**IN THE SUPREME COURT OF OHIO**

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| REED HAVEL,<br><br>*Appellant*,<br><br>v.<br><br>BOARD OF ZONING APPEALS, CITY OF KENT, OHIO,<br><br>*Appellee*. | Case No. 2025-0495<br><br>On Appeal from the Court of Appeals, Eleventh District of Ohio<br>Case No. 2024-P-0010 |

# BRIEF OF THE INSTITUTE FOR JUSTICE AND THE BUCKEYE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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## IDENTITY AND INTEREST OF AMICI CURIAE

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society, including private property rights. As part of that mission, IJ is a leading national advocate for the rights of ordinary people to use their property in peaceful, productive ways, including to build a life, pursue their dreams, and help their communities. To that end, IJ regularly challenges unjust and arbitrary zoning rules and land-use restrictions that violate people's rights under the federal and state constitutions. *See, e.g.*, *Diagne v. City of S. Fulton*, No. 24CV010646, 2024 WL 5466376 (Ga.Super.Ct. Dec. 16, 2024) (reversing city council's arbitrary denial of application for special use permit to open a braiding shop and ordering city to issue the permit); *Flathead Warming Ctr. v. City of Kalispell*, 756 F.Supp.3d 985 (D.Mont. 2024) (permanently enjoining government's arbitrary revocation of shelter's conditional use permit). This case involves just such an unjust and arbitrary restriction.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

## INTRODUCTION AND SUMMARY OF ARGUMENT

This brief proceeds in two parts. Part I explains that the decision of the intermediate appellate court here, *Havel v. Bd. of Zoning Appeals*, 2024-Ohio-4544 (11th Dist.), is not a faithful application of this Court's precedent. Most notably, in *City of Norwood v. Horney*, 2006-Ohio-3799, this Court clearly held that private property rights are fundamental rights and that, when

they are challenged in Ohio courts, government intrusions on those fundamental rights must always face meaningful scrutiny. Part I.A.1. That is consistent with this Court's decisions before and after *Norwood*, which emphasize that property rights are fundamental rights and which protect those rights from various intrusions, including in the context of zoning. Parts I.A.2–3. Meaningful scrutiny was required here because the right to establish one's household and the right to lease property are both *property* rights, and because zoning is a particularly pernicious and newfangled intrusion on property rights, meaningful scrutiny is all the more appropriate. Part I.B. Against that backdrop, a review of the intermediate appellate court's decision shows that it falls well short of applying the meaningful scrutiny that should apply in a case such as this one involving fundamental private property rights. Parts I.C & I.D.

Part II explains that the decision below should be reversed because Kent's roommate ban violates the Ohio Constitution's protection for unenumerated rights. Like both the federal constitution and the constitutions of several other states, Ohio's constitution includes a clause which provides that people retain rights even if they are not listed in the document and that those rights shall not be impaired or denied. These unenumerated rights are not absolute, to be sure, but they may not be impaired or denied without some reasoned, evidence-based justification, which is lacking here.

## STATEMENT OF THE FACTS

Amici adopt the statement of facts laid out in the Appellant's merits brief, which is also being filed today.

## ARGUMENT

### I. Proposition of Law No. 1: The court of appeals' decision is inconsistent with this Court's decision in *Norwood v. Horney*, which requires Ohio courts to apply meaningful scrutiny to incursions on private property rights because private property rights are fundamental rights.

In *Norwood v. Horney*, this Court rejected a city's attempt to use eminent domain to take property from one private person and give the property to a private developer and, in doing so, held that private property rights are fundamental rights that deserve meaningful protection by Ohio courts. That decision is consistent with holdings of this Court both from before and after *Norwood*, and such meaningful protection for property rights is particularly appropriate in the context of zoning restrictions. The roommate ban here implicates Appellant's and other residents' private property rights. And the court below failed to give those rights meaningful protection. Amici explain each of these points in turn below.

#### A. Ohio's case law—in *Norwood*, before *Norwood*, and after it—requires meaningful protection for Ohioans' fundamental private property rights.

##### *1.* Norwood v. Horney *requires courts to apply meaningful scrutiny when the government interferes with fundamental private property rights.*

In *Norwood v. Horney*, this Court held that private property rights are fundamental rights and interferences with those rights must receive meaningful scrutiny. 2006-Ohio-3799. Although *Norwood* arose in a different context involving eminent domain, its command that Ohio courts must provide meaningful protection for fundamental private property rights is more broadly relevant and applies here.

In *Norwood*, the City of Norwood proposed to use eminent domain to take a residential neighborhood that was alleged to have suffered some decline over the years. *See Norwood* at ¶¶ 12–15, 18. The city proposed to give the neighborhood to a private developer who would replace the area's homes with a mixed-use development. *Id.* at ¶¶ 17, 21. The city claimed it could

use eminent domain for this private-to-private taking because the neighborhood was "deteriorating" and might become blighted in the future. *Id.* at ¶ 24. The trial court agreed. *Id.* at ¶¶ 26, 30.

But this Court did not. *Id.* at ¶¶ 9, 80. The Court rejected the city's speculative justification because it was insufficiently protective of fundamental private property rights. *See id.* at ¶ 63. "[W]hat notice does the term 'deteriorating area' give to an individual property owner?" the Court asked. *Id.* at ¶ 91. None. *Id.* at ¶ 98. Thus, the Court rejected the city's vague "deteriorating area" standard because, otherwise, courts "would permit the derogation of a cherished and vulnerable individual right based on nothing more than a plank of hypothesis flung across an abyss of uncertainty," *id.* at ¶ 103 (Cleaned up.).[1] Further discussing eminent domain, this Court said that, "[g]iven the individual's fundamental property rights in Ohio," the role of judicial review "is important *in all cases*." *See id.* at ¶ 74 (Emphasis added.); *see also id.* at ¶ 78 (noting holding is based on "[o]ur understanding of the individual's fundamental rights in property").

