dissent, Justice Marshall reasoned that the zoning ordinance unconstitutionally intruded on the fundamental right to privacy and freedom of association. Village of Belle Terre v. Borass, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

1032, 1039-40 (Pa. Commw. Ct. 2015) (recognizing Belle Terre as controlling, and affirming that a zoning ordinance restricting the number of unrelated persons who may cohabitate is not subject to strict scrutiny and should be reviewed under rational basis); City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320, 332 (La. 2014) (adopting Belle Terre reasoning that ordinance restricting right of unrelated persons to live together does not involve a fundamental right); Rosenberg, 2010 WL 2090956, *7-11 (zoning amendment prohibiting five or more undergraduate students from living together did not infringe on fundamental right to privacy or freedom of association).

To date, courts in twenty-eight (28) other states have considered whether laws limiting the number of unrelated persons who may live together offend constitutional guarantees, and California is the ***only*** state that has held that unrelated persons have a fundamental right to live together.[28] Even then, the California Supreme Court's decision in City of Santa Barbara v.

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[28] See (listed in alphabetical order by state) Behavioral Health Agency of Central Arizona (BHACA) v. City of Casa Grande, 708 P.2d 1317 (Ariz. Ct. App. 1985); City of Santa Barbara v. Adamson, 610 P.2d 436 (Cal. 1980); Rademan v. City and County of Denver, 526 P.2d 1325 (Colo. 1974); Dinan v. Bd. of Zoning Appeals of the Town of Stratford, 595 A.2d 864 (Conn. 1991); Hayward v. Gaston, 542 A.2d 760 (Del. 1988); Macon Ass'n for Retarded Citizens v. Macon-Bibb Cty. Planning & Zoning Comm., 314 S.E.2d 218 (Ga. 1984); Marsland v. Int'l Soc'y for Krishna Consciousness, 657 P.2d 1035 (Haw. 1983); City of Des Plaines v. Trottner, 216 N.E.2d 116 (Ill. 1966); Metro. Dev. Comm of Marion Cty. v. The Villages, Inc., 464 N.E.2d 367 (Ind. Ct. App. 1984); Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007); Jones v. Wildgen, 320 F. Supp. 2d 1116, 1132 n.9 (D. Kan. 2004) (applying federal law due to plaintiffs' failure to identify state laws at issue), recon. sust'd on other grounds, Jones v. Wildgen, 349 F. Supp. 2d 1358 (D. Kan. 2004); Hamner v. Best, 656 S.W.2d 253 (Ky. Ct. App. 1983); City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320 (La. 2014); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); Kirsch v. Prince George's Cty., 626 A.2d 372 (Md. 1993); Rosenberg v. City of Boston, No. 08-MISC-377101, 2010 WL 2090956 (Mass. Land Ct. May 25, 2010); Charter Twp. of Delta v. Dinolfo, 351 N.W.2d 831 (Mich. 1984); City of Ladue v. Horn, 720 S.W.2d 745 (Mo. Ct. App. 1986); State v. Champoux, 566 N.W.2d 763 (Neb. 1997); Town of Durham v. White Enterprises, 348 A.2d 706 (N.H. 1975); Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J. 1990) and State v. Baker, 405 A.2d 368 (N.J. 1979) (two New Jersey cases); Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989) and McMinn v. Town of Oyster Bay, 488 N.E.2d 1240 (N.Y. 1985) (two New York

Adamson, 610 P.2d 436, 438-39 (Cal. 1980), which held that a zoning ordinance restricting more than five unrelated persons from living together violated the state constitution, was influenced by the fact that an express right to privacy was added to the California Constitution by ballot amendment. See id. at 439-40 ("[t]hat ballot argument evidenced voters' intent … to ensure a right to privacy not only in one's family but also in one's home"). Based thereon, the court held that the state right to privacy in California is broader than the privacy rights afforded by the federal constitution. See id. at 440 n.3 ("the federal right to privacy in general appears to be narrower than what the voters approved … when they added "privacy" to the California Constitution"). Reasoning that restrictions on unrelated persons' right to live together as a group implicated California's express constitutional right to privacy, the court applied heightened scrutiny to the ordinance, requiring more than a rational relationship to a legitimate governmental interest.[29] See id. at 439-40.

This Court should not follow California's unique decision to apply heightened scrutiny based on a fundamental right to privacy for several reasons: The United States Supreme Court has not recognized a fundamental right in circumstances akin to those addressed by the

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cases); Carroll v. Washington Twp. Zoning Comm., 408 N.E.2d 191 (Ohio 1980); Schwartz v. Philadelphia Zoning Bd. of Adjustment, 126 A.3d 1032 (Pa. Commw. Ct. 2015) and Lantos v. Zoning Hearing Bd. of Haverford Twp., 621 A.2d 1208 (Pa. Commw. Ct. 1993) (two Pennsylvania cases); McMaster v. Columbia Bd. of Zoning Appeals, 719 S.E.2d 660 (S.C. 2011); City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996); Anderson v. Provo City Corp., 108 P.3d 701 (Utah 2005); Browndale Int'l, Ltd. V. Bd. of Adjustment for the Cty. of Dane, 208 N.W.2d 121 (Wis. 1973).

[29] The zoning ordinance at issue in Adamson, 610 P.2d at 438-39, was much more restrictive that the zoning ordinance at issue here. Whereas the City's Single-Family Dwelling Amendment restricts more than three college students from living together in two of its twenty (20) zoning districts, the 93-page ordinance at issue in Adamson essentially prohibited five or more unrelated persons from residing together *anywhere* in Santa Barbara. See id. Based on this blanket prohibition, the Adamson Court held that the ordinance did not pass heightened scrutiny because the restriction did not truly and substantially relate to the stated goals of the ordinance, and the ordinance was not the least restrictive means for achieving its objectives. Id. at 440-42.

