

**ALL IN THE FAMILY: ASSESSING THE  
DEFINITION OF “FAMILY” IN CITY OF  
BATON ROUGE/PARISH OF EAST BATON  
ROUGE V. MYERS**

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**I. INTRODUCTION**

Like many cities, Baton Rouge, Louisiana has a zoning ordinance that limits the occupancy of dwellings in single-family residential districts to a small number of persons unless those persons are related by blood, marriage, or adoption. Because a strong, if unconscious, bias in favor of a nuclear family in a suburban environment affects the logic of the various courts to address such ordinances, restrictive definitions of “family” persist

in zoning ordinances. Most recently, in *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, the Louisiana Supreme Court rejected challenges to Baton Rouge's definition of "family" on the basis of the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act (FHA).<sup>1</sup> This Note analyzes the court's opinion and concludes that the definition of "family" in the ordinance fails to reflect the complex ways in which individuals share affective co-residential relationships. Part II explores the factual and procedural background of the case, while Part III examines the legal backdrop of zoning, equal protection, and the FHA. Part IV analyzes the court's opinion. Finally, Part V criticizes the ordinance as a violation of equal protection and the FHA and examines how biases against nontraditional families influence zoning law and jurisprudence.

## II. FACTS AND HOLDING

In 2011, Stephen Myers owned a home in a single-family residential district<sup>2</sup> and rented it to four unrelated young men.<sup>3</sup> Under the Unified Development Code (UDC) of the City of Baton Rouge/Parish of East Baton Rouge (City-Parish), dwellings in a single-family residential district may only be occupied by a single family.<sup>4</sup> The ordinance defines "family" as:

an individual or two (2) or more persons who are related by blood, marriage or legal adoption living together and occupying a single housekeeping unit with single culinary

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1. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036 (La. 5/7/14); 145 So. 3d 320.

2. *Id.* at p. 2; 145 So. 3d at 325.

3. Original Brief on Behalf of the City of Baton Rouge/Parish of East Baton Rouge, Plaintiff-Appellant at 6-7, *Myers*, 145 So. 3d 320 (No. 2013-CA-2011), 2014 WL 1673329, at \*6-7 [hereinafter Brief of City-Parish].

4. BATON ROUGE, LA., UNIFIED DEV. CODE app. at H-2 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>. Oddly enough the UDC does not explicitly say that only single families may live in dwellings in a "Single Family Residential District." Compare BATON ROUGE, LA., UNIFIED DEV. CODE § 8.201 (2015) ("The purpose of A1 is to permit low density residential development with a maximum density of 4.1 units per acre.") with *id.* § 8.202.5 ("The purpose of the Two-Family Residential District is to provide for the location and grouping of low density two-family residences."). Nevertheless, all parties operate as if the UDC explicitly forbids anything other than single family to reside in a single family residential district, and the enforcement provisions of the UDC contemplate requiring owners or occupants to attest to their relationships when it is suspected that too many unrelated persons may be residing together. See BATON ROUGE, LA., UNIFIED DEV. CODE § 6.7(C) (2010).

facilities; or, not more than two (2) persons, or not more than four (4) persons (provided the owner lives on the premises) living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost-sharing basis.<sup>5</sup>

Believing that inquiries about family relationships violate the FHA, Myers did not ask the men about their relationship before renting to them.<sup>6</sup> A citizen complaint led to a photographic inspection by the City-Parish, which then ordered Myers to correct the alleged violation.<sup>7</sup> When Myers failed to evict his tenants, the City-Parish sought an injunction.<sup>8</sup>

Myers answered, alleging that the UDC definition was unconstitutional.<sup>9</sup> Following a trial in January 2013, at which the court heard the testimony of Louisiana State University sociologist Dr. Dana Berkowitz,<sup>10</sup> the court found that the tenants formed an “interdependent fictive family.”<sup>11</sup> It also found that the restrictive definition of “family” in the ordinance bore no rational relationship to a legitimate state objective.<sup>12</sup> Thus, the court held that the definition violated the Equal Protection Clause by limiting the number of nontraditional family members who could reside together while allowing an unlimited number of traditional family members to do so.<sup>13</sup> The court specifically noted:

[T]reating creative kinship networks and families such as

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5. BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

6. City of Baton Rouge/Parish of East Baton Rouge v. Myers, 13-2011, 13-2036, p. 15 n.9 (La. 5/7/14); 145 So. 3d 320, 334 n.9.

7. Respondent’s Brief in Opposition to Application for Supervisory Writs of Certiorari, Review and Mandamus at 1, *Myers*, 145 So. 3d 320 (No. 2013-CD-2036), 2014 WL 1673332, at \*1 [hereinafter Respondent’s Brief in Opposition].

8. *Myers*, 13-2011, 13-2036, p. 2; 145 So. 3d at 325. Prior to filing the suit, the City sent a second letter demanding that Myers remedy the violation. Respondent’s Brief in Opposition, *supra* note 7, at 2.

9. *Myers*, 13-2011, 13-2036, p. 2; 145 So. 3d at 325.

10. Brief of City-Parish, *supra* note 3, at 4.

11. City of Baton Rouge/Parish of East Baton Rouge v. Myers, 13-2011, 13-2036, p. 15 n.9 (La. 5/7/14); 145 So. 3d 320, 326. The sociologist testified that “fictive kin” describes “any group of people who consider themselves family, although not related.” Brief of City-Parish, *supra* note 3, at 4. She further testified that the Myers’s tenants formed a fictive family because they provided one another with “economic [and] emotional support.” *Id.*

12. *Myers*, 13-2011, 13-2036, p. 4; 145 So. 3d at 326.

13. *Id.*

same sex relationships, non-marital child births, cohabitations, foster homes, and the like with disparate treatment from the traditional nuclear family appears out of touch with society's reality and denies several non-traditional groups the right to cohabitate as a family unit.<sup>14</sup>

Finding the UDC definition of "family" to be unconstitutionally vague, the trial court dismissed the City-Parish's petition for a permanent injunction with prejudice.<sup>15</sup>

On appeal to the Louisiana Supreme Court,<sup>16</sup> the City-Parish first argued that the UDC's use of the word "family" is not unconstitutionally vague because it provides a precise and applicable definition.<sup>17</sup> The City-Parish further insisted that Myers lacked standing to raise any claims about alleged violations of the equal protection rights of any sort of "fictive families" as he was neither a member of such a family nor had he attempted to rent to one.<sup>18</sup> Drawing upon *Village of Belle Terre v. Boraas*,<sup>19</sup> the City-Parish argued that Myers's evidence was insufficient to rebut the presumption of constitutionality afforded zoning ordinances.<sup>20</sup> Finally, the City-Parish claimed that the

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14. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, pp. 3-4 (La. 5/7/14); 145 So. 3d 320, 326.

15. Brief of City-Parish, *supra* note 3, at 2.

16. The Louisiana Supreme Court has original appellate jurisdiction on questions of constitutionality. LA. CONST. art. 5, § 5(D). The City-Parish applied to the district court for a suspensive appeal. Brief of City-Parish, *supra* note 3, at 3. Myers objected and the court authorized a devolutive appeal. *Id.* The City-Parish initially submitted an application for supervisory writs (No. 2013-CD-2036), asserting that the district court acted arbitrarily when it refused to grant a suspensive appeal. *Id.* Concerned that the time for appeal would elapse before a favorable ruling could be granted, the City-Parish also filed a devolutive appeal (No. 2013-CA-2011). *Id.* The Louisiana Supreme Court found that the district court should have granted a suspensive appeal. *Myers*, 13-2011, 13-2036, pp. 19-21; 145 So. 3d at 336-38.

17. Brief of City-Parish, *supra* note 3, at 6-7. According to the City-Parish, there are four potential persons or groups that may constitute a family under the UDC: (1) "an individual;" (2) "two or more persons . . . related by blood, marriage, or adoption;" (3) two unrelated persons; (4) four unrelated persons if the owner lives on the premises. *Id.* at 6. Since none of these definitions is so vague that "men of common intelligence must guess as to its meaning," the statute provides due process. *State v. Prestridge*, 399 So. 2d 564, 571 (La. 1981).

18. Brief of City-Parish, *supra* note 3, at 7-9. The four tenants do not fall into any of the categories identified by the district court judge as denied equal protection by the ordinance, and the City-Parish rejected Dr. Berkowitz's characterization of the four young men as a "family." *Id.*

19. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974). *See infra* text accompanying notes 40-46.