Although *Norwood* involved eminent domain, its direction that courts must be vigilant in protecting private property rights extends to other contexts. After all, in reaching its holding, this Court articulated and relied on Ohio's longstanding reverence for *fundamental* private property rights generally. Private property rights "are among the most revered in our law and traditions," the Court explained, and "are integral aspects of our theory of democracy and notions of liberty." *Id.* at ¶ 34. The Court described these rights as being "derived fundamentally from a higher

[1] This Court declined to follow the U.S. Supreme Court's 5-4 decision in *Kelo v. City of New London*, which had held that the "public use" requirement in the U.S. Constitution's Fifth Amendment is no bar to local governments taking property from one private individual and handing it to a private corporation for purposes of economic development. 2006-Ohio-3799, ¶ 5, citing 545 U.S. 469 (2005). Instead, "the fact that the appropriation would provide an economic benefit to the government and community, standing alone, does not satisfy the public-use requirement of Section 19, Article I of the Ohio Constitution." *Id.* at ¶ 9. As a result, "an economic or financial benefit alone" is not a public use and "any taking based solely on financial gain is void as a matter of law." *Id.* at ¶ 80.

authority and natural law," *id.* at ¶ 35; "inalienable," *id.*, quoting *Henry v. Dubuque Pacific RR Co.*, 10 Iowa 540, 543 (1860); "*original* and *fundamental* right[s] existing anterior to the formulation of the government itself," *id.* at ¶ 36 (Emphasis in original.), quoting *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 664 (1853); "sacrosanct," *id.* at ¶ 37; and a "bundle of venerable rights," *id.* at ¶ 38. *Norwood* even endorsed the view that it is "the primary and only legitimate purpose of civil government" to protect people's rights, and that this purpose "is accomplished by protecting man in his rights of personal security, personal liberty, and private property." *Id.* at ¶ 36, quoting *Bank of Toledo*, 1 Ohio St. at 632. Thus, "[t]he right of private property" is "an *original right,* which it was one of the primary and most sacred objects of government to secure and protect," and so "[t]he fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society." *Id.* (Emphasis in original.), quoting *Bank of Toledo*, 1 Ohio St. at 632. After surveying that unbroken precedent, *Norwood* declared, "Ohio has always considered the right of property to be a fundamental right," one which "is strongly protected in the Ohio Constitution" and which "must be trod upon lightly, no matter how great the weight of other forces." *See id.* at ¶ 38.

The Court was surely aware that private property rights may be threatened by "other forces" beyond eminent domain. Notably, at the beginning of its discussion of property rights, the Court lists the quintessential "rights related to property" as the rights to "acquire, use, enjoy, and dispose of property," and it cites *Buchanan v. Warley*, 245 U.S. 60 (1917). *Norwood* at ¶ 34. In *Buchanan*, the U.S. Supreme Court struck down Louisville's zoning code because it was racially discriminatory. *See* 245 U.S. at 81. The zoning code prohibited anyone from selling property if the prospective purchaser was a different race from the majority of people already present

on the block. *See id.* at 70–71. The Supreme Court stated that "property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land," *id.* at 74, and held that governments cannot use their zoning power to "prevent the alienation of . . . property" based on race, *see id.* at 82.

*2. Cases before* Norwood *confirm that courts apply meaningful scrutiny when the government interferes with fundamental private property rights.*

*Norwood* continues a long tradition of Ohio courts recognizing private property rights as fundamental. *E.g.*, *Kata v. Second Nat'l Bank of Warren*, 26 Ohio St.2d 210, 216 (1971) ("[I]t is a fundamental right of every individual to be able to dispose of his property, in accordance with the law, as he deems desirable."); *State ex rel. OTR v. City of Columbus*, 76 Ohio St.3d 203, 211 (1996) (finding a compensable taking occurs when "any governmental action [ ] substantially or unreasonably interferes with" the property owner's "right to access" their property). That tradition involved Ohio courts protecting the entire bundle of rights from all manners of incursion, including zoning.

Take *City of Akron v. Chapman*, where this Court held that the right to continue using and enjoying one's property invalidated a zoning restriction. 160 Ohio St. 382 (1953). There, the property owner had been engaged in a lawful junk business for years. *Id.* at 383, syllabus. The city adopted a new ordinance which, in relevant part, zoned the property for residential use only and gave the property owner "a reasonable time" to wind up his business. *Id.*; *see also id.* at 385. Reversing the appellate court, this Court enjoined the city from enforcing its zoning ordinance, holding it would violate due process and further explaining:

> What is property? It has been defined as not merely the ownership and possession of lands or chattels but the unrestricted right of their use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right.

*Id.* at 388; *see also id.* at 388–89.

The Court has also upheld the right to alienate or dispose of property. Consider *Phillips v. Graves*, in which the court upheld the right to dispose of property. 20 Ohio St. 371 (1870). There, despite the traditional rule of coverture (which, as relevant here, treated a married woman's property as belonging to her husband), this Court held that a married woman could use her separately owned real property as collateral to make purchases on credit because her power to dispose of the real property was "incident to [her] unqualified ownership of property." *Id.* at 390; *see also id.* at 385 (describing "the English rule to be . . . that the *jus disponendi*[2] is an incident to the absolute ownership of property"). This Court similarly upheld the right to dispose of property in *Reece v. Kyle*, 49 Ohio St. 475 (1892), where the Court explained:

> Among the fundamental rights is the right to acquire, possess, and dispose of property. The right of disposition necessarily inheres in the right of ownership. We are taught that a chose in action is as much property as a thing in possession, and that in this day the right to dispose of such property is as high and free from doubt as is the right to sell the horse or farm of which the seller has manual possession. And if one may lawfully dispose of such property, why may he not dispose of it upon such terms as to him may seem advantageous?

*Id.* at 484–85.[3]

This Court has also upheld the right to exclude—i.e., the right to decide who to allow onto the property. For example, the Court rejected the notion that a state statute implicitly preempted this right in *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302 (1993). In that case, the Legislature adopted statutes authorizing the state's racing commission to exclude

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[2] "A right of disposal of property." https://www.merriam-webster.com/legal/jus%20disponendi.

