No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS, ET AL.,
Petitioners

V.

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF THE BOSTON BAR ASSOCIATION, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS AND THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF TEXAS AS AMICI CURIAE SUPPORTING RESPONDENTS

BARBARA ARNWINE
THOMAS J. HENDERSON*
CHERYL L. ZIEGLER
JONATHAN P. HOOKS

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

* Counsel of Record

NADINE M. COHEN

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW OF THE
BOSTON BAR
ASSOCIATION
294 Washington Street
Suite 443
Boston, MA 02108
(617) 482-1145

EVA JEFFERSON PATERSON

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS OF
THE SAN FRANCISCO
BAY AREA
131 Steuart Street
Suite 400
San Francisco, CA 94105
(415) 543-9444

REED COLFAX

WASHINGTON
LAWYERS'COMMITTEE
FOR CIVIL RIGHTS
AND URBAN AFFAIRS
11 DuPont Circle
Suite 400
Washington, DC 20036
(202) 319-1000

JAVIER N. MALDONADO

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW OF TEXAS
2311 North Flores
San Antonio, TX 78212
(210) 736-1503

Of Counsel:

MICHAEL CHURCHILL
PUBLIC INTEREST
LAW CENTER OF
PHILADELPHIA
125 South 9th Street
Suite 700
Philadelphia, PA 19107
(215) 627-7100

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STATEMENT OF INTEREST

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") and its independent local affiliates, the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the Washington Lawyers' Committee for Civil Rights and Urban Affairs and the Lawyers' Committee for Civil Rights Under Law of Texas, submit this brief as *amici curiae*, with the consent of the parties,[1] in support of Respondents' argument that the Sixth Circuit properly recognized a claim for intentional discrimination in violation of the Fourteenth Amendment and the Fair Housing Act ("FHA"), and in support of the availability of disparate impact claims under the FHA, though none is pursued by Respondents in this case.

The Lawyers' Committee was formed in 1963 at the request of President Kennedy in order to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Toward that end, the Lawyers' Committee has been involved as *amicus curiae* or counsel in several cases before this Court involving claims for discrimination under the Fourteenth Amendment and the FHA. *See*, *e.g.*, *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

SUMMARY OF ARGUMENT

Taken in the light most favorable to Plaintiffs-Respondents ("Buckeye"), the facts of this case establish a straightforward instance of intentional discrimination by a municipality, violating the Fourteenth Amendment of the U.S. Constitution and the FHA, 42 U.S.C. § 3601 *et seq*. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) ("the court must draw all reasonable inferences in favor of the

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[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity other than *amici curiae*, its staff, or its counsel made a monetary contribution for the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

nonmoving party"); *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) ("Summary judgment . . . is appropriate only where there is no genuine issue of material fact"; government "motivation is itself a factual question").

The record contains substantial evidence that the City of Cuyahoga Falls, Ohio (the "City") engaged in discrimination in violation of the Equal Protection Clause and the FHA when it denied building permits to Buckeye under the approved site plan for its tax credit housing development. A city may properly be held liable when, in bowing to discriminatory public pressure, its leaders ignore or improperly apply the law. In concluding that the record contained evidence the City acted with discriminatory animus, the court below properly considered evidence of the nature of the public opposition to Buckeye's project. As demonstrated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), and numerous other cases, courts may broadly consider such evidence in determining whether government action is impermissibly motivated.

This is not a First Amendment case. Consideration of evidence bearing on municipal intent simply does not implicate any such concerns. The City's potential liability in this case stems not from citizen speech, but from its municipal action in response to that activity; not from the filing of a referendum petition, but from the City's decision to withhold permits from Buckeye. No citizen is subject to liability for speaking in opposition to the project or pursuing a referendum.

The Court of Appeals properly found that the evidence could support a claim for intentional discrimination. Here, City officials, acting in response to citizens motivated in part by animus to African Americans and families with children, delayed approval of Buckeye's site plan in a determined effort to find any legal pretext to halt the project. After proposing and facilitating a referendum drive to challenge the approved project, City officials then wrongly used the referendum filing to prohibit the issuance of building permits to Buckeye. Refusing to issue the permits on the basis of the referendum challenging the site plan approval - an administrative action - violated the Ohio Constitution. Refusing to issue the permits to serve its own or its citizens' discriminatory opposition violated the Equal Protection Clause and the FHA. City officials improperly withheld permits from Buckeye and may properly be held liable for that decision.

While the disparate impact claim in this case is moot (and the City has waived its challenge by not raising it below), the Court of Appeals properly recognized that the FHA, like its counterpart Title VII, countenances

disparate impact claims. This ruling is consistent with the language and legislative history of the FHA, as well as this Court's reading of virtually identical language in Title VII. The Court has no basis on which to address this issue here, but if it does, it should not disturb this settled interpretation, unanimously adopted by the Courts of Appeals and accepted by Congress.

STATEMENT OF THE CASE

Buckeye developed a proposal for subsidized multifamily housing in the City that met or exceeded all applicable zoning requirements. Notwithstanding the absence of any legitimate zoning basis to block the project, City officials acted in response to and in concert with community opposition motivated by an animus to families and African Americans to delay and ultimately deny Buckeye the building permits needed to proceed with its project.