20. Brief of City-Parish, *supra* note 3, at 9-12. *See infra* text accompanying notes

UDC did not violate Myers's equal protection rights because it treated him the same as any other property owner in the district.<sup>21</sup>

In response, Myers argued that the UDC definition of "family" is vague because it creates two separate categories: households composed of persons related by blood, marriage, or adoption, and households composed of unrelated persons.<sup>22</sup> However, a household may contain persons related to some occupants but unrelated to others; because these persons are both related and unrelated, the ordinance provides no guidance as to whether the maximum number of occupants in such a household is two or four.<sup>23</sup> Myers further argued that he had standing to challenge the definition of "family" because a violation of the UDC exposed him to the possibility of a fine or imprisonment.<sup>24</sup> He alleged that the ordinance denied him equal protection by more severely restricting the rights of non-resident homeowners and resident landlords than those of resident homeowners who do not rent to tenants; he contended that such homeowners may have an unlimited number of unrelated people living with them.<sup>25</sup> Myers then disputed the City-Parish's use of *Belle Terre*, arguing that the subsequent United States Supreme Court decision in *Moore v. City of East Cleveland*<sup>26</sup> should control.<sup>27</sup> Myers next contended that the UDC definition of "family" should fail rational basis review because it allows an unlimited number of related persons to reside together while imposing numerical restrictions on unrelated persons.<sup>28</sup> Finally, Myers argued that the UDC violated his freedom of association and his right to privacy, that it

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60-61. The City-Parish also alleged that the district court erroneously concluded that the City did not prove a violation of the ordinance. Brief of City-Parish, *supra* note 3, at 12-13. The district court never reached the issue of the alleged violation since it ruled the ordinance unconstitutional; as a result, the Supreme Court remanded the case for the district court to rule on the merits. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 21 (La. 5/7/14); 145 So. 3d 320, 338.

21. Brief of City-Parish, *supra* note 3, at 7-8.

22. Original Brief on Behalf of Stephen C. Myers, Appellee at 5-7, *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036 (La. 5/7/14); 145 So. 3d 320 (No. 2013-CA-2011) [hereinafter Original Brief of Myers].

23. *Id.* at 7.

24. *Id.* at 7-8.

25. *Id.* at 9-11.

26. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). See *infra* text accompanying notes 47-52.

27. Original Brief of Myers, *supra* note 22, at 11-12.

28. *Id.* at 14-16.

violated the Takings Clause, and that it violated the FHA prohibition on discrimination based on familial status.<sup>29</sup>

In a 6–1 decision<sup>30</sup> the Louisiana Supreme Court held that the definition of “family” in the UDC does not violate a landlord’s right to equal protection<sup>31</sup> and that requiring a landlord to inquire into the familial status of prospective tenants does not violate the FHA.<sup>32</sup>

### III. BACKGROUND

#### A. ZONING

Zoning ordinances divide a municipality into districts, each dedicated to a particular use or type of building in order to “reduce or eliminate the adverse effects that one type of land use might have on another.”<sup>33</sup> Because zoning is an exercise of police

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29. Original Brief of Myers, *supra* note 22, at 18-23.

30. Justice Hughes authored the majority opinion. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 1 (La. 5/7/14); 145 So. 3d 320, 325. Justice Weimer concurred in the result, but emphasized that if the ordinance were to be challenged by tenants rather than by a landlord, he would likely find the ordinance unconstitutional. *Id.* at pp. 1-4; 145 So. 3d at 340-41. (Weimer, J., concurring in the result). He argued that although the goals served by the ordinance are undeniably legitimate, “there are clearly more logical, rational, and reasonable means of accomplishing the stated goals.” *Id.* at p. 4; 145 So. 3d at 341. Justice Knoll dissented, finding that because the rights of property and privacy are fundamental under the Louisiana Constitution, LA. CONST. art. I, §§ 4-5, the ordinance is subject to strict scrutiny. *Myers*, 13-2011, 13-2036, pp. 1-4; 145 So. 3d at 338-39 (Knoll, J., dissenting). While conceding that the state’s interest in reducing overcrowding may be compelling, the dissent argued that there are less restrictive means to achieve that objective. *Id.* at pp. 3-4; 145 So. 3d at 339.

31. *Myers*, 13-2011, 13-2036, p. 13; 145 So. 3d at 332-33 (majority opinion).

32. *Id.* at p. 15; 145 So. 3d at 333-34. The court made additional holdings that this note, in the interest of brevity, does not address. The court rejected Myers’s argument that the definition of “family” is vague because the two clauses conflict. *Id.* at pp. 12-13; 145 So. 3d at 322. Although the two clauses refer to different groups, because they are joined by the disjunctive “or,” the court held that the statute clearly indicated that occupants must fall into one group or the other. *Id.* at p. 13; 145 So. 3d at 322. The court also held that Myers was not unconstitutionally deprived of the right to use his property because Myers failed to show that he would be unable to find tenants that complied with the UDC requirements. *Id.* at pp. 16-18; 145 So. 3d at 334-35.

33. *Jenkins v. St. Tammany Parish Police Jury*, 98-2627, p. 5 (La. 7/2/99); 736 So. 2d 1287, 1290 (citing *City of New Orleans v. Hamilton*, 602 So. 3d 112, 114 (La. 1992)). *But see generally* Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59 (1993) (arguing that zoning is an exclusionary device rather than merely a neutral bureaucratic tool).

power,<sup>34</sup> courts typically defer to the judgment of the legislative body charged with zoning.<sup>35</sup> As a result, zoning ordinances enjoy a presumption of constitutionality.<sup>36</sup> This Note examines the principles articulated in the leading United States Supreme Court zoning cases before addressing zoning in Louisiana.

## 1. FEDERAL REVIEW OF ZONING

The United States Supreme Court first considered zoning in 1926 in *Village of Euclid v. Ambler Realty Co.*<sup>37</sup> There, the Court held that a zoning ordinance is unconstitutional only if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>38</sup> The Court later clarified that “welfare” includes the aesthetic appeal of the built environment.<sup>39</sup>

The Court’s next major zoning decision was *Village of Belle Terre v. Boraas* in 1974,<sup>40</sup> by which time the Court had more fully articulated the standards of review for alleged equal protection violations.<sup>41</sup> In *Belle Terre*, the Court addressed the

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34. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (holding that zoning ordinances “must find their justification in some aspect of the police power”); *State ex rel. Hayes v. City of New Orleans*, 97 So. 446, 448 (La. 1923) (finding that it is within the police power to deem certain activities nuisances in a particular location, even if they are not nuisances in law or in fact).

35. Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 208 (1991).

36. *Folsom Rd. Civic Ass’n v. St. Tammany Parish*, 407 So. 2d 1219, 1222 (La. 1981); see also Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopton*, 24 B.C. ENVTL. AFF. L. REV. 103, 103 (“Historically, local government land-use decisions have enjoyed a presumption of validity . . .”).

37. *Euclid*, 272 U.S. 365. Before the emergence of zoning ordinances around the turn of the century, private restrictive covenants served many of the same purposes. See Frank S. Alexander, *The Housing of America’s Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1235-50 (2005).

38. *Euclid*, 272 U.S. at 395 (citing *Cusack Co. v. City of Chicago*, 242 U.S. 526, 530-31 (1917)). However, as one scholar notes, the “welfare” invoked by the court was limited to those who could afford live in detached single-family houses. Kosman, *supra* note 33, at 98-99.

39. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (holding that the Fifth Amendment allows urban renewal projects to take non-derelict property with appropriate compensation).

40. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974); see Alexander, *supra* note 37, at 1261 (positioning *Belle Terre* within the timeline of Supreme Court zoning cases).

41. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 & n.4 (1938) (suggesting circumstances in which a heightened form a scrutiny rather than a mere identification of a rational basis might be appropriate).

constitutionality of an ordinance strikingly similar to the one in *Myers*.<sup>42</sup> The ordinance defined "family" as:

(o)ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.<sup>43</sup>

Because the ordinance was not directed toward transients, did not erect inequitable procedural barriers, and implicated no fundamental right, the Court subjected the ordinance to rational basis review, requiring that the law be rationally related to a legitimate state interest.<sup>44</sup>

The Court found that creating a "zone[] where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" is a legitimate state objective.<sup>45</sup> Since a reduced population density is rationally related to that objective, the ordinance passed constitutional muster.<sup>46</sup> *Belle Terre* thus became a basis upon which later courts have upheld similar restrictive definitions of "family."<sup>47</sup>

Three years later, in *Moore v. City of East Cleveland*, the Court struck down a zoning ordinance that defined family in such a way that a grandmother could not live with two of her grandsons because they were cousins rather than brothers.<sup>48</sup> The

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42. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

43. *Id.*

44. *Id.* at 7-8; see *infra* text accompanying notes 74-82.