[3] While *Reece* has been overruled, *Norwood* cites the case (and others which follow it) to support the proposition that "Ohio has always considered the right of property to be a fundamental right." *Norwood* at ¶ 38, citing *Reece* and *In re Vine St. Congregational Church*, 20 Ohio Dec. 573 (C.P. 1910).

jockeys' agents from racetracks. *Id.* at 303. When a racetrack owner excluded a jockey's agent (without an order from the racing commission), the jockey's agent sued and argued that the statute limited the right to exclude to the commission. *See id.* This Court disagreed because "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Id.*, quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). In fact, within limits laid down by statute or the constitution, property owners enjoy the common-law right to "*admit or exclude* whomsoever they please." *See id.* at 304 (Emphasis added.), quoting *Fletcher v. Coney Island, Inc.*, 165 Ohio St. 150, paragraph one of the syllabus (1956); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–50 (2021) ("[T]he very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' 2 William Blackstone, *Commentaries* *2. In less exuberant terms, we have stated that the right to exclude is universally held to be a fundamental element of the property right, and is one of the most essential sticks in the bundle of rights that are commonly characterized as property." (Citations and quotation marks omitted.)).

Even when it intersects with the right to speak freely, this Court has upheld the right of private property owners to decide who to let onto their property. In *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221 (1994), this Court held that an injunction which prohibited someone from protesting on another person's private property was not an unlawful prior restraint on speech. *See id.* at 224. Despite the unquestioned importance of speech, this Court upheld the property right to exclude "any person [from using] a privately owned shopping center as a forum to communicate on any subject without the permission of the property owner," *id.* at 222, and explained that speech protections are permissible "so long as [they] do not conflict with the private

property owner's constitutional rights," *id.*; *see also id.* at 223, quoting *Bresnik* and by extension *Loretto* for proposition that the right to exclude is "one of the most treasured strands in an owner's bundle of property rights."

*3. Cases after* Norwood *confirm that courts apply meaningful scrutiny when the government interferes with fundamental private property rights.*

As the foregoing shows, even before *Norwood* and even in contexts other than eminent domain, this Court has not been reluctant to prevent interferences with Ohioans' fundamental private property rights. And that trend continued after *Norwood*.

Most relevant here, the Court has followed *Norwood* to protect property rights from incursions via zoning. In *Boice v. Village of Ottawa Hills*, this Court held that a town could not amend its zoning ordinances and deny property owners grandfathering rights. *See* 2013-Ohio-4769, ¶ 17. The Court explained that, if it held otherwise, Ohioans would own property "at their own peril subject to government regulations that can change overnight," and the "result would [be to] eliminate the constitutional protections that people must be afforded with respect to their own private property." *Id.*, citing *Norwood* at ¶¶ 34–38 and Ohio Const., art. I, § 1.

And in other contexts, this Court has continued to cite *Norwood* for the proposition that property rights are fundamental. *E.g.*, *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 2011-Ohio-4612, ¶ 60 (referring to the Court's "history of protecting property rights," which it "recently reiterated . . . in *Norwood*," and explaining that the Court in *Norwood* "observed that Ohio has always considered property rights to be fundamental" and held that such rights are "strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces"); *State ex rel. Doner v. Zody*, 2011-Ohio-6117, ¶ 52 ("The right of property is a fundamental right" that is "strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces," quoting in part *Norwood* at

¶ 38); *Ohio Power Co. v. Burns*, 2022-Ohio-4713, ¶¶ 22, 35 (remanding because trial court's deference to government in eminent domain case "makes us question whether the trial court conducted the appropriate review" and emphasizing that "[t]he property rights of an individual are fundamental rights, and 'the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces,'" quoting *Norwood* at ¶ 38)).[4]

B. The right to establish one's household and the right to lease one's property are both fundamental private property rights which should be protected from intrusions caused by zoning.

The right to establish one's household is a property right. So is the right to lease one's property. Ohio courts should protect these kinds of fundamental private property rights against interference caused by zoning, which lacks a historical basis and which is deleterious to private property rights. Each of these points is further explained below.

Begin with the property right to establish one's household. In *Moore v. City of East Cleveland*, the U.S. Supreme Court considered whether that city's definition of "family" ran afoul of the Due Process Clause insofar as it prohibited a grandmother from living in one home with her son and two grandsons (who were cousins). 431 U.S. 494, 495–96 (1977). A majority of the Court held that it did. *Id.* at 506. Noting that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," the Court explained the country's tradition was "by no means . . . limited to respect

[4] So has the intermediate court of appeals. *Columbia Gas v. Bailey*, 2023-Ohio-1245, ¶ 61, citing *Burns* where it quotes *Norwood*; *Luckey v. T&S Agriventures, L.L.C.*, 2025-Ohio-2348, ¶ 35 (same); *Algoma Group v. Marchbanks,* 2024-Ohio-2342, ¶ 21 (same). And, even where it hasn't cited *Norwood* specifically, this Court has followed *Norwood* in meaningfully protecting property from government intrusion. *E.g.*, *State ex rel. New Wen, Inc. v. Marchbanks*, 2020-Ohio-63, ¶ 25 (2020) (finding state impermissibly expanded its easement in violation of property owner's right to exclude, which "is one of the most essential sticks in the bundle of rights that are commonly characterized as property" (Citations and quotation marks omitted.)).

for the bonds uniting the members of the nuclear family." *See id.* at 503–04. Thus, the State may not "forc[e] all to live in certain narrowly defined family patterns." *Id.* at 506. Writing for himself, Justice Stevens concurred and grounded the Court's decision in the "right of a property owner to determine the internal composition of his household." *Id.* at 518–19 (Stevens, J., concurring in judgment). Thus, in Justice Stevens's reading, in *Moore*, "the critical question presented . . . is whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit." *Id.* at 513 (Stevens, J., concurring in judgment); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating "liberty" undoubtedly includes "the right of the individual to . . . establish a home").