Amendment; the Rhode Island Supreme Court has expressed hesitation in departing from federal constitutional standards; and the Rhode Island Constitution does not include an express right to privacy like the California Constitution. Accordingly, the challenged Amendment to the Zoning Ordinance, which restricts the number of college student cohabitants, does not infringe on a fundamental right under the Rhode Island Constitution.[30] Thus, it is proper for the Court to apply minimal-scrutiny or rational basis review to the challenged ordinance.

iii. *The Single-Family Dwelling Amendment Is Constitutional Because It is Rationally Related to Legitimate Governmental Interests*

The Amendment is constitutionally sound under minimal scrutiny review because it is rationally related to legitimate governmental interests. See Faria, 947 A.2d at 868 ("A statute will survive this minimal scrutiny if 'a rational relationship exists between the provisions of [the statute] and a legitimate state interest.") (Brackets in original). As discussed above, under the rational relationship analysis, the Court must uphold the enactment as constitutional, and may not (improperly) delve into the legislature's actual motives, if the Court can ***conceive*** of "any reasonable basis" for the ordinance. See Mackie, 936 A.2d at 596 (the proper inquiry is not whether the Court rationally could conclude that the legislation would resolve a legitimate problem, but whether the ***legislature*** could so conclude); Power, 582 A.2d at 902 (an enactment will not be set aside under minimal-scrutiny "if any state of facts reasonably may be conceived to justify it"). Recall that a party challenging legislation bears the burden of negating "***every***

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[30] The only other case, apart from Adamson, to have found that a fundamental right is implicated where zoning ordinances restrict the number of unrelated persons who may live together is DiStefano v. Haxton, C.A. No. WC-1992-0589, 1994 WL 931006, *8, *14 (R.I. Super. Ct. Dec. 12, 1994) (Fortunato, J.); see Crane, supra, 43 Suffolk U. L. Rev. at 229 n.83. The Rhode Island Superior Court recognized a "fundamental right of otherwise competent adults to live with whom they choose" under the Rhode Island Constitution, despite there being no federal or state precedent to support same. See DiStefano, 1994 WL 931006 at *14. DiStefano, which is not binding on the Court, is discussed in detail, infra.

conceivable basis that might support it." Id.; see also Moreau, 15 A.3d at 574 (the party challenging the constitutionality of a statute bears the burden of proving its unconstitutionality).

Rational basis review is highly deferential to the legislature. See Village of Euclid, 272 U.S. at 388 (landmark zoning case noting that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").[31] Under this standard, valid legislation may be considerably overinclusive or underinclusive—"it can include people undeserving of regulation and exempt people who presumably should be subject to regulation." Crane, supra, 43 Suffolk U. L. Rev. at 230; see Chemerinsky, supra, at 686-87 (describing rational basis test's tolerance for overinclusive and underinclusive legislation). See also, e.g., Vance v. Bradley, 440 U.S. 93 111-12 (1979) (upholding underinclusive and overinclusive law); Mackie, 936 A.2d at 598 ("a statute or regulation is not lacking in a rational basis simply because it addresses a broader problem in small or incremental stages… [W]hen enacting statutes with such far-reaching goals, the General Assembly must start somewhere"); Schwartz, 126 A.3d at 1040 ("Social and economic legislation involves drawing lines that are inherently overinclusive and underinclusive.").

Additionally, rational basis review does not require factual evidence in support of the legislation. Crane, supra, 43 Suffolk U. L. Rev. at 230; see Heller v. Doe, 509 U.S. 312, 320 (1993) (under rational basis, municipality "not required or expected to produce evidence to justify its legislative action"); Faria, 947 A.2d at 868 (allowing any conceivable basis to uphold a law under the minimal-scrutiny test); Mackie, 936 A.2d at 596 ("the legislation … hold[s] up to

[31] In other words, judicial disagreement with or dislike of the policy goals or means of given legislation are not enough to overturn legislation under rational basis review. See Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that … even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.")

rational basis scrutiny if [the] Court [can] find any legitimate objective"). See also Egan v. United States, 137 F.2d 369, 375 (8th Cir. 1943) ("A legislative judgment is presumed to be supported by facts known to the [city council], unless facts judicially known or proved preclude that possibility.") (Citations omitted).

In the instant matter, the restriction on the number of college students who may reside together in a non-owner occupied single-family dwelling in the R-1A and R-1 zones in Providence is rationally related to the City's Council's legitimate interests in preserving the residential character of those neighborhoods as a place for families to prosper and as a quiet and peaceful sanctuary; protecting the availability and affordability of single-family housing; fostering the stability of the neighborhood and limiting transiency; promoting low population density; and limiting the congestion of motor vehicles both traveling in the neighborhoods and requiring additional parking at the expense of scenic lawns and greenspace.

In the context of zoning, these objectives are valid. The United States Supreme Court explained in Belle Terre:

> 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. … The police power is not confined to elimination of filth, stench, and unhealthy places. ***It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people***. 416 U.S. at 9 (emphasis added).

Put differently, United States Supreme Court precedent makes clear that protecting the residential character of a neighborhood and preserving neighborhoods as places for families to prosper, as well as limiting density, congestion and their externalities, such as noise and traffic, are legitimate governmental concerns. See id. ("urban problems" are created where "[m]ore

people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds").

Since Belle Terre, countless court decisions around the country have recognized these interests as valid. See, e.g., Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255, 260 (Iowa 2007) ("governing bodies have a legitimate interest in promoting and preserving neighborhoods that are conductive to families—particularly those with young children," and "[q]uiet neighborhoods with a stable population and low traffic are laudable goals"); Rosenberg, 2010 WL 2090956, *6 (recognizing as legitimate public purposes in the City of Boston "protecting students from unsafe conditions that may be created by overcrowding and the preservation of neighborhoods as places for families to prosper, including promoting affordability and increasing neighborhood stability"); McMaster v. Columbia Bd. of Zoning Appeals, 719 S.E.2d 660, 665 (S.C. 2011) (recognizing the "legitimate governmental interests of controlling the undesirable qualities associated with 'mass student congestion'").[32]

In Rhode Island, the Zoning Enabling Act embodies these purposes, specifically providing that legitimate governmental interests in land use regulation include, *inter alia*, "[p]romoting the health, safety, and general welfare" of the community, "[p]roviding for a range of uses and intensities of use appropriate to the character of the city or town and reflecting current and expected future needs," "[t]he need to shape and balance urban and rural

[32] Even those state court decisions that have invalidated similar types of ordinances have recognized their objectives as valid. See, e.g., McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1243 (N.Y. 1985) (the "ordinance was enacted to further several legitimate governmental purposes, including preservation of the character of traditional single-family neighborhoods, reduction of parking and traffic problems, control of population density, and prevention of noise and disturbance"); Charter Township of Delta v. Dinolfo, 351 N.W.2d 831, 270-71 (Mich. 1984) ("[T]he objectives of this ordinance [are] preservation of traditional family values, maintenance of property values and population and density control. We cannot disagree that those are not only rational but laudable goals.").

development," "[p]roviding for the protection of the natural, historic, cultural, and scenic character of the city or town or areas in the municipality," and "[p]romoting a balance of housing choices, for all income levels and groups, to assure the health, safety, and welfare of all citizens and their rights to affordable, accessible, safe, and sanitary housing." R.I. Gen. Laws § 45-24-30(a)(1), (2), (3)(vi), (4) and (8) ("purposes" provision of Zoning Enabling Act); see Zoning Ordinance, § 101 (identical "purposes" provision in Providence).