The City's Planning Commission required unprecedented changes to Buckeye's site plan, including the creation of a barrier between the project and the surrounding community. *See* Sixth Circuit Joint Appendix ("JA") at 152-54, 966-67. Prior to a Commission meeting to review the plan, a City Councilman urged residents to express their concerns at the meeting. *See id.* at 484-87. The proposal met vigorous community opposition, in contrast to a more dense condominium project approved several years earlier. *See* U.S. Supreme Court Joint Appendix ("App.") at 43a. Comments at the meeting made both overt and veiled reference to the discriminatory animus underlying the opposition. *See*, *e.g.*, App. at 44a ("Are your little kids going to shut up right at sunset?"); JA at 479 (concern that the project would "potentially have a lot of children"); App. at 40a ("They know what kind of element is going to move in there, just like you have on Prange Drive," referring to the only area of the City with a substantial black population).

Notwithstanding its recognition that there was no technical or legal basis on which to reject Planning Commission approval of the project, the City Council held two public meetings to discuss the project and further delayed voting on it. *See* Docket Entry Record ("R.") 40, Ex. G, at 50; JA at 967 (Mayor's request that vote be delayed to "buy time"). Again, the opposition expressed to the project suggested discriminatory animus. *See*, *e.g.*, App. at 139a ("We have got our ghetto. . . . This project is already being called Pleasant Ghetto."). Racial animus was also indicated in the threatening

comments made to Buckeye's representative. *See* Transcript of Preliminary Injunction Hearing ("Tr.") at 37.

In further response to such opposition, members of the City Council and the Mayor sought in vain for any legal pretext to block the project. For example, at a public meeting one Councilwoman explained that she and others had engaged in extensive efforts, "[j]ust to get any legal shred that we could hang onto so that we could reject this project." App. at 150a. City Councillors requested that the City Law Director identify any legal basis to block the project. *See*, *e.g.*, *id*. at 140a-141a. Despite their recognition that blocking Buckeye's proposal would result in liability for the City, *see id*. at 119a-120a (Mayor acknowledging advice that the City would likely lose a lawsuit if it blocked the project); *id*. at 147a-148a (Councilman acknowledging same), the Mayor and others urged the Council to reject the project and force Buckeye into expensive litigation in the hopes it could not afford to do so. *See id*. at 156a-157a. Eventually, after delaying votes on the site plan, the City Council approved (by divided vote) the ordinance authorizing the project. The ordinance was "pocket approved" only because the Mayor did not veto it.

Having delayed the approval process, City officials then facilitated and participated in a referendum movement - the "legal shred" the City manufactured to legitimize its refusal to issue building permits to Buckeye. The idea to use a referendum, in fact, was initially raised by the City Law Director at a City Council meeting, *see id*. at 173a, though one had never been used to challenge an apartment project in the City. Using the time the delays bought to complete the referendum drive, the Mayor met on several occasions with other leaders of the drive. The Mayor's continuing participation in the drive was indicated by his request to the City Law Department to identify the exact number of citizen signatures required to submit the referendum petition. *See* JA at 979.

Before the referendum petition was even filed and without any legal basis, the Mayor instructed the City Engineer, through his supervisor, the Director of Public Service, to withhold permits from Buckeye. *See* R. 34, Ex. A; Tr. at 193-94. The Law Director also jumped the gun, similarly advising the Engineer to withhold permits in a brief three-sentence memorandum which concluded that "[a]s a result of the filing of these [referendum] petitions, *the sufficiency of which is currently being ascertained* by the Clerk, [the ordinance authorizing the Buckeye project] does not take effect." App. at 55a (emphasis added).

Contrary to those actions, the referendum petition should have been rejected as inappropriately challenging administrative action. *See Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 186 (Ohio 1998). The City's decision to withhold permits was thus without legal basis.

Such evidence, viewed in the light most favorable to Buckeye, clearly is sufficient to support a finding of intentional discrimination by City officials. The City repeatedly used its powers and processes to delay approval of Buckeye's site plan to find any "legal shred" to oppose the project, then seized upon a wrongful interpretation of its City Charter to refuse to issue building permits to Buckeye. Because there is evidence that the City did so with invidious motives, bowing to public animus, it may properly be held liable under the Equal Protection Clause and the FHA.

ARGUMENT

VIII. TO ASSESS MOTIVES BEHIND MUNICIPAL ACTION, COURTS MAY PROPERLY CONSIDER EVIDENCE OF THE DISCRIMINATORY NATURE OF PUBLIC OPPOSITION.

Under the long-standing precedent of this Court, trial courts considering claims of intentional discrimination under the Equal Protection Clause and the FHA legitimately consider the motivations of citizens supporting referenda as relevant evidence of whether municipal actions giving effect to such citizen activity are motivated by invidious purposes. There is nothing in the procedural peculiarities of this case - or the First Amendment - that warrants deviation from the analysis this Court set forth in *Arlington Heights*.