45. *Belle Terre*, 416 U.S. at 9.

46. *Id.*

47. Alexander, *supra* note 37, at 1263. *But see* Richard C. Stanley, *Age Restrictions in Housing: The Denial of the Family's Right to Its Integrity*, 19 HARV. C.R.-C.L. L. REV. 61, 68-70 (1984) (arguing that *Belle Terre* does not allow states to regulate the internal composition of families, but only allows them to identify zones for occupation by families, whose integrity must not be undermined).

48. *Moore v. City of East Cleveland*, 431 U.S. 494, 496, 499 (1977). The ordinance defined family as "a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit," but further limited occupants to the following relatives of the head of the household: spouse, a single parent of the head or spouse, unmarried children, and one married child with a spouse and dependent children of that child only. *Id.* at 496 n.2. The grandmother violated the ordinance by living with her son and his dependent son as well as the son of another one of her children. *Id.* at 496-97.

Court found that this restriction on the biological family infringed upon the “freedom of personal choice in matters of marriage and family life.”<sup>49</sup> Because the ordinance implicated a fundamental right, the Court applied an unspecified sort of heightened scrutiny to find that the ordinance violated substantive due process.<sup>50</sup> The Court distinguished *Belle Terre* where the numerical restriction in that case had affected only unrelated persons whom the court did not consider to be a family.<sup>51</sup> Though *Moore* suggests that a heightened scrutiny is appropriate for certain zoning ordinances,<sup>52</sup> courts typically apply to zoning ordinances the rational basis review applicable to other forms of “economic and social legislation.”<sup>53</sup>

## 2. ZONING IN LOUISIANA LAW AND JURISPRUDENCE

The Louisiana Constitution authorizes local governments to “adopt standards for use, construction, demolition, and modification of areas and structures.”<sup>54</sup> The Revised Statutes identify the purposes of zoning: “to lessen congestion in the public streets, secure safety from fire, promote health and the general welfare, provide adequate light, avoid undue concentration of population, and facilitate adequate transportation, water supply, sewerage, schools, parks, and other public requirements.”<sup>55</sup> Statutes also allow municipalities to consider the “character of the district” and the effect of zoning decisions on property values.<sup>56</sup> To accomplish these objectives, permissible regulations may affect building size and height, the number of stories, the percentage of a lot that must be left open, the density of population, and the location and use of buildings for “trade, industry, residence, or other purposes.”<sup>57</sup> Each municipality may

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49. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974)).

50. *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)).

51. *Id.* at 498-99.

52. *Id.* at 499 (citing *Poe*, 367 U.S. at 554) (“But when the government intrudes on choices concerning family living arrangements, this Court must *examine carefully* the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” (emphasis added)).

53. *See, e.g., Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

54. LA. CONST. art. 6, § 17.

55. LA. REV. STAT. ANN. § 33:4723 (2009). *See* LA. REV. STAT. ANN. §§ 33:4721-4734 (2009 & Supp. 2015) (authorizing municipal zoning ordinances); *id.* §§ 33:4780.40-52 (authorizing parish zoning ordinances).

56. LA. REV. STAT. ANN. § 33:4723 (2009).

57. *Id.* § 33:4721.

create its districts within which the application of the zoning must be uniform<sup>58</sup> and follow a comprehensive plan.<sup>59</sup> Because zoning restricts the free use of property, Louisiana courts interpret zoning ordinances so as to produce the fewest such restrictions.<sup>60</sup> However, an ordinance is presumed constitutional.<sup>61</sup> Thus, if its rationality is debatable, courts will uphold it.<sup>62</sup>

Baton Rouge has codified its zoning ordinances in the UDC.<sup>63</sup> Under the UDC, single-family residential districts are intended for low-density residential development.<sup>64</sup> The residential units are to be single-family dwellings,<sup>65</sup> the definition of which includes townhouses but excludes trailers,<sup>66</sup> and the occupants must meet the definition of “family.”<sup>67</sup> Additional appropriate uses include agriculture, golf courses and amenities, railroad passenger terminals and rights of way, and government buildings and facilities.<sup>68</sup> Developers may also apply for conditional-use permits for bed and breakfast establishments, cemeteries, daycares and preschools, and “educational, religious, and philanthropic institutions.”<sup>69</sup>

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58. LA. REV. STAT. ANN. § 33:4722(C)(1) (Supp. 2015).

59. LA. REV. STAT. ANN. § 33:4723 (2009).

60. *Esplanade Ridge Civic Ass'n v. City of New Orleans*, 13-1062, p. 8 (La. App. 4 Cir. 2/12/14); 136 So. 3d 166, 171 (quoting *Palm-Air Civic Ass'n, Inc. v. Syncor Int'l Corp.*, 97-1485, p.7 (La. App. 4 Cir. 3/4/98); 709 So. 2d 258, 262).

61. *Fransen v. City of New Orleans*, 08-0076, p. 10 (La. 7/1/08); 988 So. 2d 225, 233 (citing *Theriot v. Terrebonne Parish Police Jury*, 436 So. 2d 151, 520 (La. 1983)).

62. *Palermo Land Co. v. Planning Comm'n*, 561 So. 2d 482, 493 (La. 1990). Because of this presumption, “the party attacking the statute has the burden of proving unconstitutionality by clear and convincing evidence.” *Lakeside Imports, Inc. v. State*, 94-0191, p. 2 (La. 7/5/94); 639 So. 2d 253, 255. However, if a statute classifies on the basis of a protected classification under the Louisiana Constitution, then the state bears the burden of proving that the classification is not “arbitrary, capricious, or unreasonable.” *Sibley v. Bd. of Supervisors*, 477 So. 2d 1094, 1108 (La. 1985); see *Lakeside Imports*, 94-0191, p. 2; 639 So. 2d at 255.

63. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 8 (La. 5/7/14); 145 So. 3d 320, 329.

64. BATON ROUGE, LA., UNIFIED DEV. CODE app. at H-2 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

65. *Id.*

66. BATON ROUGE, LA., UNIFIED DEV. CODE 2-7 to -8 (2015).

67. See *id.* at 2-9.

68. BATON ROUGE, LA., UNIFIED DEV. CODE app. at H-2 (2015).

69. BATON ROUGE, LA., UNIFIED DEV. CODE § 8.201 (2015).

## B. EQUAL PROTECTION

The Fourteenth Amendment of the United States Constitution forbids a state from denying “any person within its jurisdiction the equal protection of the laws.”<sup>70</sup> When a party claims that a statute violates equal protection, a court first determines whether the statute targets a suspect or quasi-suspect class.<sup>71</sup> If the statute implicates a suspect class, the courts apply strict scrutiny such that legislation must be narrowly tailored to promote a compelling state interest.<sup>72</sup> If the statute involves a quasi-suspect class, courts apply intermediate scrutiny such that legislation must be “substantially related to an important governmental objective.”<sup>73</sup> In all other cases, courts defer to legislative judgment and require only that the statute be “rationally related to a legitimate state interest.”<sup>74</sup>

When analyzing a statute under rational basis review, a court first determines if the legislation implicates a legitimate state interest before determining whether the required rational relationship exists between that interest and the statute.<sup>75</sup> A given statute need not actually promote the legitimate state interest provided that a legislature “could rationally have decided” that the enactment furthered the interest.<sup>76</sup> Though equal protection requires that similarly situated persons be treated alike,<sup>77</sup> it does not require absolute equality.<sup>78</sup> Hence, a

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70. U.S. CONST. amend. XIV, § 1.

71. See *Rudolph v. Mass. Bay Ins. Co.*, 472 So. 2d 901, 904 (La. 1985) (describing the equal protection analysis in federal courts).

72. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). Notably, however, proof of discriminatory intent or purpose is required; a disproportionate impact is insufficient. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (finding that a decision by zoning board to deny rezoning of a property necessary for the construction of a low- and moderate- income development was not motivated by racial animus and so did not violate the Equal Protection Clause).

73. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

74. *Rudolph*, 472 So. 2d at 904.

75. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63 (1981).

76. *Id.* at 466.

77. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

78. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488-89 (1955) (finding that an Oklahoma statute regulating opticians but not merchants selling ready-to-wear glasses did not constitute invidious discrimination such as would violate the Equal Protection Clause). The Equal Protection Clause in the Louisiana Constitution receives the same interpretation. *Beauclaire v. Greenhouse*, 05-0765, p. 5 (La. 2/22/06); 922 So. 2d 501, 505 (citing *McCormick v. Hunt*, 328 So. 2d 140, 142 (La. 1976)).

piecemeal approach to a problem does not violate equal protection so long as a rational reason may exist for not addressing an entire problem at once.<sup>79</sup>

However, when animosity towards a group motivates a statute, courts apply a more stringent version of rational basis.<sup>80</sup> The United States Supreme Court has found such animosity when the classification involves an immutable characteristic<sup>81</sup> or when evidence suggests a legislative desire to “harm a politically unpopular group.”<sup>82</sup> When applying this version of rational basis, the Court requires that the statute actually serve the interests advanced by the government.<sup>83</sup>

### C. THE FAIR HOUSING ACT

The FHA makes it unlawful to refuse to rent or sell housing on the basis of “race, color, religion, sex, familial status, . . . national origin,”<sup>84</sup> or disability.<sup>85</sup> Relief can be administrative or

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79. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (citing *Semler v. State Bd. of Dental Exam'rs*, 294 U.S. 608 (1935)); *see also* *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (holding that an ordinance that only bans pushcarts that have been in operation for less than eight years is rationally related to the legitimate object of preserving charm in the French Quarter).

80. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (animosity towards homosexual couples); *Romer v. Evans*, 517 U.S. 620 (1996) (animosity towards gays, lesbians, and bisexuals); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (animosity towards the mentally handicapped); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (animosity towards “hippies” and communal households).

81. *Cleburne*, 473 U.S. at 442-43.

82. *Moreno*, 413 U.S. at 534 (desire suggested by negative comments in the Congressional Record directed at “hippies”); *see also Windsor*, 133 S. Ct. at 2693 (desire suggested by the title of “Defense of Marriage Act” and by House findings that DOMA reflects “moral disapproval of homosexuality” (quoting H.R. REP. No. 104-664, at 16 (1996))); *Romer*, 517 U.S. at 632-33 (desire suggested by broad sweep of the law denying gay, lesbian, and bisexual citizens the ability to have laws passed to protect them).

83. *See, e.g., Cleburne*, 473 U.S. at 448-50 (examining whether the denial of a permit for a home for the intellectually disabled actually serves any of the alleged objectives).

84. 42 U.S.C. § 3604(a) (2012).

85. *Id.* § 3604(f). The statute also makes unlawful the provision of differing levels of service, *id.* § 3604(b), advertising that indicates a preference against a protected class, *id.* § 3604(c), lying about the availability of housing to a member of a protected class, *id.* § 3604(d), and inciting persons to sell or rent based on “representations regarding the entry or prospective entry into the neighborhood” of a member of a protected class, *id.* § 3604(e). *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 222-39 (2006) (discussing the legislative background of the Fair Housing Act).

through civil actions brought by private persons, the state, and political subdivisions.<sup>86</sup> The FHA defines “familial status” as:

one or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.<sup>87</sup>

Thus, “familial status” under the FHA requires the presence of minors, who may be biological, adopted, or foster children<sup>88</sup> or children living with a guardian.<sup>89</sup> Concerned that protections based on familial status may lead to increased litigation by large families, Congress exempted “any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”<sup>90</sup> However, in *City of Edmonds v. Oxford House, Inc.*, the United States Supreme Court held that while restrictions referring solely to number are exempt, those that describe the composition of a family in terms of genetics, adoption, or marriage are not.<sup>91</sup>

A challenger can prove liability under the FHA by alleging either disparate treatment or disparate impact.<sup>92</sup> Courts analyze disparate treatment claims using the *McDonnell Douglas* burden-

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86. 42 U.S.C. §§ 3610, 3612-13 (2012). See generally Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993) (arguing that the amendments strengthened the weak enforcement provisions found in the original legislation). Narrow exceptions exist. For instance, the FHA exempts buildings of less than four units where the owner lives in one of the units as well as dwellings that are for sale by owner unless that owner engages regularly in such transactions. 42 U.S.C. § 3603(b)-(c) (2012).

87. 42 U.S.C. § 3602(k) (2012). The statute also includes protections for pregnant women and those who are “in the process of securing legal custody” of minors. *Id.*

88. See, e.g., *Gorski v. Troy*, 929 F.2d 1183, 1187 (7th Cir. 1991) (holding that the FHA protects foster parents from discrimination based on familial status).

89. See 42 U.S.C. § 3602(k) (2012).

90. *Id.* § 3607(b)(1). See generally Tim Iglesias, *Clarifying the Federal Fair Housing Act’s Exemption for Reasonable Occupancy Restrictions*, 31 FORDHAM URB. L.J. 1211 (2004).

91. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 735-36 (1995). But see generally Tim Iglesias, *Moving Beyond Two-Person-Per-Bedroom: Revitalizing Application of the Federal Fair Housing Act to Private Residential Occupancy Standards*, 28 GA. ST. U. L. REV. 619 (2012) (arguing that a typical two-person-per-bedroom occupancy standard is itself discriminatory).

92. *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1997).

shifting framework.<sup>93</sup> First, the plaintiff must make a prima facie showing that housing was denied on the basis of one of the protected characteristics under the FHA.<sup>94</sup> The defendant must produce a nondiscriminatory reason for the conduct at issue.<sup>95</sup> An “ostensibly benign justification” for the conduct may be insufficient<sup>96</sup> because the challenger may then prove that that reason is merely pretextual.<sup>97</sup> Under a disparate impact theory, a plaintiff must show that “outwardly neutral . . . practices” had a “significantly adverse or disproportionate impact on persons of a particular [type].”<sup>98</sup> For instance, the United States Supreme Court found a violation when a city limited the construction of subsidized housing to a predominately minority area, thereby perpetuating existing segregation.<sup>99</sup>

The FHA does not address every circumstance “that might conceivably affect the availability of housing.”<sup>100</sup> For example, when a highway route selection restricted the potential growth of a predominantly African-American community, the Fourth Circuit held that the connection between the route selection and

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93. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997); see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

94. *Gamble*, 104 F.3d at 305.

95. *Id.*

96. *Potomac Grp. Home Corp. v. Montgomery Cnty.*, 823 F. Supp. 1285, 1295 (D. Md. 1993); cf. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (finding that a policy that denied women the opportunity to work in a job that would actually or potentially expose them to lead unless they had been medically declared infertile was a disparate treatment under Title VII even though there was no evidence that the policy was motivated by malice towards women).

97. *Gamble*, 104 F.3d at 305.

98. *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 744-45 (9th Cir. 1996) (alteration in original) (quoting *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986)). Although some commentators have argued that the text of the FHA permits claims of disparate treatment only, see, e.g., Kirk D. Jensen & Jeffrey P. Naimon, *The Fair Housing Act, Disparate Impact Claims, and Magner v. Gallagher: An Opportunity to Return to the Primacy of the Statutory Text*, 129 *BANKING L.J.* 99 (2012), the United States Supreme Court has confirmed the availability of disparate impact liability, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). However, the Court cautioned that mere statistical difference was insufficient but that plaintiffs must also show that a particular policy of the defendant caused the impact in order to make out a prima facie case and that developers must be allowed the opportunity to prove that a policy that produces a discriminatory impact is “necessary to achieve a valid interest” *Id.* at 2523.

99. *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (per curiam).

100. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)).

housing interests was too remote to give rise to a claim under the FHA.<sup>101</sup> Similarly, in *Pfaff v. U.S. Department of Housing and Urban Development*, the Ninth Circuit held that a private landlord successfully rebutted a prima facie case of discrimination on the basis of familial status when the landlord imposed a reasonable and “facially neutral . . . numerical occupancy restriction” in order to prevent wear on a house.<sup>102</sup>

#### IV. THE COURT’S DECISION

##### A. TREATMENT OF MYERS’S EQUAL PROTECTION CLAIM

First, the court pretermitted discussion of any alleged violations of the rights of occupants of dwellings in the single-family residential district, as Myers lacked standing to raise the claims of third parties.<sup>103</sup> The majority then held that the definition of “family” in the ordinance did not deny Myers equal protection.<sup>104</sup>

Myers, by living elsewhere, could lease his home to two unrelated occupants or any number of relatives, while if he lived in his home he could lease it to four unrelated occupants (including himself) or any number of his relatives.<sup>105</sup> Nevertheless, the court held that because every property owner in the district faced the same restriction, the UDC did not create a classification affecting Myers and hence did not violate his equal protection rights.<sup>106</sup>

Because the court determined that no classification had been made, it did not reach the question of the standard of review for equal protection analysis. However, by citing *City of New Orleans v. Dukes*, the court suggested that the standard should be rational basis.<sup>107</sup> The court also analyzed *Belle Terre* in some detail,<sup>108</sup> but did not actually analogize it to the circumstances at

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101. *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (quoting *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423 (4th Cir. 1984)).