The legitimate governmental concerns espoused by the United States Supreme Court in Belle Terre and in innumerable state court decisions, which are consistent with the purposes set forth in the Zoning Enabling Act and Zoning Ordinance, are the very interests the Amendment was intended to address. At a minimum, these are "conceivable" bases for the Amendment. Furthermore, the Single-Family Dwelling Amendment is rationally related to these objectives.

It was rational for the City Council to conclude that limiting the number of college students who reside together in certain areas of the City would not only decrease crowding in those neighborhoods and related externalities (such as increased motor vehicles and parking needs), but also would curb the "group" mentality that comes with a greater number of young adults living together in transient circumstances, and that commonly results in loud and disorderly behavior incompatible with youth and family values or quiet and peaceful residential neighborhoods. Indeed, it is common knowledge that groups of college students generally have living styles that differ significantly from those of traditional or extended families living in single-family homes, and that college students' living arrangements are transient in nature, such that college students are less committed to the long-term sustainability and well-being of the

community.[33] See, e.g., Schwartz, 126 A.3d at 1037 n.8 ("it is clear the municipalities … may enact ordinances excluding students from certain districts where the ordinance is rationally related to the legitimate purpose of preserving the single-family residential uses within the municipality"); Ames Rental Prop. Ass'n, 736 N.W. 2d at 261 (noting that "[c]ity council members are permitted to legislate based on their observations of real life," and finding that the living arrangements of large groups of unrelated persons are relatively short term and normally involve young adults who tend not to establish roots in the community and who typically attract friends, creating additional noise and traffic); Dinan v. Bd. of Zoning Appeals, 595 A.2d 864, 870 (Conn. 1991) (noting a group of college students is less likely to become involved in the neighborhood and community than is a typical family because of the students' short-term living arrangements).[34]

It was also rational for the City Council to conclude that limiting the number of college students who reside in leased single-family homes would decrease the appeal of single-family homes as an "investment opportunity" for landlord investment companies, and help ensure the availability and affordability of single-family homes for families, especially young families with children.[35] In turn, it was rational for the City Council to conclude that the Amendment would promote communities whose residents take root there and take pride in establishing a high

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[33] Indeed, the Merriam-Webster online dictionary uses as an example of "transiency" in a sentence: "[B]ecause of the ***transiency*** of their residency, college students often display little interest in the welfare of the towns where they go to school." See http://www.merriam-webster.com/dictionary/transiency (emphasis in original).

[34] See also Henry Wechslter et al., *Secondhand Effects of Student Alcohol Use Reported by Neighbors of Colleges: The Role of Alcohol Outlets*, 55 Soc. Sci. & Med. 425, 429 (2002) (correlating proximity to college students with higher rate of community disturbances); Smith v. Lower Merion Township, Civ. A. No. 90-7501, 1992 WL 112247, *3 (E.D. Pa. May 11, 1992) (noting municipal investigation revealed students' presence changed character of neighborhood).

[35] See Daniel E. Wenner, Note, *Renting in Collegetown*, 84 Cornell L. Rev. 543, 557-60 (1999) (explaining unique characteristics of student renters and how they result in higher rents).

quality of life for themselves and their neighbors. See, e.g., Anderson v. Provo City Corp., 108 P.3d 701, 704 (Utah 2004) (upholding zoning amendment "intended to 'prohibit[] outside investors from targeting … neighborhoods[,] buying up homes and essentially creating [dwellings] that do not contribute to the overall stability of the neighborhood,'" where residents were concerned "that the [neighborhood's] stability [was] disintegrating one home at a time from what was once a predominantly affordable family owner-occupied neighborhood").

As discussed above, under the rational basis review appropriate to this case, the City is under no obligation to provide the Court with evidence supporting its legislative enactment, which must be upheld if there is a ***conceivable*** set of facts to support it.[36] See infra. It is far more than conceivable that the City Council rationally could conclude that the legislation challenged here would advance its objectives. Nonetheless, the City has appended hereto, as **Exhibit E**, the writings of constituents to their local representatives evidencing genuine and wide-spread concern that the character of historically family-friendly, stable, and quiet neighborhoods in the City has been steadily eroding over the last few years as a result of the increasingly common purchase of single-family dwellings by landlord companies established for the purpose of obtaining and managing real estate leased to large groups of college students. Their concerns include a dramatic change in the character the neighborhood, increased noise and traffic, diminished scenic attributes, and lewd and inappropriate behavior by college-student lessees that is unconducive to and inconsistent with the goals of raising a family. See Rosenberg, 2010 WL 2090956, *6 (evidence provided at public hearing on ordinance "sufficient to provide a 'reasonably conceivable state of facts' demonstrating that the burdens students place on neighborhoods are greater than for other similarly sized groups of tenants who are not

[36] Here, those facts are conceivable based solely on common knowledge about the realities of the college experience, for good and for bad.

undergraduate students").

The City is mindful that the Amendment may not be perfectly tailored to remedy all the concerns raised by constituents and that the enactment may impact individuals who have not contributed to these problems—i.e., that it may be underinclusive and overinclusive in its scope. For instance, it may be underinclusive because it does not encompass households without college students, or with three or fewer college students, who nonetheless drive numerous motor vehicles, throw loud and late-night parties, discard trash on their front yard, or decline to take root in or contribute to the welfare of the community. On the other side of the spectrum, it may be overinclusive because it affects groups of four or more college students who reside together, but are quiet, studious, and impeccably clean renters who do not drive cars or throw parties, and who volunteer with non-profit groups committed to the community.