Though *Moore* dealt specifically with related individuals, America has a long history of property owners sharing their household with unrelated people. *See* Jefferson-Jones, *Airbnb & the Housing Segment of the Modern "Sharing Economy": Are Short-Term Rental Restrictions an Unconstitutional Taking?*, 42 Hastings Const. L.Q. 557, 562–64 (2015). "During the 19th century, boarding was commonplace and a culturally acceptable practice." Kreider & Vespa, *The historic rise of living alone and fall of boarders in the United States: 1850-2010* at 2 (Annual Meeting of the Population Assn. of Am., 2015), available at https://www.census.gov/content/dam/Census/library/working-papers/2015/demo/SEHSD-WP2015-11.pdf. It is estimated that "one in five to one in three nineteenth century American households took in boarders." Jefferson-Jones, 42 Hastings Const.L.Q. at 563 & n.28, citing Gamber, *Tarnished Labor: The Home, the Market, and the Boardinghouse in Antebellum America*, 22 J. Early Republic 177, 184 (Summer 2002). And "[w]hether they sheltered one lodger or ten, boardinghouses were remarkably diverse establishments that often catered to residents of particular class, gender, racial, ethnic,

occupational, regional, political[,] moral, or religious identities." Jefferson-Jones, 42 Hastings Const.L.Q. at 563–64.

Ohio shared this rich history of property owners making their homes available to unrelated people. For example, in the 19th century, Ohio property owners opened their doors to shelter people seeking freedom on the underground railroad. *See* Ohio Historical Underground Railroad Trail, available at https://ohio.org/home/ugrrtrail. These locations included the home of John Brown in Akron, which is very near to Kent. *See id.* Later, in the Jim Crow era, Ohioans made their homes available as safe places for African American travelers to stay. *See* Green, *The Negro Motorist Green Book* 58–61 (1949), available at https://www.thc.texas.gov/public/upload/preserve/survey/highway/Negro%20Motorist%20Green%20Book%201949.pdf.

Despite that history, the U.S. Supreme Court's decision in *Belle Terre* declined to recognize the property right to establish one's household in a case involving unrelated people. *Belle Terre* involved six unrelated students who wished to live together in one home which was zoned for single-family use. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2–3 (1974). The property owners could not rent to those students and the students could not live together because the village defined a "family" to include only up to two unrelated people. *See id.* The Court applied rational-basis review and rejected the "several grounds" on which the landowners and tenants challenged the ordinance, explaining the ordinance wasn't based on animus, did not impose a "procedural disparity" on anyone, and did not implicate specific fundamental rights. *See id.* at 7–9. But the Court did not separately discuss property rights. *Belle Terre*'s failure to consider the importance of private property was a serious error because, as laid out below, the owner of real property has and always has had the right (within reasonable statutory and constitutional limits) to lease their property to others of their choosing.

The right to lease—no less than the right to establish a household—is part of what it means to own property. The "bundle of sticks" comprising property "include[s] the right to use the property, to receive income produced by it, to exclude others from it, to dispose of it," but also "*to include others* in the use, possession, or enjoyment of it." *Valentine v. Cedar Fair, LP*, 2022-Ohio-3710, ¶ 13 (Emphasis added.), citing in part Kelly, *The Right to Include*, 63 Emory L.J. 857, 885 (2013); *see also Akron v. Molyneaux*, 144 Ohio App.3d 421, 428 (9th Dist. 2001) (referring to "property owner's 'right to include' speech on his own property"). The right to include people on one's property straightforwardly includes the right to lease property to others. *See, e.g.*, *Miller v. Cloud*, 2016-Ohio-5390, ¶ 98 (7th Dist.) (referencing "the right to lease (one stick of the bundle)"); *Northeast Properties Co. v. Schnieber*, 1984 WL 3996, at *2 (9th Dist. Oct. 24, 1984) ("[T]he right to lease property is an incident of title and possession."); Kelly, 63 Emory L.J. at 898–901 (discussing various kinds of leases).[5] Indeed, "[i]n 2010, out of nearly 112 million occupied housing units in the United States, over 37 million units were rentals." Kelly, 63 Emory L.J. at 898, citing U.S. Census Bureau, Statistical Abstract of the United States: 2012, at 615, table 982 (2011); *see also* Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1322–32 (1993) (noting "[t]he scores of millions of leaseholds in the United States").

[5] Of course, the choice whether to lease property to another must be made within the boundaries set by law and by the Ohio and federal Constitutions. *E.g.*, *State v. Mills*, 28 Ohio Dec. 236, 239 (C.P. 1918) ("[E]ven though the commissioners may have the right to lease the building for various forms of entertainment, they have no right to lease it for the purpose of exhibiting a moving picture on Sunday," which was then a crime.). And to be sure, cities have legitimate interests in adopting reasonable regulations of property ownership and lease arrangements. For instance, cities may validly target nuisance-like activities, or activities that create unsafe conditions or generate undue noise. But there is no reason to believe that a regulation defining what constitutes a "family" is a reasonable or permissible way to target such activities. *See Yoder v. City of Bowling Green*, 2019 WL 415254 (N.D.Ohio Feb. 1, 2019).

Moreover, the right to lease property is well-recognized and deeply rooted in the country's history. Leases can be traced "throughout recorded human history."[6] They appear in "Babylonian cuneiform tablets." Merrill, 12 J. Legal Analysis at 222. And so too in Greece:

> The letting of houses at Athens formed an important class of transactions. Subletting in different forms was extensively practised, with relation, both to the tenants of the property of the state, and the property of private persons. The houses belonging to the state were let to persons who were styled contractors or landlords, and they sublet to lodgers. Private persons built and let houses as lodgings, and houses were rented by speculators for the purpose of subletting.

Hunter, *A Dissertation on the History of the Lease: Being the Introduction to a Treatise on the Law of Landlord and Tenant* 26 (Bell & Bradfute 1860). Leases were also common in "the Roman empire," which "recognized leases of agricultural land, urban dwellings, and personal property." Merrill, 12 J. Legal Analysis at 222.[7] Then, too, "[i]n common law countries, leases of land emerged as a form of property." *Id.*

Leases were and continue to be a common form of property in America. *See* Kreider & Vespa at 2. In fact, in the 1880s, census data showed that over 1.2 million people lived in the United States as roomers or boarders. Scopilliti & O'Connell, *Roomers and Boarders: 1880-2005* at 8, Table 1 (Annual Meeting of the Population Assn. of Am., 2008), available at https://www.census.gov/content/dam/Census/library/working-papers/2008/demo/scopilliti-

[6] Merrill, *The Economics of Leasing*, 12 J. Legal Analysis 221 (2020), https://doi.org/10.1093/jla/laaa003.