102. *Pfaff v. U.S. Dep’t of Hous. & Urban Dev.*, 88 F.3d 739, 749 (9th Cir. 1996).

103. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2026, pp. 10-12 (La. 5/7/14); 145 So. 3d 320, 331.

104. *Id.* at p. 13; 145 So. 3d at 332-33.

105. *Id.* at p. 13; 145 So. 3d at 332.

106. *Id.* at p. 13; 145 So. 3d at 332-33.

107. *Id.* at p. 13 n.8; 145 So. 3d at 333 n.8; see *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (applying rational basis review to legislation regulating pushcarts in the French Quarter).

108. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2026,

bar. However, the court made clear that *Belle Terre* and not *Moore* controlled since *Moore* overruled an ordinance forbidding relatives from living together while *Belle Terre*, like the case at bar, upheld an ordinance limiting the number of nonrelatives living together.<sup>109</sup>

### B. TREATMENT OF MYERS'S FHA CLAIM

“Familial status” under the FHA “refers to the presence of minor children in the household” whereas the UDC merely speaks to an absolute number of unrelated people who may live in a single-family dwelling.<sup>110</sup> As a result, the majority found that the UDC definition of “family” did not discriminate on the basis of “familial status” under a disparate impact theory.<sup>111</sup> First, the court noted that the FHA does not “*expressly* prohibit a landlord from inquiring as to the familial status of prospective tenants.”<sup>112</sup> Interpreting *Pfaff's* holding that a landlord may justifiably refuse to rent a house to families of more than four members in order to prevent excessive wear,<sup>113</sup> the majority held that an investigation into the familial status of prospective tenants would not violate the FHA.<sup>114</sup> Hence, the court concluded that the effective imposition of a requirement to conduct this inquiry upon landlords renting properties in a single-family residential zone would not violate the FHA.<sup>115</sup> The majority acknowledged that the Baton Rouge ordinance may have restricted the availability of housing, but because this restriction did not produce a discriminatory effect on a particular type of person, the majority agreed with the Fourth Circuit in *Jersey Heights Neighborhood Ass'n v. Glendening*<sup>116</sup> that the FHA does not provide relief.<sup>117</sup>

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pp. 16-18 (La. 5/7/14); 145 So. 3d 320, 335-36.

109. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2026, p. 18 n.13 (La. 5/7/14); 145 So. 3d 320, 336.

110. *Compare* 42 U.S.C. § 3602(k) (2012) (defining “familial status”) with BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015) (defining “family”), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

111. *Myers*, 13-2011, 13-2026, pp. 14-15; 145 So. 3d at 333-34.

112. *Id.* at p. 15; 145 So. 3d at 333 (alteration in original).

113. *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 749 (9th Cir. 1996).

114. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2026, p. 15 (La. 5/7/14); 145 So. 3d 320, 334.

115. *Id.*

116. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999).

117. *Myers*, 13-2011, 13-2026, p. 15; 145 So. 3d at 333.

## V. ANALYSIS

### A. EQUAL PROTECTION

Although the Louisiana Supreme Court correctly found that the UDC did not deny Myers equal protection since every landlord in the district is subject to the same restrictions, the ordinance also creates a classification by distinguishing *occupants* who are all related to one another from those who are not.<sup>118</sup> The evident dislike of non-traditional families apparent in the City-Parish's brief<sup>119</sup> further suggests that the tension between traditional definitions of "family" and one that would include other affective relationships has yet to be resolved.<sup>120</sup> Because the UDC definition distinguishes related from unrelated occupants, equal protection analysis is appropriate. By analogy with the treatment of illegitimacy, a court could apply intermediate scrutiny. However, even if a court reviewed the UDC's definition of "family" under rational basis, its exclusion of foster families and other groups is not rationally related to the legitimate state interests served by zoning.

#### 1. CLASSIFICATION CREATED BY THE UDC

The United States Supreme Court has held that a distinction between a household composed entirely of related persons and a household containing a person unrelated to any of the others

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118. The potential of *Myers* to threaten this distinction even attracted notice in local popular media. See, e.g., Adam Pearson & Steve Sanoski, *All in the 'Family'*, GREATER BATON ROUGE BUS. REP. (Feb. 18, 2013, 6:01 PM), [http://www.businessreport.com/article/all\\_in\\_the\\_family/](http://www.businessreport.com/article/all_in_the_family/) (discussing the district court case as having the potential to significantly impact the rental market in Baton Rouge); Leslie D. Rose, *Unwelcome Mat*, DIG (Apr. 8, 2014), <http://www.digbatonrouge.com/southdowns-baton-rouge-section-8-housingcontroversy/> (discussing Myers's placing "Section 8 Welcome" signs in front of his rental properties); *WBRZ News* (WBRZ television broadcast Jan. 29, 2013) (local news broadcast in Baton Rouge covering the filing of the case in district court), available at <http://www.wbrz.com/videos/property-lawsuit-brings-up-definition-of-family/>; see also *Baton Rouge's Definition of "Family" Weighed by Louisiana Supreme Court*, ALLIANCE ALERT (Mar. 5, 2014), <http://www.alliancealert.org/2014/03/25/baton-rouge-def-of-family> (a national aggregating service alerting conservative readers to the Louisiana Supreme Court oral arguments).

119. See *infra* text accompanying notes 143 and 170.

120. See *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2026, p. 4 (La. 5/7/14); 145 So. 3d 320, 341 (Weimer, J., concurring in the result) ("[U]nder the right factual scenario and with the properly aligned interests, the line drawn by the legislature would fail to withstand constitutional scrutiny.").

creates a classification susceptible to equal protection analysis.<sup>121</sup> Similarly, the UDC definition of “family” distinguishes between similar households based on relationships of blood, marriage, or adoption.<sup>122</sup> Under the UDC, a group without the required relationships is strictly limited in the number of occupants who may inhabit a dwelling while a group with the required relationships is not. Though these cases are somewhat factually distinguishable, in both cases differences in relatedness produce different treatment. Hence, equal protection analysis is equally appropriate. The fit between the definition and the City-Parish’s objectives determines whether the UDC definition of “family” violates equal protection.

Since the suspect classes are race and national origin<sup>123</sup> and the UDC classification involves neither, a court should not analyze it under strict scrutiny on that basis. Although a fundamental right to family autonomy is arguably at issue, such an infringement on personal liberty would violate the Due Process Clause rather than the Equal Protection Clause.<sup>124</sup> Hence, the UDC cannot be subjected to strict scrutiny on equal protection grounds.

## 2. APPLICATION OF INTERMEDIATE SCRUTINY

Intermediate scrutiny may be appropriate by analogy with illegitimacy.<sup>125</sup> For example, in *Clark v. Jeter*, the United States

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121. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (distinguishing between related and unrelated households for zoning purposes); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529 (1974) (distinguishing between related and unrelated households for food stamp eligibility).

122. BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>; see *supra* text accompanying note 5.

123. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

124. U.S. CONST. amend. XIV. For instance, in *Moore*, the United States Supreme Court emphasized that free choice in matters of marriage and family is a fundamental right. *Moore v. City of East Cleveland*, 431 U.S. 494, 502-04 (1977). Likewise, the dissent in *Myers* would find that the UDC violates Myers’s fundamental rights to privacy and property guaranteed by the Louisiana Constitution. See *supra* note 30. Because the focus of this Note is equal protection and not due process, in the interest of brevity this Note does not consider a possible due process challenge to the UDC definition of “family.”

125. Although it is possible that sexual orientation (and by extension, sexual preference) is also subject to intermediate scrutiny, which would lend support to the main argument in this Note, as courts have yet to determine the appropriate standard of scrutiny for cases involving sexual orientation, this Note does not

Supreme Court invalidated Pennsylvania's six-year statute of limitations for child support actions in favor of illegitimate children when the state subjected legitimate children to no such limitation.<sup>126</sup> Applying intermediate scrutiny, the Court found that while the state interest in preventing the litigation of fraudulent or stale claims was important, the limitation did not substantially serve that objective because Pennsylvania did not subject other paternity actions to statutes of limitations.<sup>127</sup> Although support for illegitimate children likely provokes a greater degree of sympathy than the desire of unrelated adults to live together, thus making it easier for a court to apply a heightened standard of scrutiny, the Supreme Court's analysis in *Clark* nevertheless provides a precedent for subjecting familial relationships to intermediate scrutiny.