It bears reiterating, however, that under rational basis review, "it is well recognized that a law does not have to be perfectly tailored to meet its goals as long as the dividing line was created rationally." Rosenberg, 2010 WL 2090956, *7 (upholding similar zoning ordinance in Boston despite the challengers' arguments that the law was both under and overinclusive). The United States Supreme Court has explained that "every line drawn by a legislature leaves some out that might well have been included[;] [t]hat exercise of discretion, however, is a legislative, not a judicial, function." Belle Terre, 416 U.S at 8. As Justice Holmes remarked almost a century ago:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is

> no mathematical or logical way of fixing it precisely, ***the decision of the Legislature must be accepted unless we can say that it is very wide of any reasonable mark***. Id. at 7-8 n.5 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928) (J. Holmes, dissenting) (emphasis added)).

In other words, and as explained above, rational basis review recognizes and permits this line-drawing may result in overinclusive and underinclusive legislation. Under rational basis review, however, the Court must accept the legislature's reasonable line-drawing to address a real or rationally perceived concern.[37]

Here, the City Council's "line-drawing" is a rational and balanced approach to its zoning objectives, as demonstrated by two significant aspects of the Amendment. First, the Amendment is limited to groups of ***four or more*** college students living together off–campus in leased dwellings. Second, the restriction applies to only two of the City's twenty (20) zoning districts, and to only two of its six strictly residential districts. In other words, groups of four or more college students may reside together anywhere in the City where residential uses are allowed except in R-1A and R-1 zones, including in the other four Residential Districts (R-2, R-3, R-4, and RP), the three Commercial Districts (C-1, C-2, and C-3), the Downtown District, the W-2 Waterfront District, the M-MU District, and both Institutional Districts (I-1 and I-2). See Zoning

[37] Indeed, the requirement that a law be "narrowly tailored" to achieving its objectives is a component of heightened scrutiny, where suspect classes or fundamental rights are implicated, which is not the case here. See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (strict scrutiny requires that an enactment be "'narrowly tailored' to achieve a 'compelling' government interest); In re Advisory Opinion to House of Representatives Bill 85-H-7748, 519 A.2d 578, 582 (R.I. 1987) (when courts apply strict scrutiny, "legislative enactments must be narrowly drawn to express only a compelling state interest"); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 736 (R.I. 1992) (in under to survive strict scrutiny, the enactments "must be justified by a compelling governmental interest and must be necessary to the accomplishment of their legislative purpose") (internal citations and quotations omitted).

Ordinance § 1201 (Table 12-1: Use Matrix) (**Exhibit D**).[38] It was reasonable for the City to draw the line at R-1A and R-1 districts because these zones permit only single-family residences as a matter of right—they do not allow dwelling units for two, three or more families ("double-decker," "triple-decker," or rowhouse multifamily dwellings)—and they are the lowest density districts in Providence. See Zoning Ordinance § 400 (defining only R-1A and R-1 Districts as "low density residential") **(Exhibit C)**.

Additionally, such line-drawing is consistent with other use restrictions in the Ordinance. For example, fraternities and sororities are allowed only in the I-2 (Institutional) district, and "apartment dormitories" (structures used for living accommodations with not more than four unrelated persons per dwelling unit, who are affiliated with an educational facility, hospital, or other institutional use) are permitted only in D-1 (Downtown) and I-2 (Institutional) districts. See Zoning Ordinance §§ 1201 (Table 12-1: Use Matrix) (**Exhibit D**) and 1204 (Use Definitions) (attached as **Exhibit F**).

Likewise, restricting landlords from leasing single-family dwellings to groups of four or more college students in just two zoning districts imposes no irrational line-drawing. Landlords remain free to lease single-family homes in R-1A and R-1 districts to as many as three college students or to other tenants. They may also choose to invest in two-family, three-family or multi-family dwellings located in neighborhoods and zones intended to absorb a denser population and the traffic and activities attendant to the dwelling units allowed in those districts.

Regardless, Plaintiffs cannot meet their burden of demonstrating that there is ***no*** set of reasonably conceivable facts that support the rational connection between the legitimate governmental objective of preserving and protecting residential neighborhoods and the Single-

[38] Some districts, such as the W-3, M-1, M-2, PS, OS, and CD districts, do not permit residential uses at all. See Zoning Ordinances § 1201 (Table 12-1: Use Matrix).

Family Dwelling Amendment. See Ames Rental Prop. Ass'n, 736 N.W.2d at 262 ("Certainly this ordinance is imprecise and based on stereotypes. Nevertheless, it is a reasonable attempt to address concerns by citizens who fear living next door to the hubbub of an 'Animal House.'"); State v. Champoux, 566 N.W.2d 764 (Neb. 1997) (that the municipality could have chosen to effectuate its objectives in a variety of other ways does not demonstrate any constitutional defect in the zoning ordinance restricting the number of unrelated persons who may live together).

In sum, the City Council, based on the experience of its members with college students living off-campus in Providence, as well as the experience of their constituents, made a reasonable policy decision to limit to three the number of college students who may reside together in non-owner occupied single-family dwellings in certain districts within the City. Its decision was a rational response to the concerns of the community and a reasonable means to accomplish its objectives.

B. The Decisions in Other States Buttress the Constitutionality of the Single-Family Dwelling Amendment

i. *The Majority of Other States Have Upheld Similar Ordinances as Constitutional*

To date, it appears that twenty-eight (28) states have reviewed the constitutionality of ordinances that restrict the number of unrelated persons or college students who may live together.[39] As recognized recently by the Supreme Court of South Carolina, "[t]he overwhelming majority of states that have considered the issue have found similar zoning ordinances restricting the number of unrelated persons that may live together to be constitutional."[40] McMaster, 719

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[39] See supra Footnote 28 for a list of citations to these state court decisions.