IX. Evidence of public animus has always been probative of municipal discriminatory purpose under the *Arlington Heights* test.

In considering whether a municipality has violated the Equal Protection Clause or the FHA, a court must inquire, as the Sixth Circuit did here, "whether invidious discriminatory purpose was a motivating factor" in the defendant's actions.

Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 634 (6th Cir. 2001); *see also Arlington Heights*, 429 U.S. at 265-66. Establishing a violation of the Equal Protection Clause "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes," *Arlington Heights*, 429 U.S. at 265, since it can rarely be said that a single consideration was the dominant or primary purpose in legislative action.

Rather, making such an assessment of municipal intent "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id*. at 266; *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (same). In *Arlington Heights*, the Court identified several non-exclusive factors probative of discriminatory purpose: (1) the disproportionate racial impact of the official actions; (2) the historical background of the action; (3) the specific sequence of events leading up to the challenged action; (4) departures from normal procedures; (5) substantive departures from the factors normally considered by decision-makers; and (6) the legislative or administrative history. *Arlington Heights*, 429 U.S. at 266-68. Applying this framework, it is permissible to inquire "whether the public opposition to the housing project was animated by racial bias and whether City officials improperly gave effect to that racial bias by allowing the fate of the project to be decided by referendum." *Buckeye*, 263 F.3d at 634.

Such consideration is clearly contemplated by precedent.

Arlington Heights and subsequent decisions of this Court properly consider evidence of citizen or voter intent in assessing whether even facially-neutral referenda embody racially discriminatory intent. In *Washington v. Seattle School District No. 1*, 458 U.S. 457, 484-85 (1982), for example, the Court noted that "when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." Looking at, *inter alia*, statements by sponsors of the initiative, the Court found that "despite its facial neutrality there is little doubt that the [challenged citizen- approved] initiative was

effectively drawn for racial purposes." *Id*. at 471. Similarly, in *Crawford v. Board of Education*, 458 U.S. 527, 543-45 (1982), the Court considered evidence of voter intent before concluding that a popularly-approved constitutional amendment was not motivated by a discriminatory purpose.

In evaluating whether a popularly-adopted state constitutional amendment contained a distinction based on race, the Court in *James v. Valtierra*, 402 U.S. 137 (1971), also did not limit its examination to the text of the amendment, but rather concluded that "the *record* here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *Id*. at 141 (emphasis added); *see also Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (court "properly undertook" examination of constitutionality of popularly-approved constitutional amendment with consideration of its "immediate objective").

This Court has looked regularly to evidence of discriminatory intent in striking down various forms of law-making, such as constitutional conventions and legislative redistricting. As a general rule, "if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause . . . if that impact can be traced to a discriminatory purpose." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272 (1979). Thus, in *Hunter v. Underwood*, 471 U.S. 222, 227-32 (1985), the Court looked to statements at a state constitutional convention as evidence of discriminatory intent to invalidate a facially neutral provision restricting the franchise.

Likewise, in assessing a redistricting plan in *Miller v. Johnson*, 515 U.S. 900, 917-20 (1995), the Court looked at evidence that the legislature was predominantly motivated by race in striking down its creation of a voting district. It concluded that "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Id*. at 913. Noting *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court stated

that "it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation." *Miller*, 515 U.S. at 913; *see also Hunt*, 526 U.S. at 553-54 (directing district court to consider evidence as to whether legislature had impermissible motivation in districting plan); *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J.) (adopting district court's determination that race was the predominant motivating factor in districting plan); *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (looking to "racial block voting" as evidence in concluding that at-large voting system "has been maintained for the purpose of denying blacks equal access"). In other areas, the Court has also emphasized the importance of invidious legislative intent. *See Griffin v. County Sch. Bd.*, 377 U.S. 218, 223 n.6 (1964) (looking to statement of school board abandoning public schools as establishing discriminatory government purpose); *Feeney*, 442 U.S. at 276 (dispositive question is whether discriminatory purpose shaped legislation giving civil service preference to veterans).

Following *Arlington Heights* and these cases, several Courts of Appeals have similarly considered evidence of public animus in determining whether a municipality violated the Equal Protection Clause by taking action to prevent the development of low-income housing. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (trial court properly considered evidence of public racial animus, including "statements by citizens," "'racial innuendo' and 'racial pressure,'" and statements by leaders of public opposition indicating that "opposition to the project was primarily racial"); *see also id*. at 1066 ("There can be no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition.").[2]

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[2] *See also Contreras v. City of Chicago*, 119 F.3d 1286, 1292 (7th Cir. 1997) ("Of course, private citizens' motivations and government officials' knowledge of these motivations may be quite relevant to the ultimate issue of the government officials' purposes."); *United States v. City of Birmingham*, 727 F.2d 560, 564 (6th Cir. 1984) ("the views expressed by a significant number of opponents of [the proposed low-

This broad inquiry into evidence of intent is necessary because straightforward evidence of discriminatory intent is "rare," *Arlington Heights*, 429 U.S. at 266, since "[m]unicipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Clarkton*, 682 F.2d at 1064. Moreover, "[p]atterns of discrimination as conspicuous as [in *Yick Wo* and *Gomillion*] are rare, and are not a necessary predicate to a violation of the Equal Protection Clause." *Miller*, 515 U.S. at 913-14; *see also Hunt*, 526 U.S. at 553 ("Outright admissions of impermissible racial motivation are infrequent"); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection.").