Illegitimacy is a status created by a birth in the absence of a marriage. The UDC classifies persons on the basis of their relations of blood, marriage, or adoption.<sup>128</sup> Thus, for persons unrelated by blood or adoption, their ability to reside together in a home in a single-family district in Baton Rouge depends upon the presence or absence of a marriage. The UDC distinction between unrelated and related persons may be treated similarly to illegitimacy and under intermediate scrutiny be required to demonstrate a substantial relationship to an important state objective.

Zoning in Baton Rouge serves three overarching objectives: promoting welfare, mitigating congestion, and encouraging

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address that issue. See Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1085-89 (2014). The most recent Supreme Court decision related to sexual orientation was primarily a due process decision. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-602 (2015). Though the Court discussed equal protection, it declined to specify any particular standard of scrutiny to be applied to cases involving discrimination on the basis of sexual orientation. *Id.* at 2603-04 (emphasizing that the denial of marriage equality denied gay men and lesbians equal access to a fundamental right).

126. *Clark v. Jeter*, 486 U.S. 456, 457 (1988). However, in *Mathews v. Lucas*, the Court upheld a statute requiring certain illegitimate children to prove factual dependence in order to receive a father's social security benefits. 427 U.S. 495, 516 (1976). The Court reasoned that Congress could have found that empirical differences existed between the levels of support provided by fathers to legitimate and illegitimate children such that the classification substantially served an objective of paying the benefits only to children who are dependent. *Id.* at 510-16.

127. *Clark*, 486 U.S. at 457, 465.

128. BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

values.<sup>129</sup> The UDC's basic goal is to "promote the health, safety, convenience, morals, and general welfare of the community."<sup>130</sup> While welfare certainly includes health and safety, local authorities may also examine the community's desire to have an environment shaped to their liking.<sup>131</sup> Reducing congestion not only promotes health and safety, it also supports more specific objectives identified in the UDC: facilitating traffic flow, providing available parking, maintaining ready access for fire-fighting equipment, and opening up sufficient space for "recreation, light, and air."<sup>132</sup> Finally, because a stated goal is to promote "morals,"<sup>133</sup> a court may also make a values-based assessment of what provides the most salubrious environment for human development. The UDC's concern with the relationships between the occupants of dwellings in single-family residential districts suggests that the "family values" approved by the United States Supreme Court in *Belle Terre*<sup>134</sup> were another likely motivation.

However, it is unclear if a substantial relationship exists between these interests and the UDC's distinction between related and unrelated persons. According to the *Moore* Court, a law allowing an unlimited number of relatives of certain types to reside together while prohibiting other relatives and nonrelatives from doing so reduces overcrowding only marginally.<sup>135</sup> Since the vast majority of households are still composed of persons related by blood, marriage, or adoption,<sup>136</sup> restrictions on unrelated people living together are unlikely to substantially reduce any potential overcrowding. Thus, the UDC's definition of "family"

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129. See BATON ROUGE, LA., UNIFIED DEV. CODE § 1.1 (2010), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

130. *Id.*

131. *Palermo Land Co. v. Planning Comm'n*, 561 So. 2d 482, 494 (La. 1990) (holding that a rezoning of two tracts adjacent to a landfill based primarily on public opposition was a valid exercise of police power to direct the community's "development in a direction commensurate with the needs and desires of its residents").

132. BATON ROUGE, LA., UNIFIED DEV. CODE § 1.1 (2010).

133. *Id.*

134. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

135. *Moore v. City of East Cleveland*, 431 U.S. 494, 500 (1977).

136. In 2012, only 6.1% of households contained more than one person and had no members of the household related to the householder by blood, marriage, or adoption. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 5 (2013), available at <http://www.census.gov/prod/2013pubs/p20-570.pdf>.

fails to reduce congestion and promote welfare.

In *Clark*, the United States Supreme Court found that a willingness to dispense with a statute of limitations for paternity actions in some contexts but not in others indicated the absence of a substantial relationship between the limitations and the objective to be served.<sup>137</sup> Likewise, any larger concern for the moral fitness of the population of Baton Rouge is hardly served by restricting occupancy on the basis of marriage if in other contexts courts will recognize unmarried persons as a family. Since the Louisiana Supreme Court has found that an unmarried couple can form the nucleus of a family,<sup>138</sup> by analogy with *Clark*, the UDC restriction fails to effectively promote “family values.” Because the UDC definition of “family” fails to substantially serve any of its stated objectives, if a court were to apply intermediate scrutiny in a suit brought by unrelated occupants, a court should strike the ordinance down as unconstitutional.

### 3. APPLICATION OF RATIONAL BASIS REVIEW

The UDC definition of “family” may not even satisfy rational basis review. The UDC identifies three objectives for zoning: promoting welfare, mitigating congestion, and encouraging values.<sup>139</sup> Because welfare promotion and congestion mitigation are clearly legitimate objectives,<sup>140</sup> the definition satisfies the legitimate interest prong of rational basis review. Rational basis does not require that a law be perfect or that it address all aspects of a problem.<sup>141</sup> Here, by limiting the numbers of unrelated occupants, the ordinance ostensibly reduces overcrowding to some degree.<sup>142</sup>

However, when a law suggests that the actual motivation may have been animus towards an unpopular group, a more

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137. *Clark v. Jeter*, 486 U.S. 456, 464-65 (1988).

138. *See, e.g., Thompson v. Vestal Lumber & Mfg. Co.*, 22 So. 2d 842, 854 (La. 1944) (finding that a man, a woman, and their two illegitimate children constitute a family such that the children may bring a claim under the Workman’s Compensation Act).

139. BATON ROUGE, LA., UNIFIED DEV. CODE § 1.1 (2010), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

140. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *State ex rel. Civello v. City of New Orleans*, 97 So. 440, 443-44 (1923).

141. *See supra* text accompanying notes 75-78.

142. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-64 (1981) (holding that rational basis is satisfied in a legislature “could rationally have decided” that its classification would produce the intended result).

searching form of rational basis applies. The UDC definition of family and the City-Parish's argument that "the purpose of a single family zone is to get away from the [nontraditional] families"<sup>143</sup> suggest a desire to "harm a politically unpopular group"<sup>144</sup> by limiting where members of that group can live. Given the suggestion of such an improper motivation, a court should test the definition against each objective stated in the UDC.<sup>145</sup>

The distinction between related and unrelated persons does not reduce congestion because it allows an indefinite number of persons to reside in a given dwelling provided that they share the necessary relationships.<sup>146</sup> Likewise, the distinction fails to demonstrate a rational relationship to public welfare as the ordinance allows overcrowding so long as the crowd is composed of relatives only. Even if the legislature were to believe that groups of related people are "self-limiting" in terms of the number of persons who will choose to live together while groups of unrelated persons are not, this argument lacks an evidentiary basis.<sup>147</sup> As the *Myers* concurrence noted:

[T]he definition of family adopted by the ordinance would permit twenty distant cousins, all adults possessing their own vehicles, to reside together but prohibit three unrelated elderly individuals, or even nuns, without independent means of transportation, from living together in a single unit. The current definition of "family," thus, distinguishes between acceptable and prohibited uses on ground which may, in many instances, have no substantial, or even rational, relationship to the problems sought to be ameliorated.<sup>148</sup>

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143. Brief of City-Parish, *supra* note 3, at 12.

144. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

145. *Cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448-50 (1985) (testing a denial of a permit to a group home for the mentally handicapped against each interest proffered by the city).

146. See City of Baton Rouge/Parish of East Baton Rouge v. Myers, 13-2011, 13-2036, p. 3 (La. 5/7/14); 145 So. 3d 320, 341 (Weimer, J., concurring in the result).

147. Timberlake v. Kenkel, 369 F. Supp. 456, 467 (E.D. Wis. 1974), *vacated and remanded*, 510 F.2d 976 (7th Cir. 1975) (vacating and remanding without an opinion, presumably in light of the intervening Supreme Court decision in *Belle Terre*); see also Collin & Collin, *supra* note 35, at 212. This assumption is analogous to the "wholly unsubstantiated assumption[]" that households with unrelated members are more likely to commit food stamp fraud. *Moreno*, 413 U.S. at 535.

