

In the Supreme Court of the United States

VAL FRENCH,

Petitioner,

v.

CITY OF SHAWNEE, KANSAS; PAUL KRAMER, IN HIS
OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF
SHAWNEE; AND KEVIN MESSICK, IN HIS OFFICIAL
CAPACITY AS CODE ENFORCEMENT OFFICER FOR THE
CITY OF SHAWNEE,

Respondents.

*On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Tenth Circuit*

**REPLY IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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INTRODUCTION

The City’s opposition does not negate the advisability of review. To obfuscate the force of the Petition, they incorrectly assert that Ms. French has not clearly identified the right she asserts. BIO 18. The Petition advances the “right to choose the people with whom you live.” Pet. 2. She does not advocate, as Respondents suggest, for a “right to form a household free from numerical zoning restrictions.” BIO 1. All households may be subject to reasonable occupancy restrictions to promote health and safety. *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 735 (1995) (distinguishing rules which “fasten[] on the composition of households” from those which regulate “the total number of occupants living quarters can contain[.]”). But the Constitution does not permit such restrictions to depend entirely on the kinship status of residents. That is so because choosing one’s living companions is a fundamental associational right; because kinship-based discrimination has no rational basis; and because zoning properly concerns land use, not land users.

Further obfuscating matters, Respondents collapse the Petition’s two questions presented into one and fail to address the force of the Petition’s second question. They urge that the ordinance challenged here is less restrictive than the one upheld in *Belle Terre*. Not so: Given the nature of the Village, Belle Terre’s ordinance applied only in single-family zones. Shawnee’s, by contrast, sweeps city-wide—including in zones where *Belle Terre*’s already-weak reasoning becomes unintelligible.

Respondents’ leading argument—that there is no direct and explicit conflict among federal courts—begs

the question. Federal courts must apply *Belle Terre*, notwithstanding its poor reasoning and its incompatibility with this Court's later decisions. *Belle Terre* itself forces that outcome, which is exactly why it must be reviewed.

Respondents assert that the courts below "did not decide the boundaries of [P]etitioner's proposed right" because of some deficiency in the pleadings. BIO 2. That is baseless. Neither court made any suggestion to that effect. Rather, they refused to reach Ms. French's arguments because *Belle Terre* bound them.

This Court's review is warranted where a court of appeals decides "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The decision below conflicts with *Roberts* by refusing to apply the scrutiny this Court prescribes where associational rights are infringed. Review is warranted.

ARGUMENT

I. Respondents Fail Entirely to Address the Second Question Presented

Respondents collapse the Petition's questions presented into a single inquiry: whether the court below correctly affirmed dismissal given that the challenged ordinance is less restrictive than the one upheld in *Belle Terre*.

This tactic avoids the second question presented: Shawnee's ordinance applies everywhere throughout the city, including in high density, multi-family zones. *Belle Terre*'s defense of a "quiet place where yards are wide, people few, and motor vehicles restricted" plainly has no application in the apartment district.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974). And in a zone that expressly permits two different families to share one structure, Respondents offer no justification—and Petitioner cannot conceive of one—why the kinship status of people *within* each family group must be as Shawnee’s ordinance requires.

II. Neither the Absence of Direct Conflict nor the Decision’s Unpublished Status Counsels Against Review

A. There can be no direct conflict because of *Belle Terre* itself, which is why that case must be reviewed

Respondents highlight that no two federal holdings explicitly conflict over *Belle Terre*’s application. BIO 5-8. But of course not. As the Petition explained, lower courts must apply *Belle Terre* notwithstanding its analytical shortcomings or its dissonance with subsequent jurisprudence. Pet. 23. The courts below recognized that constraint. App. 21a, 35a. That is precisely why this Court must step in.

This Court has granted review in this posture before. In *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), the Seventh Circuit applied the rule of *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), despite concluding that case was unsound when decided and had been eroded by this Court’s later decisions. This Court granted certiorari and overruled *Albrecht*, while commending the Seventh Circuit for its dutiful adherence to precedent. *Ibid.* There was no circuit conflict nor much confusion about applying *Albrecht*’s *per se* rule. But this Court reviewed and overruled it because its “conceptual foundations” were “gravely weakened.” *Khan*,

522 U.S. at 22. Respondents’ overreliance on the absence of a direct conflict proves far too much. On their logic, the precedents most in need of review would be least likely to receive it; the more a wrong decision binds lower courts, the more thoroughly it would be insulated from review. But adherence to the rule that only this Court may overturn “does not insulate a legal principle” on which lower courts must rely from review. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Even so, the incompatibility of *Belle Terre* with *Roberts* is clear. See *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). The Ninth Circuit determined that the relationship among those who share a home “easily qualifies” for constitutional protection under *Roberts*. *Fair Hous. Council of San Fernando Valley v. Room-mate.com, LLC*, 666 F.3d 1216, 1221 (9th Cir. 2012). This was not dicta; constitutional avoidance was central to the court’s ultimate holding interpreting the Fair Housing Act. Yet *Belle Terre* deprives Val French of that protection against government intrusion into her home.