Nor is an inquiry into popular motivations rare. In other contexts, considering evidence of voter intent behind popularly-enacted petitions and referenda is commonplace. When faced with questions of legislative intent, courts will look to evidence of voter intent in construing ambiguous portions of popularly-enacted initiatives and referenda. For example, "[m]aterial in an official voters' pamphlet may be considered by the court in determining the purpose of legislation adopted by the initiative process. This is because the 'collective intent' of the people becomes the object of the court's search where a law is enacted in this manner." *Lemon v. United States*, 564 A.2d 1368, 1381

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income housing]" were properly considered in assessing whether the defendant municipality's actions were racially motivated); *United States v. City of Parma*, 661 F.2d 562, 568 (6th Cir. 1981) (implicitly approving inquiry into intent of voters by including voter-approved facially-neutral ordinances among the municipal actions found to be "motivated by a racially discriminatory and exclusionary intent"); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) (approving consideration of evidence of racial animus displayed by public supporters of a petition opposing proposed low-income housing in concluding that racial motivation rendered city liable despite "no evidence of racial prejudice on the part of any city official").

(D.C. 1989) (citation omitted). Likewise, other courts routinely approve examining evidence of voter intent.[3]

X. Conducting the *Arlington Heights* inquiry into the motivations behind the instant referendum petition poses no First Amendment concerns where, as here, no speaker is being silenced or held liable for speech.

Notwithstanding these applications of the "motivating factor" test to government action, the City and *amicus* United States suggest that "an inquiry into the motives of those who supported a referendum threatens to chill important First Amendment activities." United States Br. at 9. This argument misconceives this case: this is a case against a municipality for discriminatory action, not a lawsuit against private parties who supported the referendum.

The City's First Amendment contentions do not withstand serious scrutiny, for no speaker is being prevented from, or punished for, speaking. Instead, the Sixth Circuit decision here contemplates municipal liability for withholding building permits, not citizen liability for advocating or filing a referendum. The City's invocation of First Amendment concerns depends upon its erroneous premise that the potential for liability chills speech by "punish[ing] citizens for pursuing these most fundamental of constitutional rights." Pet. Br. at 10. But the imposition of liability upon a *municipality* for government action does not fall upon any of the *citizen*

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[3] *See*, *e.g.*, *Estate of Turner v. Wash. State Dep't of Revenue*, 724 P.2d 1013, 1015 (Wash. 1986) (in construing popularly enactment, the court should "consider the collective intent of the people as it would ordinarily consider 'legislative intent'"); *Thomas v. Bailey*, 595 P.2d 1, 4 n.15 (Alaska 1979) ("In construing a constitutional provision which has been ratified by the voters, the court also can look to evidence on the meaning the voters probably placed on the provision.") (citation omitted); *Winter v. Royal Oak City Manager*, 26 N.W.2d 893, 896 (Mich. 1947) (in construing voter- enacted local charter amendment, the court must "ascertain and give effect to the intent of the electorate with due regard to the circumstances and the purpose sought to be accomplished").

speakers.[4] No one is punished for filing a referendum petition, nor for speaking in support of it.[5] Simply put, this is not a First Amendment case: liability attaches only to the municipal action in withholding permits from Buckeye. The First Amendment protects political expression, but does not insulate government action undertaken with an unlawful purpose from constitutional scrutiny.

To the extent citizen speech is considered here, it only serves as permissible evidence of discriminatory intent, or motive, on the part of City actors. This Court has already made clear that consideration of such discriminatory motives, even where laws impose direct penalties on the speakers, does not offend the First Amendment. *See Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) ("The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). In *Mitchell*,

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[4] This case is therefore distinguishable from *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (federal investigation of private citizens for FHA violations based on petitioning activities runs afoul of First Amendment).

[5] Given the absence of claims against any citizen-speaker, the United States' analogy to other contexts where the protected speech activities are only unlawful where they are "a sham" (the *Noerr-Pennington* antitrust and defamation contexts) are particularly inapt. *See* United States Br. at 13-15. In those contexts, the alleged *speakers* are exposed to potential liability. By contrast, here, the citizens are not defendants.

Moreover, a *Noerr-Pennington*-type "sham" standard would be incoherent in the petition context because of the requirement that a "sham" activity be "objectively baseless." *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). By contrast, a petition could never be "objectively baseless," since even referenda that are unconstitutional, unwise or illogical may be approved by voters - and will often have alternate justifications. *See generally* David Franklin, Comment, *Civil Rights vs. Civil Liberties? The Legality of State Court Lawsuits under the Fair Housing Act*, 63 U. Chi. L. Rev. 1607, 1625-28 (1996) (sham standard inappropriate for FHA cases).