[40] Of the twenty-eight (28) states to have considered the issue, six have invalidated ordinances similar to the Single-Family Dwelling Amendment. One such state, California, discussed supra, applied heightened scrutiny to the ordinance. The other five states purported to

S.E.2d at 664 n.7; see Bloomsburg Landlords Ass'n, Inc., 912 F. Supp. at 804 ("Innumerable decisions have upheld the constitutionality of zoning restrictions on student housing. … So long as regulations governing the location, amenities, etc. of student housing are rationally related to a legitimate governmental interest, they survive constitutional scrutiny."). Many such cases involved ordinances that expressly applied to college students or, like Belle Terre, involved occupants who happened to be college students. See, e.g., Ames Rental Prop. Ass'n, 736 N.W.2d at 261 n.6 (noting that many of the cases addressing similar ordinances involve college towns); City of Brookings v. Winker, 554 N.W.2d 827 (S.D. 1996) (noting the unavoidable population density problems in college towns and finding challengers to ordinance failed to overcome ordinance's presumption of validity). The City submits that these cases in majority jurisdictions, several of which are discussed below, are persuasive authority on which this Court may comfortably rely.

For instance, as recently as last year, in Schwartz v. Philadelphia Zoning Bd of Adjustment, 126 A.3d 1032, 1044 (Pa. Commw. Ct. 2015), the Commonwealth Court of Pennsylvania (the intermediate appellate court) upheld a zoning ordinance that prohibited more than three unrelated persons from residing in areas zoned for single-family residential use. Similarly to the Single-Family Dwelling Amendment, the ordinance at issue in Schwartz prohibited groups of four or more unrelated persons from cohabitating in areas zoned for single-family residential use, but said groups could reside in other areas of the city. See id. at 1038-39. In that case, landlords appealed citations issued for the rental of properties in those zones to unrelated groups of students. See id. at 1034. The Pennsylvania court expressly rejected the landlords' argument that the precedential value of Belle Terre had eroded and the invitation to

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apply rational basis review; their flawed analyses are discussed infra. The other twenty-two (22) states upheld similar ordinances under rational basis review.

apply strict scrutiny—affirming that rational basis review is appropriate when analyzing these types of ordinances. See id. at 1037-40. In finding Philadelphia's ordinance facially constitutional, the Pennsylvania court noted that it was much less restrictive than the ordinance considered in Belle Terre: Whereas the prohibition in Belle Terre applied everywhere within the bounds of the municipality, Philadelphia's restriction, like the Single-Family Dwelling Amendment, applied only in areas zoned for single-family residential use. Id. at 1038, 1044.

Likewise, in 2014, in City of Baton Rouge/Parish of East Baton Rouge v. Myers, 145 So. 3d 320, 338 (La. 2014), the Supreme Court of Louisiana upheld a local zoning ordinance restricting the number of unrelated persons who could occupy homes in single-family residential zones. In so holding, the court made clear that, under Belle Terre, the challenged zoning provision was only required to be rationally related to a legitimate state interest, rather than narrowly tailored to further a compelling state interest. See id. at 335-36. In reliance on Belle Terre, the court found no violation of constitutional rights. See id.

Nearby, in Boston, Massachusetts, the Land Court upheld an ordinance prohibiting five or more undergraduate students from living together anywhere in the city, despite challenges under both equal protection and due process. See Rosenberg v. City of Boston, No. 08-MISC-377101, 2010 WL 2090956 (Mass. Land Ct. May 25, 2010). Boston, like Providence, held public hearings before enacting its ordinance. See id. at *2. The hearings evoked evidence and support from area residents, university administrators, law enforcement officials, real estate companies, landlords, and elected officials themselves revealing that large groups of undergraduate students created undue noise, parking, and trash impacts on neighborhoods; that the business model of leasing to large groups of undergraduate students was pricing other residents out of the housing market; and that undergraduate students are likely to be subjected to substandard rental

accommodations. See id. at *2-4. With these considerations in mind, the Land Court concluded that the ordinance was rationally related to the valid objectives of protecting residential quality of life; preserving quiet areas where families can thrive; enabling residents to afford housing; protecting students from substandard living conditions; and alleviating the environmental and economic consequences of overcrowded student housing. See id. at *2, *6.

Notably, in addition to Massachusetts, the other states in New England that have considered the constitutionality of zoning ordinances restricting the number of unrelated people who may live together also upheld said ordinances. See Dinan v. Bd. of Zoning Appeals, 595 A.2d 864 (Conn. 1991) (ordinance allowing occupancy of a dwelling by up to two roomers in addition to family members did not violate the equal protection or due process clauses of the Connecticut Constitution); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981) (ordinance that restricted occupancy to family members related by birth, marriage or other domestic bond did not infringe on any fundamental rights, served state interests, and was valid under Belle Terre); Town of Durham v. White Enterprises, 348 A.2d 706 (N.H. 1975) (ordinance which prohibited groups of more than four unrelated persons from living together constitutional under rational basis review).

Moreover, courts in fifteen (15) other states have upheld the constitutionality of zoning ordinances similar to the Amendment at issue in this case. See, e.g., McMaster, 719 S.E.2d at 664-65 (ordinance which limited to three the number of unrelated individuals who may live together survived rational basis review under the due process clause of the South Carolina Constitution); Ames Rental Prop. Ass'n, 736 N.W.2d at 258, 260-61 (ordinance which limited to no more than three the number of unrelated people who could reside together in certain areas of a college town survived rational basis review under equal protection clause of Iowa Constitution,

because, *inter alia*, the Supreme Court in Belle Terre upheld a more restrictive ordinance); City of Brookings, 554 N.W.2d at 831-32 (ordinance which prohibited more than three unrelated adults from occupying a dwelling unit did not violate equal protection or due process clauses of South Dakota Constitution). The City urges the Court to rely on the majority position of state courts across the country in reviewing the Amendment.

ii. *The Decisions in Minority Jurisdictions Are Distinguishable in Both Their Application of Rational Basis and on Their Facts*

Appellate courts in five jurisdictions in addition to California (see infra) have struck down zoning ordinances restricting the number of unrelated persons who may live together. The City submits that this Court should not rely on these decisions in reviewing the Single-Family Dwelling Amendment, for several reasons. First, a close examination of these cases—in Illinois, Michigan, Maryland, New Jersey, and New York—reveals that the courts in those states actually applied a "heightened" rational basis test that is less deferential than both the federal standard and the minimal scrutiny test well established in Rhode Island.[41] Compare, e.g., Charter Township of Delta v. Dinolfo, 351 N.W.2d 831, 841 (Mich. 1984) ("[t]hose states that have rejected *Belle Terre* have stressed that a line drawn [in the ordinance] … is both over- and underinclusive") with Chemerinsky, supra at 686-87 (describing rational basis test's tolerance for overinclusive and underinclusive legislation). Second, it appears that the states that have struck down these types of ordinances as unconstitutional "have done so, generally, because the ordinances preclude[d] functional families from living together." McMaster, 719 S.E.2d at 664 n.5; see Champoux, 566 N.W.2d at 775. In contrast, it cannot be said that a zoning ordinance