The courts below did not even consider Ms. French’s arguments under *Roberts*. The Tenth Circuit refused to apply *Roberts* on the basis that “there is no federal court that has done so in the context of a zoning ordinance.” App. 18a, n.10. Respondents similarly observe that *Roberts* did not involve zoning. BIO 1, 11. But Respondents offer no explanation why *Roberts* would *not* apply to zoning nor any reason to read the phrase “except for zoning” into the *Roberts* decision. The zoning power is no more unas-sailable than any other police power. See, e.g., *Carter v. City of Salina*, 773 F.2d 251, 254 (10th Cir. 1985) (“[Z]oning ordinances are in derogation of common-

law property rights and find their authority through the state police power[.]”).

Respondents point out that *Roommate.com* concerned the inverse “right *not* to associate[.]” BIO 6. But the positive “right to invite” a person into one’s home is no less basic. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring). It involves “deeply personal considerations as to the kind and quality of intimate relationships within the home.” *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting). Moreover, prohibiting one living arrangement risks forcing people into another. See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 687 (1980). A person prohibited from their preferred living arrangement by the Co-Living Ordinance may be forced to choose between accepting some other uncomfortable or incompatible arrangement or else leaving town altogether.

B. Publication status is not a factor in this Court’s decision to grant review

Respondents are incorrect in suggesting that the unpublished status of the decision below counsels against certiorari. *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987) (“[T]he fact that the Court of Appeals’ order under challenge here is unpublished carries no weight in [this Court’s] decision to review the case.”). This Court regularly grants certiorari to review unpublished decisions. See *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022); *Lange v. California*, 594 U.S. 295 (2021); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018); Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007) (this Court reviews unpublished decisions “with some frequency.”).

Moreover, the lack of publication can be understood by the same considerations explaining the absence of conflict. The Tenth Circuit’s decision not to publish indicates nothing about the case’s importance. 10th Cir. R. 36.1. Rather, it reflects only the court’s conclusion “that the case does not require application of new points of law that would make the decision a valuable precedent.” *Ibid.* The court below saw no occasion to publish precisely because *Belle Terre* walled off Petitioner’s arguments under *Roberts* and *Cleburne*.

III. *Belle Terre* Was an Aberrational Application of the Ordinary Rational Basis Test

Belle Terre never examined or explained the relationship between kinship and the suburban blessings it identified as legitimate aims. It has thus become a rubber stamp. Courts invoke it to approve all zoning regulations that discriminate based on kinship. That result warrants review because it is aberrational in three significant ways.

First, *Belle Terre* is an outlier in its utter lack of meaningful analysis of the relationship between a zoning regulation and its purported aim. This Court’s pre-*Belle Terre* zoning cases emphasized the need to examine regulation in the context and circumstances of the locality in which it applies. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). Its only zoning case applying rational basis after *Belle Terre*¹ tested whether the regulation in question actually

¹ *Moore v. City of East Cleveland* applied a heightened scrutiny given the special constitutional protection afforded to family relationships. 431 U.S. 494, 499 (1977) (“When a city undertakes such intrusive regulation of the family . . . the usual deference to the legislature is inappropriate.”).

bore any relationship to genuine government aims. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985).

Second, it departs from a tradition of cases refusing to credit unfounded prejudices against a class of people—here, those who choose to live with non-relatives—as rational. While generalized assumptions about the probable effect of structures and activities may be sufficient to support legislative line-drawing, rational basis review applies greater skepticism where those assumptions amount to stereotypes about people based on identity or status. *See Moreno*, 413 U.S. at 535 (rejecting “wholly unsubstantiated assumptions concerning the differences between ‘related’ and ‘unrelated’ households” as irrational); *Cleburne*, 473 U.S. at 448 (“[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases” for unequal treatment under rational basis).

Third, *Belle Terre* broke with a tradition of courts recognizing a broad conception of the family in zoning law. *See Moore v. City of East Cleveland*, 431 U.S. 494, 516 (1977) (Stevens, J., concurring in the judgment) (observing that “attempts to limit occupancy to related persons have not been successful[,]” and collecting cases); *see generally* Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law’s Functional Turn*, 128 Yale L.J. 2412, 2430-46 (2019) (tracing judicial attitudes toward definitions of family in zoning laws up to *Belle Terre*, and explaining that the formalistic view overtook the more functional approach, which defined family as a distinct domestic unit, in the 1970s).

Respondents correctly argue that *Cleburne* did not “announce a freestanding ‘rational basis with bite’ standard” for identity-based zoning regulations. BIO 10. The Petition does not suggest otherwise. On the contrary, *Cleburne* demonstrates ordinary rational basis properly applied by testing the relationship between a legislative classification and some legitimate state aim it may be thought to advance. *Cleburne*, 473 U.S. at 446 (“The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”); see *Nectow*, 277 U.S. at 188 (zoning regulation “cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”) (citing *Euclid*, 272 U.S. at 395).