Furthermore, discovering evidence to prove such a "sham" theory would exacerbate - not ameliorate - First Amendment concerns, since the same (or more extensive) discovery regarding the motives of referendum proponents would be required to prove that the movement was a "sham." This higher standard would not cure that problem, but only increase (to unwieldy levels) the burden on civil rights plaintiffs to prove motive.

the Court likened the First Amendment challenge to the criminal penalty-enhancement statute to "federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." *Id*. at 487. In one such case, the Court rejected a First Amendment challenge to an application of Title VII, noting that "[invidious] private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)); *see Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (stating same); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim).

The First Amendment does not prohibit considering public statements as evidence of discriminatory intent to establish a municipality's liability for its actions. Though the City and the United States attempt to conjure up an untenable parade of horribles that would stem from a finding of liability, the Sixth Circuit's decision creates no such problems. It does not force city officials to cross-examine citizens, United States Br. at 19, or impose liability on a municipality "if only one voter . . . express[es] racial bias." Pet. Br. at 20. Instead, the Court of Appeals decision simply - and properly - countenances that, in proving discriminatory intent, Buckeye may introduce evidence of public statements.

Moreover, the standards proposed by the City and *amicus* United States would open the Equal Protection Clause to relatively facile modes of evasion. Under the City's proposed standard, since the motives of referendum supporters could never be considered, intentionally and openly discriminatory referenda would not be unconstitutional so long as care in drafting rendered them not "facially" discriminatory. For example, citizens could hypothetically propose a referendum that barred construction of multi-family housing each time a developer proposed to construct subsidized housing. Since the referendum could be supported by numerous non-

discriminatory rationales, *e.g.*, budget concerns for public works or schools, it could always survive the proposed "sham" test. In sum, the standards proposed by the City and *amicus* United States would eviscerate the Equal Protection Clause so long as citizens intending to discriminate put even a minimal amount of forethought into disguising their motives in the text of the provision.

Thus, the referendum exception to *Arlington Heights* that the City finds in *Arthur v. City of Toledo*, 782 F.2d 565 (6th Cir. 1986), is misguided. *See* Pet. Br. at 20 ("[A]bsent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context.") (quoting *Arthur*, 782 F.2d at 574). There is no reason to hold municipal action taken in response to popular initiatives to a more forgiving standard, creating two distinct tests under the Fourteenth Amendment - one applicable to one type of government action by elected legislatures or executives and another to government action in response to citizen referenda. As this Court has noted, government action through referendum is subject to the same judicial scrutiny as other official action, for "[t]he sovereignty of the people is itself subject to . . . constitutional limitations." *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).[6] In the equal protection context, history and the jurisprudence of this Court counsel against greater constitutional deference to the direct initiatives of a citizen majority. *See*, *e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

XI. THERE IS EVIDENCE SUFFICIENT TO SUPPORT PLAINTIFF'S CLAIM FOR INTENTIONAL DISCRIMINATION.

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6 Similarly, those cases where the Court has inquired into legislative motive suggest that neither the First Amendment nor the respect traditionally accorded legislative speech and debate can insulate unlawfully-motivated statutes from constitutional scrutiny. *See*, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 917-20 (1995), and cases cited *supra*.

In applying the standards for intentional discrimination under the FHA and the Equal Protection Clause to the facts of this case, the question before the Court is whether the City's actions denying permits were motivated by discriminatory animus.[7] Specifically, Buckeye is challenging not the referendum itself (or any citizen activity in support of the referendum), but rather the City's decision to refuse to issue permits based on its application of referendum procedures - giving effect to a referendum that the Ohio Supreme Court found constitutionally impermissible.

The City and its *amici*, however, ignore the City's decision to refuse to issue the building permits and attempt to make the City a mere passive player in the case, arguing erroneously that the City "is facing liability simply because its citizens made use of the referendum process." *Amicus* International Municipal Lawyers Association Br. at 2. Not so. The municipal action for which the City would be liable is not the citizen's filing of the referendum, but rather the City's withholding of properly approved building permits in response to the petition filing, notwithstanding that doing so violated the Ohio Constitution, the U.S. Constitution and federal law. The City's erroneous and unconstitutional decision to invoke the City Charter referendum provisions cannot shield it from liability.

Crucially, the City's decision was contrary to state constitutional law - a wrongful application of the City Charter referendum provisions invoked for the first time to the building permit context. *See Buckeye*, 263 F.3d at 635. The directions from the Mayor (through the Director of Public Service) and the City Law Director instructing the City Engineer to withhold permits from Buckeye ignored Ohio's "well-established case law . . . . [that] clearly limits referendum and initiative powers to questions that are legislative in nature." *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 184 (Ohio 1998). As the Ohio Supreme Court concluded, the referendum on which the City Law Director determined to obstruct Buckeye's permit was impermissible under the Ohio Constitution. *See id*. at 186. The Ohio Supreme Court's holding that the City could not conduct a referendum on the petition belies the City's erroneous claim that it "had no lawful authority to do other than it did." Pet. Br. at 15.

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[7] The question whether the City's enforcement of the referendum as approved would be unlawful is not presented in this case as the referendum was invalidated under the Ohio Constitution by the Ohio Supreme Court.