148. *Myers*, 13-2011, 13-2026, p. 3; 145 So. 3d at 341 (Weimer, J., concurring in the result).

The absence of the required rational relationship “suggests that either we do not care about the health and safety of families, or that we simply do not want ‘nonnuclear’ families residing in our preferred neighborhoods.”<sup>149</sup>

The ordinance may have a clearer relationship to the promotion of “morals.” Families related by blood only continue into the next generation as the result of procreation with unrelated persons. Marriage connects biological parents to one another, thereby assuring the ability of these persons to live together in a single-family residential district. Hence, the ordinance arguably encourages marriage and, by extension, the nuclear family.<sup>150</sup> However, the UDC already explicitly allows for a variety of nontraditional groups to constitute families, provided that they remain small. For instance, an unmarried couple could live in a house and each have a separate sexual partner residing there as well, effectively establishing a co-residential polyamorous relationship. So long as one of the four owned the house, even this highly nontraditional arrangement would legally constitute a “family” under the UDC.

Thus, if morality is defined in terms of adherence to traditional community norms, the UDC seemingly does a poor job of promoting it. However, by limiting the size of these groups rather than eliminating them outright, the ordinance is arguably a piecemeal approach to the encouragement of morality. Because the United States Supreme Court has held that a piecemeal approach satisfies rational basis review,<sup>151</sup> the UDC definition of “family” would pass muster under ordinary rational basis review. However, the absence of morality as a justification in the majority’s opinion suggests the weakness of such an argument. Moreover, under the more searching form of rational basis review appropriate in this context, because the UDC definition of “family” does not serve the stated objectives, it fails to meet the required standard.

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149. Alexander, *supra* note 37, at 1265.

150. David G. Richardson, *Family Rights for Unmarried Couples*, KAN. J.L. & PUB. POL’Y, Spring 1993, at 117, 118.

151. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

## B. THE FAIR HOUSING ACT

### 1. MISAPPLICATION OF *PFaff*

To hold that the UDC never requires a landlord to violate the FHA, the majority distorted and misapplied the holding in *Pfaff*.<sup>152</sup> In *Pfaff*, the Ninth Circuit held that a landlord could refuse to rent a home to a family of five without discriminating based on familial status when the landlord refused based on his estimate of the number of occupants that would produce a reasonable amount of wear on the house.<sup>153</sup> The Louisiana Supreme Court interpreted *Pfaff* as license to investigate the relationships between prospective occupants.<sup>154</sup> However, *Pfaff* is inapplicable to an evaluation of the UDC because the holding only identifies a numerical occupancy restriction as a non-discriminatory reason that successfully rebuts a prima facie case.<sup>155</sup> The holding does not give landlords permission to investigate the familial relationships among the occupants and certainly does not give municipalities license to require such investigation. *Pfaff* is further distinguishable because it allows a landlord to refuse to rent to any group that exceeds a reasonable desired maximum occupancy regardless of their relationships,<sup>156</sup> while the UDC merely restricts occupancy of unrelated persons.<sup>157</sup> In essence, *Pfaff* extends the privilege granted to maximum-occupancy ordinances under the FHA<sup>158</sup> to private property owners. At no point did the Ninth Circuit contemplate allowing a landlord to ask about anything other than the number of persons who will reside in the house. Even if a landlord phrases this question in terms of a “family,” the answer may not provide sufficiently detailed information to determine whether a given household comports with the UDC. By concluding that an allowable inquiry into the number of occupants necessarily

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152. See *supra* text accompanying notes 112-14.

153. *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 749 (9th Cir. 1996).

154. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 15 (La. 5/7/14); 145 So. 3d 320, 334 (“Obviously, the reasonable imposition of a numerical occupancy restriction would be difficult, if not impossible, to accomplish without some inquiry in to [sic] the familial status of prospective tenants . . .”).

155. *Pfaff*, 88 F.3d at 742. The landlords did not directly question the tenants; rather, the landlords refused to go forward with the lease after the listing agent reported that the prospective tenants were a family of five. *Id.* at 743.

156. *Id.* (noting that the landlord's restriction was facially neutral).

157. BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

158. 42 U.S.C. § 3607(b)(1) (2012).

includes within its ambit an investigation of the familial relationships of the occupants,<sup>159</sup> the majority distorted the holding in *Pfaff*. While the interpretation of *Pfaff* is not essential to the majority's holding regarding FHA violations (and is merely persuasive authority in any case), the interpretation collapses the two categories that the United States Supreme Court separated in *Edmonds*: numerical occupancy restrictions and family-definition provisions.<sup>160</sup> The *Edmonds* Court found that the FHA exemption for ordinances establishing reasonable restrictions on the number of people occupying a dwelling did not extend to ordinances that also defined the family.<sup>161</sup> By collapsing the categories, the Louisiana Supreme Court placed the UDC definition of "family" within the FHA exemption. However, since the two categories are separate, the UDC's non-numerical definition of "family" is not exempt from FHA requirements.

## 2. DISPARATE TREATMENT UNDER THE FHA

The "blood, marriage, or adoption" standard in the UDC is substantially narrower than the parallel definition of "familial status" in the FHA.<sup>162</sup> If the household of a prospective tenant includes children and the total number of occupants would exceed two, in order to avoid leasing the property to a group that would not be a "family" under the UDC, a landlord would have to ask how the children are related to the adults in the household. Applying the ordinance as written, a landlord must refuse to rent a house in a single-family residential district to a married couple with three foster children while he may rent to the same couple if they had adopted the children.<sup>163</sup>

Because the UDC expressly excludes certain groups such as foster families who do not conform to its definition of "family," it is not facially neutral. Thus, a claim should proceed under a disparate treatment theory. Because the UDC treats married

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159. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 15 (La. 5/7/14); 145 So. 3d 320, 334.

160. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 738 (1995).

161. *Id.*

162. Compare BATON ROUGE, LA., UNIFIED DEV. CODE 2-9 (2015) (defining "family"), available at <http://brgov.com/dept/planning/udcodeonline.asp> with 42 U.S.C. § 3602(k) (2012) (defining "familial status"); see *supra* text accompanying notes 86-88.

163. *Cf. Myers*, 13-2011, 13-2026, p. 4; 145 So. 3d at 341 (Weimer, J., concurring in the result) (arguing that the presence of foster children in a potential lessee's household would force a landlord to violate either the UDC or the FHA).

persons with foster children differently than married persons with adopted children, a *prima facie* case of discrimination on the basis of familial status is readily established. The City-Parish could certainly argue that the UDC definition provides a mechanism by which to promote welfare, reduce congestion, and encourage values.<sup>164</sup> However, the animosity displayed in the City-Parish's arguments suggests that these stated reasons could be pretextual. The City-Parish argued that "the purpose of a single family zone is to get away from the [nontraditional] families"<sup>165</sup> and dismisses other relationships as phenomena "now in vogue."<sup>166</sup> Moreover, the lack of a rational relationship between UDC's exclusion of foster families and any of its objectives suggests that they are merely pretextual. Thus, under a disparate treatment theory, a foster family could likely demonstrate that the UDC violates the FHA.<sup>167</sup>

Although the concurring opinion in *Myers* contends that landlords are thus "faced with the unenviable and irreconcilable dilemma of either violating the federal statute or the municipal ordinance,"<sup>168</sup> the FHA resolves the dilemma: "any law of . . . a political subdivision . . . that purports to require or permit any action that would be a discriminatory housing practice . . . shall to that extent be invalid."<sup>169</sup> Hence, even though denying housing to Myers's four unrelated adult tenants would not have violated the FHA, because the UDC would force a landlord to violate the FHA under other factual scenarios, the UDC's overly restrictive definition of "family" should have been held invalid. Even though a plausible argument can be made that the FHA would only invalidate the UDC definition of "family" when it discriminated against foster families, it is difficult to see how a landlord can practically distinguish allowable groups so as to remain compliant with the UDC without invasively questioning all prospective tenants regarding their relationships.

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164. See *supra* text accompanying notes 128-33.

165. Brief of City-Parish, *supra* note 3, at 12.

166. *Id.* at 10.

167. Cf. *Oxford House, Inc. v. City of Baton Rouge*, 932 F. Supp. 2d 683, 694 (M.D. La. 2013) (finding that Baton Rouge violated the FHA by refusing to grant a reasonable accommodation to a group home for recovering alcoholics and that this refusal was motivated by discriminatory intent).

168. *City of Baton Rouge/Parish of East Baton Rouge v. Myers*, 13-2011, 13-2036, p. 4 (La. 5/7/14); 145 So. 3d 320, 341 (Weimer, J., concurring in the result).