[7] "Leases for habitation merely seem also to have been known [in Rome]," where a legal text "indicate[d] the existence of houses let for habitation in Rome, and reference has been made to it by an eminent modern historian as shewing the number of houses which were let in that city. Important real evidence of such leases actually exists. On the walls of the city of Pompeii there is preserved & relic which proves that resort was had to a device similar to the modern mode of advertising by a ticket. There is scrolled in red characters 'A bath and nine hundred shops belonging to a lady named Julia Felix are to be let for five years.'" Hunter, *Dissertation*, at 28.

oconnell-paa-2008.pdf. The number of people living this way peaked in the early twentieth century at around 4 million. *Id.* at 4 (putting the figure as of 1930 at 3.8 million); *see also* Kreider & Vespa at 1 (putting the number of "people living with roommates or renting a room in another's household" in the same year at 4.6 million). Still, although the number of roomers and boarders had fallen dramatically, in 2019, 31.5 percent of U.S. housing units were occupied by people who lease. Merrill, J. Legal Analysis at 222.

At base, whether viewed as a right to establish one's household or the right to lease property, the rights at issue here are well-recognized *property* rights. And those rights should be protected against interference in the name of zoning.

In contrast to the leasehold's long historical pedigree, zoning is a relatively modern invention. Long before the U.S. Supreme Court blessed zoning in theory in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), private property (with personal security and liberty) was a "principal or primary" individual right. 1 Blackstone, *Commentaries* *129. It was "absolute" and "inherent," and included "the free use, enjoyment, and disposal" of property "without any control or diminution, save only by the laws of the land." *Id.* at *138.[8] Zoning reverses that historical presumption of private property rights. Zoning rejects the idea that property owners can freely use their property peacefully and productively and replaces it with a presumption that property rights go only so far as the local zoning code allows. Today, these codes dictate where property owners (and others) can live, work, and play.

[8] *See also Bank of Toledo*, 1 Ohio St. at 632 (describing property as "an original and fundamental right, existing anterior to the formation of the government itself"); James Madison, On Property (Mar. 29, 1792) (explaining government was "instituted to protect property of every sort" and must "impartially secure[] to every man, whatever is his own").

Take the City of Kent's zoning code as just one example.[9] In it, Kent regulates land uses in minute detail. The code divides the city into districts and "lists the permitted uses, conditionally permitted uses, and specially permitted uses in each zoning district." Kent Zoning Code § 1103.07(a). When a use is or may be allowed, the use is still subject to separate development conditions and standards. *See id.* And often even innocuous uses are prohibited. In the City's table of land uses by district, any "blank" field means the "use [is] prohibited." *See id.* So, for instance, in seven of the city's 15 districts, a property owner can *never* build a duplex. *See id.* § 1103.07(b); *id.* (showing only 5 districts where duplexes are "permitted," and 3 where they are "conditionally permitted). Then, in 13 of the 15 districts, "apartment complexes" are completely prohibited. *See id.* Also, in ten districts, boarding houses and rooming houses are unlawful. *See id.* None of these uses is inherently dangerous, yet the city claims the power to pick and choose where they are allowed and where they are illegal.

That sort of micromanagement over private property rights is not traditionally a power the government wielded. *See* Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 14–17 (2022) (discussing land-use regulation before zoning). And the fact that zoning lacks a longstanding basis in our history is important under the reasoning in *Norwood*. In *Norwood*, the Court explained eminent domain was and always had been, like an individual's property rights, a "great and fundamental right." *Norwood* at ¶ 33. By contrast, zoning replaced more targeted and less invasive tools that local governments had long used (most notably, nuisance law) to avoid incompatible land uses and to sustain orderly growth. *See, e.g.*, *Buchanan*, 245 U.S. at 74–75; Gray at 15.[10]

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[9] https://codelibrary.amlegal.com/codes/kent/latest/kent_oh/0-0-0-34744#JD_1103.

[10] Beyond the availability of nuisance law, noxious uses like brickyards or tanneries could be barred from city limits. Gray at 15. City planners also made use of master street plans, public

In addition to lacking any historical pedigree, zoning also, by design, seeks to exclude people and thereby makes America less free and less prosperous. Wolf, *The Zoning of America:* Euclid v. Ambler 138–39 (2008); *see also* Kahlenberg, *Excluded: Why Snob Zoning, NIMBYism, and Class Bias Build the Walls We Don't See* 74 (2023); Gray at 83–85. Indeed, the trial court in *Euclid* acknowledged zoning's obvious goal was "to classify the population and segregate them according to their income or situation in life." *Ambler Realty Co. v. Village. of Euclid*, 297 F. 307, 316 (N.D.Ohio 1926). Decades later, zoning authorities renewed their efforts to exclude undesirable neighbors and "aggressively expanded use segregation, significantly tightened density rules, and imposed months of additional public review on development applications." Gray at 64; *see also* Kahlenberg at 9–11, 16, 103–09, 128–33, 137 (describing economic exclusion in modern zoning).

Zoning has been and continues to be bad for all of us. The wholesale exclusion of people and types of housing has led to an undeniable, national shortage in affordable housing. *See* Council of Economic Advisers, *Annual Report* 152–55 (Mar. 2024), available at https://www.govinfo.gov/content/pkg/ERP-2024/pdf/ERP-2024.pdf. It creates and deepens racial and economic segregation. Rothstein, *The Color of Law* 48–57 (2017). It stops people from freely moving to places that offer economic opportunity, reducing the country's economic resilience and entrenching intergenerational poverty. Kahlenberg at 43–50. It worsens the environment by forcing people to live farther from the places where they work and play. Gray at 93–105. In short, zoning makes us all worse off.

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works improvements, and large urban parks to guide development without unnecessarily infringing on property rights. *See id.* at 14–15.