The decision to withhold permits embodied in those instructions, made either prior to the referendum filing or before its sufficiency had been ascertained, was not only premised on an improper interpretation of Ohio law. It also ignored the supremacy of federal and constitutional law over the referendum provisions of the City Charter. That decision, standing state and federal constitutional law on its head in response to pressure from citizens who made their discriminatory animus clear at several City Council meetings, unquestionably merits liability under the Equal Protection Clause and the FHA.

Should Buckeye prove at trial that the City withheld the permits through a series of actions motivated by discriminatory intent, neither the City's legally erroneous claim that it was "required" to withhold permits under the City Charter, nor its contention that the City merely responded to potentially invidious motives of its citizens pre-empt municipal liability.

First, it is no defense for the City to claim (incorrectly) that its action to stay the permits was required by state law, for "state action in violation of the [Fourteenth] Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a [state actor] in the absence of statute." *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948); *see also id*. at 20 ("[State action] is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy."). Thus, the City's argument that it cannot be held liable because the City Law Director concluded that "the filing of the referendum prevented the site plan ordinance from taking effect," Pet. Br. at 4, must be rejected: "state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971). To hold otherwise would excuse deliberately narrow and incorrect readings of state law which omit consideration of other state, federal and Constitutional law - and allow municipal officials to escape liability whenever they could concoct any "legal shred" upon which to justify intentionally discriminatory action. In this case, the City's novel application of the City Charter's referendum provision was not even permitted under the Ohio Constitution, and ignored that the effect it gave the petition violated federal law and the U.S. Constitution.

Moreover, in the civil rights context, the Court has made clear that a municipality's claimed good faith will not insulate it from liability for giving effect to the private discrimination of any individual citizens. For example, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), a municipal authority could be held liable for permitting a lessee of municipal

property to use it in a discriminatory manner, notwithstanding that the municipality did not endorse that use. *See id*. at 725 ("[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."); *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) ("[G]ood intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty."); *see also Gautreaux v. Romney*, 448 F.2d 731, 738 (7th Cir. 1971) ("[A]lleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools."). As in *Shelley*, the fact that a violation of the Constitution resulted from the application of state law did not immunize the state actor from liability. *See Shelley*, 334 U.S. at 17 ("It has been held that the action of state courts in enforcing a substantive common-law rule . . . may result in the denial of rights guaranteed by the Fourteenth Amendment.").

The other justification proffered by the City - that the action was taken at the behest of private individuals, the referendum petitioners - does not prevent the City from being found liable for violating the Equal Protection Clause. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *see also Shelley*, 334 U.S. at 20 ("[T]he [Fourteenth] Amendment [is not] ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by [private actors]."). Instead, as in *Shelley*, this is a case "in which the State[] ha[s] made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of [their] property rights." *Id.* at 19. Such unconstitutional uses of municipal power cannot stand, for "[t]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Id.* at 22.[8]

In this case, the City may be held liable for its knowing decision to withhold permits from Buckeye in response to a citizen referendum filing which it facilitated and supported through repeated delays in the approval

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[8] As one resident noted at a City Council meeting, "sometimes leadership calls people to do the right thing[,] not the expedient thing. It calls for leaders to make principled decisions rather than political ones. To act courageously when there may be great risk." App. at 143a.

process and whose discriminatory animus was made plain at City Council meetings. Neither the fact that the City invented a "legal shred" that ultimately proved impermissible under the Ohio Constitution, nor the claim that it merely indulged citizen animus, can shield the City from liability under the Equal Protection Clause or the FHA.

XII. THE FAIR HOUSING ACT PERMITS A CAUSE OF ACTION FOR DISPARATE IMPACT.

The City also challenges the Sixth Circuit's conclusion that Buckeye may pursue a disparate impact claim under the FHA. As a preliminary matter, this question has been mooted by Buckeye's withdrawal of any claim based on disparate impact. *See* Resp. Br. at 32; *see also* United States Br. at 10 n.1. Furthermore, because the City failed to raise this argument before either the District Court or the Court of Appeals, it has waived its challenge to this reading of the FHA. Nonetheless, the misstatements made by the City and its *amici* regarding disparate impact require a response. First, as a general matter, the language and legislative history of Title VIII, like the virtually identical provisions of Title VII, permit claims without proof of discriminatory intent. Second, such disparate impact claims are appropriate in the context presented here.

XIII. The Fair Housing Act's language, read *in pari materia* with Title VII, indicates that Congress did not require proof of a defendant's discriminatory intent to state a cause of action.

The language of the FHA does not limit violations to cases where complainants can prove the "intent" of defendants. Instead, Title VIII provides that "it shall be unlawful [t]o . . . otherwise make unavailable or deny[] a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The City erroneously contends that the "because of" language means that defendants must have acted with intentional discrimination - *i.e.*, targeting groups as a result of racial (or other) animus. But the plain language of the statute nowhere refers to potential defendants or their motives, and thus no limitation of the statute to "intentional" cases is

contemplated. Rather, the phrase "because of" may just as easily be read to mean that the dwelling is unavailable to a person "on account of the fact that" they are members of a specific race (or other protected category). *See* Pet. Br. at 23 (citing dictionary definition of "because"). This is the precise situation captured by "discriminatory effects" claims, where the fact of a person's being in the disparately-impacted category renders the dwelling "otherwise unavailable" to them. *See* Robert Schwemm, *Housing Discrimination: Law and Litigation* § 10:4, at 10-29 to 10-30 (2002).