169. 42 U.S.C. § 3615 (2012).

### C. SUBURBAN AND NUCLEAR-FAMILY BIAS

As blended families and creative kinship networks become increasingly common, the UDC will, by its restrictive definition of “family,” increasingly exclude a greater number of persons from housing in Baton Rouge. In response to this argument, the City-Parish claimed: “there is no evidence in the record that such groups [as creative kinship networks, same sex relationships, cohabitations, extramarital childbirth, and foster homes] actually exist.”<sup>170</sup> The Louisiana Supreme Court found this argument persuasive because the only evidence on this issue presented at trial was the testimony of a sociologist who studies such networks.<sup>171</sup> That said, non-traditional families certainly exist.

Nationally in 2012, 6.1% of all households were composed entirely of unrelated persons,<sup>172</sup> the majority of whom were unmarried cohabitants.<sup>173</sup> In the most recent census, same-sex couples represented almost 1% of the total number of households, and 16% of those households had children.<sup>174</sup> Over 400,000 foster children lived with persons to whom they were not related in 2009.<sup>175</sup> Cooperative living arrangements in which multiple traditional families share the same space and form a single unit have arisen.<sup>176</sup> Although ignored in many zoning ordinances,

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170. Brief of City-Parish, *supra* note 3, at 9.

171. *Id.* at 4; *see supra* text accompanying note 10.

172. VESPA ET AL., *supra* note 136, at 5.

173. Unmarried couples constitute 5.2% of total households. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 5 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

174. Fertility & Family Statistics Bureau, *Frequently Asked Questions about Same-Sex Couple Households* U.S. CENSUS BUREAU 3 (2013), [http://www.census.gov/hhes/samesex/files/SScplfactsheet\\_final.pdf](http://www.census.gov/hhes/samesex/files/SScplfactsheet_final.pdf). The recent United States Supreme Court decision in *Obergefell v. Hodges* granted same-sex couples the right to marry. 135 S. Ct. 2584, 2604-05 (2015). Thus, gay men and lesbians could avoid discrimination by taking advantage of this right. However, this development does not affect the pre-existing bias against non-nuclear families embedded in the UDC definition of “family,” nor does it provide for the inclusion of non-marital affective groups such as polyamorous relationships or “Golden Girl” households. *Cf.* Original Brief of Myers, *supra* note 22, at 7 (using the example of the household in the television program, which consisted of a mother, her daughter, and two unrelated friends, to illustrate the vagueness of the UDC definition).

175. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 370 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0579.pdf>.

176. *See, e.g.,* Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. L. 3, 10-24 (1999) (describing the principles and use of legal structure in

these changes in family and household composition have produced substantive changes in other areas of the law such as tenant qualifications for subsidized housing.<sup>177</sup>

Ordinances such as the UDC “developed around idealized versions of the American family in an attempt to exclude people who did not fit that definition.”<sup>178</sup> In the post-war period, this idealized vision was of the nuclear family (a heterosexual couple and their biological children).<sup>179</sup> When it affirmed the zoning ordinance in *Belle Terre*, the United States Supreme Court emphasized that “family values” were valid motivations for zoning ordinances.<sup>180</sup> However, the concepts that the court associated with “family values”: “clean air,” “youth values,” and the “blessings of quiet seclusion,”<sup>181</sup> suggest that “family values” encompass much more than co-residence with relatives. The inclusion of “youth values” reiterates that the primary purpose of a family is to rear children, implicitly denigrating those families that cannot or do not have children. Privileging procreative relationships also excludes friendships, which for many people provide the support and assistance traditionally ascribed to the family.<sup>182</sup> Taken together, these biases “summarily dismiss[] the value of the voluntary family.”<sup>183</sup>

Moreover, the assumption that “clean air” and the “blessings of quiet seclusion” are appropriate objectives of a zoning ordinance suggests a distinctly suburban and bourgeois perspective.<sup>184</sup> Like its literary analogue, this “pastoral vision”

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cohousing communities, a type of cooperative living); see also Ari Weisbard, *Two Couples, One Mortgage*, ATLANTIC (July 11, 2014, 7:55 AM), <http://www.theatlantic.com/business/archive/2014/07/twocouplesonemortgage/37410/> (offering an anecdotal account of two couples sharing a single large home).

177. Madeline Howard, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97, 103-04 (2007).

178. Collin & Collin, *supra* note 35, at 214.

179. Alexander, *supra* note 37, at 1248-50.

180. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

181. *Id.*; see also John DeWitt Gregory, *Redefining the Family: Undermining the Family*, 2004 U. CHI. LEGAL F. 381 (2004) (generally arguing that the legal academy’s interest in redefining the family threatens the autonomy of the family and fails to observe that proposed redefinitions will have little traction with legislatures).

182. Jessica Feinberg, *The Plus One Policy: An Autonomous Model of Family Reunification*, 11 NEV. L.J. 629, 657-59 (2011) (discussing the benefits of friendship).

183. Rebecca M. Ginzburg, Note, *Altering “Family”: Another Look at the Supreme Court’s Narrow Protection of Families in Belle Terre*, 83 B.U. L. REV. 875, 877 (2003).

184. See David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787, 788-89 (2009) (“The bourgeois power

requires the exclusion of elements associated with “the evils of the city.”<sup>185</sup> These elements not only include physical features such as apartment buildings, but also the less affluent occupants of those spaces.

Such a perspective is not unique to the *Belle Terre* court. In 1950, the American Public Health Association based a recommended square footage per person occupancy restriction not on scientific evidence but rather on the amount of space per person typical of high-income environments.<sup>186</sup> In Baton Rouge, the UDC defines “dwelling” to exclude “trailers,” typically inhabited by less affluent members of the community.<sup>187</sup> Although this distinction may serve some purposes (e.g., promoting high property values in residential districts), the language also implies that a factually habitable space does not meet the basic requirements for human habitation. Moreover, within the residential district at issue, the UDC allows country clubs and golf courses,<sup>188</sup> revealing a willingness to provide access to the leisure activities associated with a more affluent class. Even the sole dissenting justice in *Myers* demonstrates this particular bias; in another dissent, the justice distinguished apartments and mobile homes from “suitable residence[s]” for raising a family.<sup>189</sup>

## VI. CONCLUSION

Because *Myers* lacked the standing to challenge the UDC for violating the rights of occupants of dwellings in Baton Rouge’s single-family residential district, the Louisiana Supreme Court

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structure, it seems, perceives no problem in metropolitan residential segregation by class, and, indeed, the power structure may see distinct advantages in keeping the underclass literally in its place.”); *see also* Collin & Collin, *supra* note 35, at 208 (arguing that the ideally organized community envisioned by zoning “serves the purpose of perpetuating the exclusion of poor people from housing opportunities”).

185. Katia Brener, Note, *Belle Terre and Single-Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 466 (1999).

186. Alexander, *supra* note 37, at 1252-53.

187. BATON ROUGE, LA., UNIFIED DEV. CODE 2-7 (2015), available at <http://brgov.com/dept/planning/udcodeonline.asp>.

188. BATON ROUGE, LA., UNIFIED DEV. CODE app. at H-2 (2015).

189. State *ex rel.* A.T., 06-0501, pp. 2-3 (La. 7/6/06); 936 So. 2d 79, 88 (Knoll, J., dissenting) (“The mother could not explain why after three years she could not have worked more jobs in order to acquire the initial funding necessary to get into a suitable residence or even to rent an apartment or trailer.”); *see also* Papke, *supra* note 184, at 795-97 (discussing the hostility to mobile homes in zoning ordinances).

declined to consider those arguments. Even though the UDC definition of “family” does not violate Myers’s equal protection rights, it likely violates the rights of occupants whose relationships do not fit within the narrow confines of the definition. The UDC definition also violates the FHA by potentially denying housing to protected groups such as foster children and so discriminating on the basis of “familial status.”

*Myers* and similar decisions indicate a lack of empathy for those whose life choices or circumstances prohibit them from mimicking the traditional suburban nuclear family model. By supporting such ordinances, courts encourage the discriminatory desires of communities to “keep alternative families out of their neighborhoods and not have a different family-type next door.”<sup>190</sup> Nevertheless, as more persons reared in or exposed to non-traditional households reach the bench, they will hopefully apply their broader understanding of affective networks to expand rather than restrict the definition of “family.”

Patrick D. Murphree\*

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190. Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN’S L.J. 93, 119 (2000).

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