[41] Recall that the California Supreme Court applied heightened scrutiny because it recognized the infringement of a fundamental right to privacy specific to the state constitution. See City of Santa Barbara v. Adamson, 610 P.2d 436, 438-39 (Cal. 1980) (discussed infra). In contrast, the courts in Illinois, Maryland, New Jersey, and New York did not identify a suspect classification or fundamental right at issue and purported to apply rational basis.

specific to college students, such as the Single-Family Dwelling Amendment, has such an effect—i.e., precludes households that constitute the functional equivalent of a "traditional family unit." Borough of Glassboro v. Vallorosi, 568 A.2d 888, 889 (1990). Finally, the ordinances at issue in those cases were more restrictive than the Single-Family Dwelling Amendment and, thus, are distinguishable on their facts.

For instance, in City of Des Plaines v. Trottner, 216 N.E.2d 116, 120 (Ill. 1966), the Supreme Court of Illinois struck down a zoning ordinance restricting more than two unrelated persons from residing in single-family districts on grounds that the state legislature had not authorized zoning ordinances that "penetrate so deeply … into the internal composition of a single housekeeping unit." Id. Importantly, this appears to be the first case to review such an ordinance; in 1966, the Illinois Supreme Court was quite alone in its attempt to resolve a novel constitutional question of first impression without the benefit of analyses by sister state courts or, notably, the Supreme Court's decision in Belle Terre. See id. at 433. The court attempted to avoid the constitutional question by basing its holding on statutory enabling authority, but its entire discussion was devoted to the reasonableness of the ordinance under equal protection and due process.[42] Notably, the court did not delve into the intricacies of the methodology to be employed when reviewing a case under equal protection or due process, nor did it articulate a standard for review. Nonetheless, it is apparent that the court considered the ordinance to be underinclusive. See id. at 437-38. More particularly, the court recognized that groups of unrelated persons might "have a transient quality that would affect adversely the stability of the

[42] Trottner was decided expressly on the narrow ground of legislative authority. City of Des Plaines v. Trottner, 216 N.E.2d 116, 120 (Ill. 1966). The following year, in 1967, the Illinois legislature amended the state zoning enabling act to delegate such authority. See Ill. Rev. Stat. 1967, C. 24, s 11-13-1(9); see State v. Baker, 405 A.2d 368, 378 (N.Y. 1979) (Mountain, J., dissenting) (discussing Trottner). Accordingly, it is unclear whether Trottner is good law today.

neighborhood, and so depreciate the value of other property," that they "would be more likely to generate traffic and parking problems," and that the ordinance "could be regarded as tending to limit the intensity of land use." Id. at 437. Nonetheless, the court was persuaded that these are not "universal truth[s]," and that "[f]amily groups are mobile today," not always "internally stable [or] well-disciplined," and may have two or more cars. Id.

The Trottner court's concerns in 1966, however, are well understood today to be legitimate governmental objectives, and the type of "under-inclusiveness" relied upon by the court in Trotter to find the ordinance invalid is now regarded as insufficient to strike down a legislative enactment where suspect classifications and infringements on fundamental rights are not involved. Additionally, the Des Plaines, Illinois ordinance was far more restrictive than the one at issue here, because it limited to two the number of unrelated persons who may reside together, and the restriction applied at all times, not just while the residents were enrolled in college. Id. at 433-34.

Next, in Dinolfo, 351 N.W.2d at 841, 844, the Supreme Court of Michigan expressly "part[ed] company with" Belle Terre, concluding that a zoning ordinance restricting more than two unrelated persons from living together in single-family residences violated the due process clause of the Michigan Constitution. In so doing, the court clearly and indisputably deviated from the rational basis test utilized by federal courts (and by Rhode Island courts). Instead, the Michigan court placed reliance on Adamson, the California case discussed infra, which applied a *heightened* standard of review, and based its decision on the infringement of a state fundamental right, but *without identifying* any fundamental rights or suspect classifications at issue. See id. at 841. The court found persuasive that the ordinance at issue was underinclusive and overinclusive, see id. at 841-42 ("[a] greater example of over- and under-inclusiveness we cannot

imagine"), even though rational basis review does not require the least restrictive or most narrowly tailored means to achieve legislative goals. Finally, the court noted that it had been presented with no evidence in support of the ordinance, and essentially shifted the burden of proof to the township, see id. at 842-43, despite the fact that rational basis review requires only a ***conceivable*** set of facts, not actual evidence, and places the burden on the challenger.

Indeed, the flaws in Dinolfo are well demonstrated by the dissenting opinion. See id. at 844-48 (Williams, C.J., dissenting) (noting that when considering the constitutionality of a zoning ordinance, "if any state of facts either known or which could reasonably be assumed is presented in support of the ordinance, [the court] must defer to the legislative judgment," and that the majority "overstepped its bounds as a judicial body.") Interestingly, however, had the Michigan court been presented with the Single-Family Dwelling Amendment, it might well have found it constitutional because, as it noted in dicta, "[the township] need not open its residential borders to transients and others whose lifestyle is not the functional equivalent of 'family' life." Id. at 843.

Third, the Court of Appeals of Maryland (the state's highest court) invalidated a so-called "mini-dormitory ordinance" that regulated off-campus residences of full and part-time college students in Kirsch v. Prince George's Cty., 626 A.2d 372, 380-81 (Md. 1993). While the Maryland court noted that the mini-dorm ordinance did not infringe upon fundamental rights or a suspect class and purported to apply rational basis review, it seemed persuaded by the ordinance's under-inclusiveness. See id. at 379, 381. Its analysis—which the City suggests is less than thorough—seems focused on the fact that the ordinance permitted landlords to rent to any number of unrelated persons who were not college students and, therefore, was not rationally related to its objectives of minimizing motor vehicle congestion, noise, and litter. See id. at 381.