Given this history and context, it makes good sense to follow *Norwood* and protect fundamental private property rights—including the right to establish one's household and the right to lease—from incursions in the name of zoning.

### C. The decision below failed to provide the meaningful protection for fundamental private property rights that is required by *Norwood* and this Court's other cases.

The decision below did not apply a standard that is faithful to *Norwood* or to this Court's other cases. Kent's ban on more than two unrelated people living together as a single family implicates fundamental private property rights—both the right to establish one's household and the right to lease property. And, as discussed above, *Norwood* reflects Ohio's long history of reverence for precisely these kinds of private property rights. The appellate court's decision would provide little to no protection for these rights when they are assailed by zoning. The decision is circular and overly deferential to the government. As explained more fully below, for these reasons, the decision below fails to apply the meaningful scrutiny required by *Norwood* and should be reversed.

This case involves a challenge to Kent's zoning ordinance, which dictates who may live together in what parts of town as a single "family." According to the decision below, Kent does this through a "confluence of multiple" zoning ordinances. *Havel*, 2024-Ohio-455, ¶ 20. Primarily, Kent zones specific properties for specific uses by placing them in different districts. *See id.* at ¶ 27. As relevant here, Kent's R-3 district allows "occupancy of single family homes" by "no more than two unrelated individuals," *id.* at ¶ 2, but "without restriction on the number of occupants who meet the City of Kent's codified definition of 'family,'" *id.* at ¶ 4. In short, no more than two unrelated people can live together in a single-family home because Kent doesn't consider them a "family."

This restriction interferes with Appellant's fundamental private property rights because it prevents him from leasing to people of his choice. *See id.* at ¶¶ 5–7. Notably, this case does not involve any constitutional or statutory limit on the right to lease property, such as anti-discrimination provisions. Rather, this is a straightforward ban on the types of people to whom Appellant can lease his property. Though Appellant *could* rent the property to an extended family of, say, ten brothers, sisters, cousins, and so on, he cannot, for instance, rent his six-bedroom home to three unrelated friends who attend Kent State University.

The restriction also violates the right to establish one's household. Although the restriction does not implicate Appellant's right to establish his household because he does not live on the property at issue here, it nonetheless interferes with that right for other property owners and for tenants who hold a leasehold interest in the property. It does this in a similar fashion to how it interferes with Appellant's right to lease: A property owner with, say, nine relatives could live with all those relatives in a six-bedroom house. But she could not, for instance, live with her two unrelated friends from college or church. Similarly, a tenant could (if allowed by her lease) invite her nine sisters to live with her on the property, but the same tenant could not invite two good friends to live with her instead.

When presented with Appellant's challenge to this restriction, the intermediate court of appeals wrongly upheld the restriction. For starters, the decision below was circular and would allow courts to uphold zoning restrictions in the mere name of zoning. The court reasoned that the ban on more than two unrelated people living together as a "family" is a reasonable way of "limiting and allocating locations for specific property uses." *Havel* at ¶ 52. The ban is thus supposedly not about dictating which people may live where together, but rather about "the use of the property itself as a single family residence." *Id.* But that is no different from saying the

zoning ordinance is constitutional because it is about establishing a zoning district. Since this would place no limit on the government's ability to interfere with property rights, it is not consistent with *Norwood*.

The decision below also would allow courts to uphold zoning restrictions, even in as-applied challenges, without considering any facts. The court noted that Kent's roommate ban is intended to "facilitate public facilities." *Id.* But the meaning of this phrase is not self-evident. And the opinion never says what it means, much less how the roommate ban supposedly has an "actual impact" on public facilities. *Id.* Whatever the phrase means, it is not clear how, by allowing an *unlimited* number of related people to live together in a home, Kent "facilitates public facilities," but by allowing just three unrelated people to live together in the very same home, Kent would somehow be unable to facilitate public facilities. The court cites no facts to support the conclusion. Instead, the court apparently deferred *completely* to the city's mere assertion. That is not consistent with *Norwood*, which specifically rejected giving the government too much deference in property-rights cases.

The errors in the court's circular and fact-free reasoning are confirmed by comparing it to the decision in *Yoder v. City of Bowling Green*. *See* 2019 WL 415254 (N.D.Ohio Feb. 1, 2019). In *Yoder*, because the case involved property rights, the court decided that it had to apply meaningful scrutiny under *Norwood*. *Id.* at *3. Applying that scrutiny, the court quite rightly held that Bowling Green's similar prohibition against more than three unrelated individuals living together as a single family was unconstitutional because it "is arbitrary, unduly oppressive, fails to substantially advance the avowed government interests of reducing population density or targeting specific issues with college-aged inhabitants, and treats similarly-situated homeowners and tenants differently without any justifiable basis." *Id.* at *6. Since there was no limit on the number

of related people who could live together in Bowling Green as a single family, the limitation was not a reasonable way to promote the government's stated aim—controlling density. While it's true that Bowling Green offered a different rationale than Kent offered in this case, it is unclear why the court below in this case believed that "difference changed the impact on restricted individuals." *Havel* at ¶ 49. Like people in Bowling Green, property owners in Kent may not lease their properties to more than two unrelated people and can't live with more than one other unrelated person. This is virtually an identical impact on restricted individuals as the one declared unconstitutional in *Yoder*. And the intermediate appellate court's circular and fact-free decision here gives no reason to think that Kent's roommate ban is any less arbitrary, unduly oppressive, or ineffective as a means of promoting whatever Kent's aims are.

### D. At a minimum, the decision below failed to interpret Kent's zoning code in a manner that respects fundamental private property rights.

For the reasons above, the court below should have held that Kent's restriction of private property rights violated the Ohio Constitution. At a minimum, however, the court should have interpreted Kent's zoning code in a manner that better respected these rights.