Nectow invalidated a zoning ordinance prohibiting commercial and industrial uses in an area surrounded by such uses, affirming the conclusion that it would not promote legitimate government aims given “the natural development of [the locality] and [t]he character of the district[.]” *Id.* at 187. And in *Cleburne*, the Court looked to the record to determine whether there was any genuine rationale for requiring a special use permit to create a group home for the mentally disabled. 473 U.S. at 448. *Belle Terre* is the aberration in the doctrine, making “no attempt to suggest” how kinship-based discrimination advances the government interests it identified. See *Charter Twp. of Delta v. Dinolfo*, 419 Mich. 253, 273 (1984).

Contrary to Respondents, nothing in *Cleburne* suggests a different test for “historically unpopular groups.” BIO 10. Rather, *Cleburne* explained that the “desire to harm a politically unpopular group” is not a legitimate state interest, 473 U.S. at 446-47, and that an “irrational prejudice” does not create a sufficient

relationship between a regulation and its goals. *Id.* at 450. Here, the Co-Living Ordinance rests on “wholly unsubstantiated assumptions concerning the differences between ‘related’ and ‘unrelated’ households[.]” *See Moreno*, 413 U.S. at 535. Ordinary rational basis disposes of it for that reason alone—no special “bite” required.

But even if the Ordinance’s assumptions about unrelated households were rational, it would *still* fail because its application bears no relationship to any conceivable government goal. Although Respondents argued below that the Ordinance’s “obvious underlying purpose” was to maintain the “single-family character of neighborhoods,” App. 5a, they now say the real purpose is to maintain “residential” character more generally. BIO 15. But that fares no better, since unrelated residents still make nothing more than residential use of a given dwelling. Respondents do not even attempt to explain—because it cannot be explained—how preventing unrelated persons from residing together furthers “residential character.”

IV. The Petition Presents Several Reasons for Overturning *Belle Terre* in Spite of Stare Decisis

Respondents charge that the Petition does not properly apply the stare decisis framework. BIO 12. But that framework overwhelmingly supports *Ms. French*. In reviewing its own precedent, the Court considers, among other things, “the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision as handed down, and reliance on the decision.” *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 917

(2018). The majority of these factors favor overturning *Belle Terre*.

First, as described above and in the Petition, *Belle Terre*'s reasoning was "exceptionally weak" and "egregiously wrong from the start." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). Second, that reasoning—such as it is—is irreconcilable with the rest of this Court's zoning decisions and with *Roberts*. Moreover, the proliferation of residential kinship-based discrimination laws following *Belle Terre* has only exacerbated the housing crisis, one of our nation's most pressing issues.

Respondents contend that the negative effect of *Belle Terre* on housing markets "concerns policy, not constitutional doctrine[.]" BIO 12, and that recent state legislation shows "the democratic process is addressing the issue[.]" *Id.* at 2. But *Belle Terre*'s continuing role in the housing affordability crisis illustrates the Petition's importance,. In any case, partial reform elsewhere does not vindicate a federal right in Shawnee; it is no comfort to Ms. French that the legislatures of other states have acted. Regardless, fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Respondents' remaining stare decisis arguments are similarly unavailing. Legislative belief in the constitutionality of a law is not a serious reliance interest. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010). Nor does workability support *Belle Terre*. As the Petition explains, the case has come to stand for a bright line rule that is *too* workable; courts

now apply it as a rubber stamp in spite of early narrow interpretations. Pet. 23-25.

V. This Case Presents a Clean Vehicle

Respondents argue that the complaint’s facial posture makes this a poor vehicle for reviewing *Belle Terre*. BIO 13-15. They argue that various types of co-living relationships “cannot be declared constitutionally identical simply because they occur under one roof.” BIO 14. On the contrary, it is precisely because of the primacy of the home in our tradition that the state may not intrude upon the freedom to choose with whom we share it. See *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (“A special respect for individual liberty in the home has long been part of our culture and our law[.]”); *Payton v. New York*, 445 U.S. 573, 601 (1980) (“[O]verriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic.”); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (constitutional rights take on an “added dimension” in the “privacy of a person’s own home”); see also *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) (the home is “entitled to special protection as the center of the private lives of our people.”).

The *Roberts* analysis involves locating the co-living relationship along its spectrum of protection, but it does not require investigating the private lives of particular people who enter that relationship. Such investigation would undermine the very protection that the doctrine provides. Karst, *supra*, at 688-89 (“[I]t would be intolerable for the state to investigate the degree of intimacy or permanence of relationship among persons who choose to live together.”). The precise details of the relationship between Ms. French

and her son's girlfriend are none of Shawnee's business; that is the whole point. Their choice to share a home necessarily involves "deeply personal considerations." *Belle Terre*, 416 U.S. at 16 (Marshall, J., dissenting). It is a fundamentally protected association "by [its] nature." *Cf. Roberts*, 468 U.S. at 619. Protecting that relationship does not require probing its details any more than protecting the family relationship in *Moore* required asking whether the grandmother and her grandson were particularly affectionate.

Moreover, even if the right to choose one's living companions were not entitled to fundamental constitutional protection, a facial claim would still be appropriate because, for the reasons given above, the Ordinance's kinship classification is irrational on its face. Where the defect lies in the classification itself, this court has invalidated legislation whole. *Moreno*, 413 U.S. at 538 (affirming declaratory and injunctive relief invalidating kinship-based classification).

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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