This reading of the statutory language is further supported by reading Title VIII *in pari materia* with Title VII, which is appropriate since they are "part of a larger statutory framework of civil rights laws which should be interpreted in a coordinated manner." Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv. C.R.-C.L. L. Rev. 128, 159 (1976). Indeed, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court unanimously held that the language in Title VII - language almost identical to the "because of" language in the FHA - encompassed claims for discrimination notwithstanding a defendant's lack of discriminatory intent. *See id*. at 430, 426 n.1 (citing 42 U.S.C. § 2000e-2 (1971)). The use of the "because of" language in Title VII did not require claimants to prove discriminatory intent since "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432 (emphasis in original). Thus, "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained" if they work discriminatory effects. *Id*. at 430. Since *Griggs*, "[t]his Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988).[9]

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9 *See also*, *e.g.*, *Washington v. Davis*, 426 U.S. 229, 247 (1976) (reiterating that "discriminatory purpose need not be proved" in claims under Title VII). This result confirms, contrary to the implications of

XIV. **The legislative history of the Fair Housing Act indicates a broad intention to end practices supporting residential segregation.**

In addition, the legislative history of the FHA is replete with indications that Congress intended it to prohibit not merely overt, intentional discrimination but also all actions and practices that impeded, purposefully or not, the goals of the statute: facilitating minority residence in suburban areas, and promoting an integrated and stable society. *See* 114 Cong. Rec. 2274-79 (1968) (remarks of Senator Mondale); *id*. at 2279-81 (remarks of Senator Brooke); *see also* 42 U.S.C. § 3601 (broadly stating goal "to provide, within constitutional limitations, for fair housing throughout the United States"). This Court has similarly recognized that the statute should be construed broadly to achieve these goals. *See Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 211 (1972) (one goal of Title VIII is to achieve "truly integrated and balanced living patterns") (quoting Senator Mondale, 114 Cong. Rec. 3422). Moreover, as one commentator summarized,

> Congress appeared to recognize the importance of private and public actions which perpetuate discrimination and segregation but are neither explicitly nor blatantly discriminatory. Congressmen spoke of the significance of Title VIII in eliminating effects produced by past discrimination, government thoughtlessness, and subtle economic and social pressures.

Comment, 11 Harv. C.R.-C.L. L. Rev. at 144 (citations omitted); *see also*, *e.g.*, 114 Cong. Rec. 2699 (Constitutionality Memorandum) (decrying "[l]ocal ordinances with the same effect" as explicit discrimination as

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amicus Pacific Legal Foundation, *see* Br. at 16-18, that the Court's decisions requiring discriminatory intent to establish Fourteenth Amendment violations are not at odds with its conclusion that statutes like Title VII appropriately encompass disparate impact claims.

demonstrating that "the problem of government-practiced discrimination in housing is not entirely of the past"); 114 Cong. Rec. 228 (remarks of Senator Brooke). Senator Mondale, a leading proponent of the legislation, noted that it would "undo the effects" of past discrimination. 114 Cong. Rec. 2699. Thus, addressing facially neutral ordinances with the effect of excluding minorities without explicit discrimination was among the goals contemplated by Congress during consideration of the bill.[10]

Perhaps most tellingly, the Senate rejected an amendment that would have required proof of intentional discrimination in certain circumstances. *See* 114 Cong. Rec. 5221-22; *see also Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147 (3d Cir. 1977) (noting rejection of amendment); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.) (noting same), *aff'd per curiam*, 488 U.S. 15 (1988).

The City's citation of a portion of the legislative history out of context is simply a *non sequitur*. *See* Pet. Br. at 23-24. Senator Magnuson's hypothetical sale by a homeowner of a single home is not a scenario which would engender discussion of discriminatory effects claims relating to broader municipal action or policies; his question was directed at whether a public offering was required. Senator Mondale's response therefore cannot be read to imply any belief that the statute imposed an intent requirement. Similarly, *amicus* Pacific Legal Foundation ("PLF") cites

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[10] Senator Mondale made clear that such discriminatory government activity was among the problems to which the FHA responded:

> Negroes who live in slum ghettos, however, have been unable to move to suburban communities and other exclusively white areas. In part, this inability stems from a refusal by suburbs and other communities to accept low-income housing . . . . An important factor contributing to exclusion of Negroes from such areas, moreover, has been the policies and practices of agencies of government at all levels.