The decision below flipped the presumption of private property rights on its head when it cobbled together multiple ambiguous zoning ordinances to "create" the roommate ban. *Havel* at ¶ 31. The trial court found that Appellant's "intended use of the subject premises [was] fully consistent with the zoning district" and identified the zoning ordinance that allowed him to lease the dwelling to "three (3) or more unrelated individuals." *Id.* The intermediate appellate court simply called that an "incorrect application." *Id.* It then applied a "confluence of multiple definitions and other provisions within the Code"—i.e., the definitions of dwelling, dwelling unit, single-family dwelling, family, and household unit, and a set of "conditions applicable to specific land uses"—to "create" the roommate ban. *See id* at ¶¶ 20, 24, 31. The intermediate court explained it *had* to

read the ordinances this way because, by way of yet another zoning ordinance, Kent says courts should interpret its zoning ordinances to disfavor the free use of private property. Or, as the code puts it, even where one ordinance unambiguously allows a given use, if another provision is "in conflict" or "inconsistent," then "the more restrictive . . . requirement applies." *See id.* at ¶ 26, quoting an "instruction given in chapter 1101 of the Code."

This approach gets things backwards, as courts in Ohio are required to favor the free use of private property. For decades, Ohio courts have recognized:

> All zoning decisions, whether on an administrative or judicial level, should be based on the following elementary principles which underlie real property law. Zoning resolutions are in derogation of the common law and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner.

*Saunders v. Clark Cnty. Zoning Dept.*, 66 Ohio St. 2d 259, 261 (1981).[11] The intermediate court's reliance on the ordinance's direction to apply the "more restrictive or greater requirement" in the face of inconsistent zoning provisions is misplaced, as decades of this Court's case law provides that "the scope of the restrictions cannot be extended to include limitations not clearly prescribed." *Id.* The court below manufactured a conflict between applicable provisions to justify holding Appellant to a stricter standard, but binding precedent demands more respect for the rights of property owners. *See id.*; *Boice*, 2013-Ohio-4769, ¶¶ 10, 17 (citing *Saunders*, *Norwood*, and Ohio Const., art. I, § 1).

Ohio is not alone in this approach, as other states with Lockean guarantees in their constitutions also prioritize ambiguous zoning codes beneath private property rights. Indiana is one

[11] *See also Univ. Circle, Inc. v. City of Cleveland*, 56 Ohio St. 2d 180, 184 (1978); *Terry v. Sperry*, 2011-Ohio-3364, ¶ 19; *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 2014-Ohio-4809, ¶ 34.

such state. *See* Ind. Const., art. I, § 1. Finding that because "zoning ordinances limit the free use of property and are in derogation of common law," "[Indiana courts] construe any such ambiguity to favor the free use of land." *Noblesville, Indiana Bd. of Zoning Appeals v. FMG Indianapolis,* LLC, 217 N.E.3d 510, 515 (Ind. 2023); *see also Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Commn.*, 819 N.E.2d 55, 66 (Ind. 2004). Indiana courts have refused to read purported requirements into zoning ordinances, instead opting to take a strict reading to preserve the free exercise of property rights. *See Saurer v. Bd. of Zoning Appeals*, 629 N.E.2d 893, 897–98 (Ind. App. 1994) (refusing to recognize an implied duty to enhance aesthetics).

North Carolina is another such state. *See* N.C. Const., art. I, § 1. That state's supreme court interpreted a zoning ordinance like Kent's and allowed a property owner to rent out his duplexes to graduate students despite the town's attempt to hold him to requirements for a rooming house. *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 334 N.C. 132, 140 (1993). The combination of ordinances at issue in that case arguably could have been read to prohibit the duplexes on the grounds that more than one "family" would live there and so the duplexes would be a "rooming house." *See id.* at 137–38. However, the court rejected that reading because it would require implying "limitations and restrictions not clearly within the scope of the language employed in such ordinances." *Id.* at 138–39.

The court below deviated from this age-old principle and enforced an ambiguous provision. That unnecessarily and improperly restricted Appellant's deeply rooted right to make free use of his property in a way that's productive and peaceful. *See* Ohio Const., art. I, § 1 (protecting first and foremost the right of "acquiring, possessing, and protecting property").

* * *

The opinion below comes nowhere near protecting the right to establish one's household or the right to lease one's property in the way that *Norwood* and Ohio precedent requires. Under the intermediate appellate court's rationale, could Kent totally exclude even two unrelated people from living together in residences zoned for a single family? Could it similarly ban a sole individual from living in a family home? It is hard to see why it could not. Both hypothetical bans would limit and allocate locations for specific property uses, which is legitimate under the intermediate appellate court's reasoning. And following the court below's approach, Kent would not need to marshal evidence or facts to support those bans but rather could simply assert its mere interest in zoning. Furthermore, where the codes were in doubt, the decision below would allow cities to cobble ambiguous provisions together until they reach the desired prohibition on private property. None of this is consistent with this Court's stated reverence for private property rights, and it should not be allowed to stand.

## II. Proposition of Law No. 2: Kent's roommate ban also violates Appellant's unenumerated property rights, which are protected under Article I, Section 20 of the Ohio Constitution.

The Framers of the Ohio Constitution drafted its Bill of Rights with broad language protecting a maximum of individual liberty. Ohio Const., art. I, § 1. As we have seen, Article I begins by protecting "certain inalienable rights, among which are . . . acquiring, possessing, and protecting property . . ." *Id.* But the Framers ended Article I with another broad protection of rights.[12] Section 20 states, "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people." Together the two sections tell us that this State's Bill of Rights broadly protects rights beyond just

[12] Article I ended with Section 20 until 2011 when the voters of Ohio adopted Section 21.

those specifically enumerated in the document. Ohio's protection for unenumerated rights includes property rights.

Section 20 is a "Baby Ninth Amendment." *See generally* Sanders, *Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters* (2023). Its text is nearly, but not totally, identical to the Ninth Amendment in the U.S. Constitution. U.S. Const., amend. IX.[13] Thirty-two other states also have Baby Ninths. Sanders at 66. These provisions mean what they say; they are meant to protect the rights that aren't listed. *Id.* at 111 (referring to these as "etcetera" clauses). As a practical matter, the framers of a bill of rights cannot list every right they think is worthy of protection. So, to try to protect those other rights too, the framers placed this language at the end of their enumerations. Further, unlike at the federal level, where some scholars argue that the Ninth Amendment itself does not protect individual rights and instead guarantees federalism, at the state level there is no federalism to protect. *Id.* at 98–112. For state constitutions, Baby Ninths necessarily exist entirely to protect the rights of the individual.