The dissent aptly noted that the majority opinion in Kirsch "seems to be either subtly altering the rational basis test, or paying lip service to that test but refusing to apply it in the instant matter." Id. at 381 (Chasanow, J. dissenting).

The dissent in Kirsch went on to elaborate a conceivable set of facts that should have been found to sustain the ordinance. The dissent's hypothetical, which mirrors the concerns the City Council sought to address with the Single-Family Dwelling Amendment, stated as follows:

> We can ***conceive*** that as full or part-time students, [college students] may only have limited funds and are therefore more willing to tolerate crowded, inferior living quarters. Real estate speculators, seizing upon this market, may buy small, inexpensive single-family residences close to these institutions of higher learning and rent formerly single-family homes to several students per house. Many of these students have cars which they might park on the street. As only nine-month tenants, the students may not be concerned about maintaining the property. Intolerant neighbors inconvenienced by the shortage of parking spaces and concerned about declining aesthetics of their neighborhoods may put their homes up for sale. Prospective buyers may not be eager to move into a neighborhood with neglected, crowded student group residences, so the speculators may be able to purchase more houses at deflated prices. The speculators, without doing anything more than is minimally necessary to rent the properties, can create more mini-dorms in close proximity to [the colleges]. Soon there may be a real danger that many quiet college residential neighborhoods will be saturated with student mini-dorms. These assumed justifications are not irrational or arbitrary.
>
> It is also easy to conceive that there is no such problem with non-students or people of other occupations. These non-students are more likely to be employed full-time than are students, and with more money to spend on housing, they presumably may be less willing to tolerate crowded, inferior living conditions. Also, since they will live in the same residence all year long, rather than only for nine months of the year, the premises are less likely to be neglected. Non-student group residences are more likely to be disbursed throughout the county and not clustered around the [colleges]. Id. at 382-83 (Chasanow, J., dissenting) (emphasis added).

The dissent went on to explain that (like the minimal scrutiny test in Rhode Island) even if the

judiciary finds these hypotheticals improbable, or disagrees with the legislative perception, that does not render the conceptions irrational or provide grounds to invalidate a legislative enactment. See id. at 383.

Fourth, state courts in New Jersey have rejected ordinances restricting the number of unrelated persons who may live together, based on a failure to survive rational basis review. See, e.g., Borough of Glassboro v. Vallorosi, 568 A.2d 888 (N.J.1990); State v. Baker, 405 A.2d 368 (N.J. 1979). These decisions reflect a body of case law in New Jersey that reviews zoning classifications in a manner distinct from that utilized in federal jurisprudence and the majority of other states, including Rhode Island.

In Baker, 405 A.2d at 371-72, the Supreme Court of New Jersey struck down a zoning ordinance limiting to four the number of unrelated cohabitants, finding no rational relationship to the problems the ordinance sought to address. The New Jersey Court engaged in the faulty rational basis test applied by courts in Maryland, Michigan, and Illinois by considering whether the law was underinclusive and overinclusive. See id. at 371 (the "classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved," and "legitimizes many uses which defeat that goal"). Meanwhile, the dissent in that case noted that, at the time Baker was decided, "no other court in the land … ha[d] so shackled the hands of its lawgivers and … the rule of law laid down [in Baker] was some years [before] repudiated by the highest court in the land [in Belle Terre]." Id. at 377 (Mountain, J., dissenting). The dissenting opinion reasoned that by elevating any group of unrelated persons to a position of parity with family, the majority, in effect, "deplorably denigrated one of the greatest and finest of our institutions"—essentially eliminating the "preferred position in the law" that families enjoy under United States Supreme Court precedent interpreting the Bill of Rights. See id. at 380

(quoting Moore v. City of East Cleveland, 431 U.S. 494, 511 (1977)).

Eleven years later, in Vallorosi, 568 A.2d at 431, the Supreme Court of New Jersey explained that Baker and its progeny preclude municipalities from adopting zoning ordinances that distinguish between unrelated and related persons and, instead, adopt a standard that inquires as to whether the use at issue qualifies as a "functional" single housekeeping unit. Thus, the narrow issue before the court in Vallorosi was whether, under New Jersey's "functional family" test, the evidence supported a conclusion that ten college students constituted a single housekeeping unit. See id. at 894. Interestingly, the court noted it might have found otherwise based on a different set of facts, stating "[i]t is a matter of common experience that the costs of college and the variables characteristic of college life and student relationships do not readily lead to the formation of a household as stable and potentially durable as the one described in this record." Id. at 894-95.

Finally, in New York, in McMinn v. Town of Oyster Bay, 488 N.E.2d 1240, 1241 (N.Y. 1985), the Court of Appeals of New York found violative of state due process guarantees an ordinance restricting the number and age of unrelated persons who may live together to no more than two persons who are both sixty-two (62) years of age or older. The New York court expressly stated that the ordinance was not reasonably related to its valid objectives because it was "fatally" overinclusive and underinclusive—ignoring again that laws that are over and underinclusive survive rational basis review. Id. at 1243. Like New Jersey, New York adopted a "functional family" test, holding that municipalities may not exclude from single-family neighborhoods a household that is "the functional and factual equivalent of a natural family." Id. The high court's pronouncement was later reaffirmed by Baer v. Town of Brookhaven, 537 N.E.2d 619 (N.Y. 1989), holding that an ordinance restricting the number of unrelated

cohabitants to four violated McMinn. Notably, the ordinance at issue in McMinn was, again, much more restrictive than the Single-Family Dwelling Amendment.

In summary, in those five jurisdictions where ordinances restricting the number of unrelated persons who may cohabitate did not survive rational basis review, the courts applied what amounts to a heightened rational basis test: they prohibited under and overinclusive laws, required the municipality to present evidence in support of its enactment, and/or shifted the burden of proof to the municipality. That standard is not only contrary to federal constitutional jurisprudence and prevailing state constitutional law, it also differs from the minimal scrutiny standard and canons of statutory construction consistently utilized by the Rhode Island Supreme Court. Additionally, it appears that in these contrary cases, the ordinances at issue generally were more restrictive in their scope than the Single-Family Dwelling Amendment. The City urges this Court to reject the analyses applied in these minority jurisdictions and, instead, to rely upon the overwhelming majority of cases which have upheld ordinances similar to the Amendment enacted by the City Council.