Also unlike at the federal level, where the Ninth Amendment has received almost no interpretation from the Supreme Court, state courts have interpreted the various Baby Ninths. These courts find that Baby Ninth Amendments protect unenumerated rights and protect them with real, meaningful scrutiny. This means that the government cannot justify its restriction of one of these unenumerated rights just with its say-so when the *facts* do not support its position.

Admittedly, this Court has not had much occasion, at all, to interpret Section 20. But rulings from other states, with almost identical Baby Ninths, are revealing. For example, in Oregon, the supreme court found a zoning ordinance unconstitutional under its Baby Ninth Amendment.

[13] "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In *Roman Catholic Archbishop v. Baker*, 140 Or. 600 (Ore. 1932), the city of Portland denied a church permission to build a parochial school on its own property. Part of the justification for the denial was that the school would produce noise that would disrupt neighborhood tranquility. *Id.* at 607, 611. The court did not buy this argument, pointing to the traffic noise from a nearby street that the city was uncontroversially allowing: "It appears that the noises made by street cars and automobiles are preferable to the prattle and laughter and merry shouts of the children of a primary school." *Id.* at 611. The court also broadly stated, "The right to own property is an inherent right, one of those rights with which men 'are endowed by their Creator.'" *Id.* at 613. And how is this right constitutionally protected? The court invoked Oregon's Baby Ninth Amendment, stating that when the framers placed it in the state constitution they "covered the matter of inherent rights of the individual." *Id.*

Another example comes from Minnesota, where the supreme court addressed a claim by a woman whose family had been thrown out of their home—that they owned—in the middle of the winter by the town government for allegedly violating a Great Depression-era, poor-relief law. *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 200–24 (1944). The law made no sense as it required the family to move to another town even though they had not been on poor relief for a couple years. *Id.* at 220–21. The court stated that the Minnesota Constitution "does not attempt to enumerate" all rights, but instead "significantly provides" a Baby Ninth Amendment, Article I, Section 16. *Id.* at 225. Among these unenumerated rights, the court said, was "the right to acquire, possess, and enjoy property; and the right to establish a home and family relations." *Id.* at 224–25. And it concluded that the town officials' behavior, as alleged in plaintiff's complaint, not only violated her rights but made the town officials potentially liable for damages. *Id.* at 231–32.

In addition to these two cases there are many other examples of state courts recognizing that Baby Ninth Amendments protect individual rights. *See, e.g.*, *Nickola v. Twp. of Grand Blanc*, 394 Mich. 589, 600–02, 605–06 (1975) (Baby Ninth Amendment protects the right to provide housing to low-income people "from discrimination by exclusionary zoning"); *In re Dorsey*, 7 Port. 293, 377–78, 406–07 (Ala. 1838) (oath in lawyer licensing law declared unconstitutional under Baby Ninth Amendment); *In re Brown*, 478 So. 2d 1033, 1035–37 (Miss. 1985) (Baby Ninth Amendment protects right of competent and alert adults to make medical decisions); Sanders at 82–88.

With these cases as a guide, we can circle back to Ohio's Baby Ninth Amendment and ask the fundamental question: What rights does Section 20 protect? Of course, the clause cannot protect every interest that anyone declares is a "right," such as a positive right for a guaranteed minimum income. But that is not a worry because, under the clause's plain text, the rights protected are only those "*retained* by the people." What are these? The rights that people retain after they enter into the theoretical social contract. *See* Sanders at 114–18 (using Ohio's Baby Ninth Amendment as an example of how these clauses protect natural rights and were adopted with the Lockean social contract theory in mind). Section 20 did not freeze into place whatever "rights" Ohioans happened to enjoy before the 1851 Constitution, whether constitutional or statutory. *See id.* at 126–30. Instead the text invokes the Lockean background of American constitutionalism. When people come together to form a government they leave their "state of nature" behind and form a "social contract." (Everyone knows this is not what literally happens, but the hypothesis of the social contract is how we think about the citizen's relationship with the state.) Section 20—and, even more explicitly, Section 1—draws upon this idea by implying that there are some

rights that the people give up under the social contract, but that there are also other rights that are "retained." Those rights are the rights that all human beings have: life, liberty, and property.

Those rights can still be regulated, but Section 20 places limits on that regulation. What are those limits? At a minimum, and as explored and implemented in cases such as *Thiede* and *Roman Catholic Archbishop*, the government cannot restrict those rights without reason and evidence. That means scrutiny for these unenumerated rights must be meaningful. And the level of scrutiny applied also cannot be less than the scrutiny applied in enumerated rights cases; otherwise, the enumeration would "impair or deny" the other rights retained by the people, which in turn would violate the command of Section 20. That means there is no place for applying the federal rational basis test that the U.S. Supreme Court sometimes applies, which is often understood to allow courts to conjure up hypothetical facts and justifications. *See, e.g.*, *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).

Kent's roommate ban cannot survive meaningful scrutiny. The right to alienate property, including in the form of a leasehold, is a natural right "retained by the people." As explained above, it is one part of the bundle of sticks. It can certainly be regulated, but not without a reasoned, evidence-based justification. And the government lacks that here. To the contrary, as discussed above, the decision below offers only a circular justification that could support *any* property restriction—and that, if accepted, would thus "impair or deny" those unenumerated rights that are supposed to be protected by Section 20. Moreover, as discussed above, there is no real evidence to support Kent's ordinance. Rather, the court below simply gave Kent deference. This, too, is a sure way to impair or deny those rights Ohioans have retained.

## CONCLUSION

This Court should reverse the intermediate court of appeals' decision because it fails to apply the kind of meaningful scrutiny called for by *Norwood* in cases involving fundamental

private property rights and violates unenumerated property rights that are protected by Article I, Section 20 of the Ohio Constitution.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2025, a copy of the foregoing was served upon all parties of record via the Court's e-filing system.

/s/ Robert E. Johnson
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