C. The Superior Court's Decision in DiStefano v. Haxton is Not Binding and Not Persuasive Because It Misapplies Constitutional Methodology and Is Factually Distinguishable

The City's memorandum in this matter would be incomplete without a discussion of DiStefano v. Haxton, 1994 WL 931006, WC-1992-0589 (Super. Ct. Dec. 12, 1994), an unpublished opinion decided by Justice Fortunato of the Superior Court. The City anticipates that Plaintiffs will focus on this twenty-year-old decision as their primary grounds for invalidating the Single-Family Dwelling Amendment. The City submits that because DiStefano is a Superior Court decision, it is non-binding. In addition, it is of little persuasive value in light of its misapplication of constitutional methodology and its distinguishable facts.

The court in DiStefano found invalid the Town of Narragansett's zoning ordinance prohibiting more than three unrelated individuals from sharing a residential unit anywhere in the town. Id. at *1, *14. Although the trial justice recognized that the Rhode Island Supreme Court has made clear that it follows "the methodology employed by the United States Supreme Court in substantive due process and equal protection matters," id. at *4, its analysis bears little resemblance to that methodology. First, the trial justice questioned whether the United States Supreme Court's squarely on-point decision in Belle Terre was still controlling, even though the high court decision remains good law to this day. See id. at *13 n.7. Instead, the court applied the *sui generis* liberty interests specific to a woman's freedom of choice as elaborated upon in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Thus, the trial justice somehow equated the right to terminate a pregnancy to "one's choice of living location and … housemates" and provided, without citation to any authority for his pronouncement, that the latter are "option[s] that ha[ve] been exercised without governmental interference by countless people since the settling of this country." Id. at *7.

The trial justice also discussed the "three-tiered approach" to scrutinizing enactments challenged as unconstitutional (strict scrutiny, intermediate scrutiny, and rational basis), and concluded that he was "permitted to use strict scrutiny." Id. at *8-9. However, in so deciding, the court did not identify any valid fundamental right to justify such review. See id. at *14 (recognizing a "fundamental right of otherwise competent adults to live with whom they choose," despite there being no federal or state court precedent to support such an extension of Casey). Nor did the court identify a recognized "suspect" class. See id. at *8-9 (finding suspect the ordinance's classification based on "consanguinity"—a "category" unrecognized as suspect by either the United States or Rhode Island Supreme Courts before or since).

Perhaps aware of the unprecedented basis for applying strict scrutiny, the trial justice concluded that the Narragansett ordinance could not pass the minimal scrutiny of the rational basis test—because of the ordinance's "favored position of persons related by marriage or adoption."[43] Id. at *9. Nonetheless, the court in DiStefano proceeded to apply ***heightened scrutiny***. In its analysis striking down the ordinance, the court was persuaded by the town's failure to produce evidence to sustain the rationality of the classification, even though (as discussed infra) rational basis review does not require factual support, as long as a conceivable rational basis exists.[44] See id. at *2-3, *11. The court's decision also reveals that the trial justice in essence found the ordinance overinclusive (although without using that term), despite the fact over-inclusiveness is not grounds for failing rational basis review. See id. at *11-12 ("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. Elementary logic teaches us that while a specie may have the qualities of the larger genus it inhabits, the genus does not have all the characteristics of each and every specie that it contains.").

Assuming, however, that the trial justice's constitutional analysis in DiStefano was

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[43] The trial justice's reasoning based on "consanguinity" is confusing at best. For instance, the City presumes both legal scholars and laypeople would disagree with the trial justice's statement that "[r]elationship by blood is every bit as irrelevant as connection to others by way of skin pigmentation or ancestry." DiStefano, 1994 WL 931006, at *9. The court's decision appears to suffer from the faults exposed by Judge Mountain's dissent from the New Jersey Supreme Court's decision in Baker, 405 A.2d at 380—the elevation of "groups of unrelated persons" to the same position as a "family," effectively denouncing the preferred legal position that the family has historically enjoyed under the federal Bill of Rights. See Moore, 431 U.S. 494.

[44] The trial justice relied heavily on the fact that three of the town's top law enforcement officials opined that the ordinance would have no effect on the legislative goals of the ordinance. See DiStefano, 1994 WL 931006, at *2-3, *11. Of course, under rational basis, their opinions are irrelevant. The only relevant inquiry is whether the ***legislature*** rationally could conclude that the law would be effective in meeting its goals. See, e.g., Mackie, 936 A.2d at 596.

legally sound, the Single-Family Dwelling Amendment is sufficiently distinguishable from the Narragansett ordinance so as to render DiStefano unpersuasive. First and foremost, the restrictive scope of Narragansett's ordinance was much broader than the Single-Family Dwelling Amendment. Narragansett's ordinance prohibited more than three unrelated individuals from residing ***anywhere*** in the town. In contrast, the Amendment applies only to the lowest density R-1A and R-1 Residential zones, which, as set forth previously, are only two of twenty (20) zoning districts in Providence. In other words, unlike the ordinance at issue in DiStefano, more than three college students may reside together anywhere in Providence where residential uses are permitted, apart from R-1A and R-1 districts (and three or fewer college students may reside together anywhere in Providence where residential uses are permitted). Furthermore, Narragansett's ordinance applied to any and all unrelated persons, whereas the Single-Family Dwelling Amendment is specific to college students. In this respect, it is not only narrower in its scope (and therefore infringes less upon people's "choices," and is less overinclusive), it also renders the Amendment rationally related to the objectives it seeks to advance. Otherwise put, because it is indisputably conceivable that the commonly-understood realities of college life differ significantly from the lifestyle choices of traditional and extended families, it was reasonable to prohibit properties in some areas from being used to accommodate large groups of college roommates.

VI. CONCLUSION

In sum, for the reasons stated above, the Amendment withstands constitutional scrutiny under the due process and equal protection clauses of the Rhode Island Constitution. Accordingly, the City respectfully requests that this Honorable Court grant summary judgment in its favor as a matter of law and deny Plaintiffs' request for declaratory relief.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 31st day of January 2017: I filed and served this document through the electronic filing system on the following parties:

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