114 Cong. Rec. 2277 (1968) (quoting U.S. Comm'n on Civil Rights, Report 60 (1967)).

several comments in the legislative history indicating that the FHA would address intentional discrimination. Of course, a major impetus behind the bill was that such overt, intentional discrimination was still legal. But none of the statements cited indicates a Congressional intention to *limit* the FHA to such cases. *See* PLF Br. at 5-6.[11]

XV. The Courts of Appeals have uniformly concluded that Title VIII, like Title VII, includes claims based on discriminatory effects, and Congress has rejected efforts to disturb that consistent judicial interpretation.

The Courts of Appeals have reached the uniform consensus that Title VIII, sharing virtually identical language with Title VII, does not require proof of discriminatory intent.[12] For example, in *Arlington Heights*, the Supreme Court, after dismissing Equal Protection claims absent proof of discriminatory intent in that case, remanded to the Seventh Circuit for consideration of whether conduct having discriminatory effects nonetheless violated the FHA. *See Arlington Heights*, 429 U.S. at 271; *Rizzo*, 564 F.2d at 147 ("In remanding, rather than directing the dismissal of the *Arlington*

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11 PLF's broad contention that the FHA "was not even intended to apply to land use regulation," PLF Br. at 8, ignores a vast body of cases, including those approved by the Court, that have applied the Act to zoning decisions. *See generally*, *e.g.*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (affirming decision that zoning restriction violated Act).

12 The City misleadingly suggests that at least one Court of Appeals has required a finding of discriminatory intent. *See* Pet. Br. at 21 (citing *Asbury v. Brougham*, 866 F.2d 1276 (10th Cir. 1989)). *Asbury* did not consider whether a disparate impact theory was viable under Title VIII, since the plaintiff there apparently alleged only intentional discrimination. Rather, when the Tenth Circuit directly considered the issue, it definitively concluded that the FHA includes disparate impact claims. *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1252 (10th Cir. 1995).

Heights litigation, the Court at least implied that considerations other than those necessary for proof of equal protection violations must govern Title VIII claims.").[13]

Noting *Griggs*, the Seventh Circuit on remand found no "indicat[ion that] Congress intended that proof of discriminatory intent was unnecessary under [Title VII] but necessary under [Title VIII]." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* ("*Arlington Heights II*"), 558 F.2d 1283, 1289 (7th Cir. 1977). Further, given the broad Congressional intent to promote integrated residential housing, and "the need to construe [Title VIII] expansively in order to implement that goal, [the Court of Appeals] decline[d] to take a narrow view of the phrase 'because of race,'" *id.* at 1289, instead concluding that violations "can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Id*. at 1290. Since requiring proof of intent often would be "impossible to satisfy," inevitably frustrating the purposes of Title VIII, the Court of Appeals concluded that "[w]e cannot agree that Congress in enacting the [FHA] intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." *Id*.[14]

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[13] As in *Arlington Heights*, this Court gave its tacit approval to discriminatory effects claims in its *per curiam* opinion approving the Second Circuit's approval of such a claim in *Huntington*, 488 U.S. at 18 ("Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown").

[14] In arguing that claims under Title VIII require proof of discriminatory intent, *amicus* PLF makes several analogies to different statutory schemes, but never addresses the body of cases that have read Title VIII *in pari materia* with Title VII. If anything, PLF's observation that Congress has limited the use of disparate impact analysis in certain situations covered by Title VII, *see* PLF Br. at 14-15, only reinforces the conclusion that it was Congress' purpose that both statutes permit disparate impact claims. As it has done in limited cases under Title VII, Congress is capable of creating exceptions to that general rule should it desire to do so.

PLF's analogies to statutes other than Title VII are harder to justify or understand. PLF's comparison to the Voting Rights Act's preclearance

Other Courts of Appeals similarly concluded that "discriminatory effect alone will, if proved, establish a Title VIII *prima facie* case." *Rizzo*, 564 F.2d at 148. As in *Arlington Heights II*, the *Rizzo* Court observed that the language and broad policy goals of the Act, as well as the reading given Title VII, supported an expansive application of Title VIII to include disparate impact cases. *Id*. at 147-48. By 1988, every Court of Appeals to consider the question joined in this conclusion.[15]

Against this background of consistent judicial interpretation, Congress considered and passed the 1988 Fair Housing Amendments Act. The Amendments Act did not change the substantive elements required to prove a violation, and instead rejected a proposal to add an intent requirement. *See* Robert Schwemm, *Housing Discrimination: Law and Litigation*, § 10:4, at 10-35 to 10-36 (2002). As Senator Kennedy summarized, Congress was well aware that nine of the

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procedures has no analogue in the FHA, since the Department of Justice does not review and approve real estate-related decisions. *See* PLF Br. at 8. PLF does not even attempt to explain what relevance its description of the history of administrative regulations under Title VI has to claims under Title VIII, *see* PLF Br. at 9-14; since the Court of Appeals decisions finding disparate impact claims under Title VIII do not depend on any similar regulations, PLF's discussion is simply irrelevant. PLF's reference to the Equal Pay Act's lack of an impact standard is incoherent, in that it concedes that the act was "designed differently" from Title VII, and, by extension, Title VIII, which shares the same language. *See* PLF Br. at 19. Finally, PLF notes that this Court has not decided whether disparate impact liability is applicable to the Age Discrimination in Employment Act. *See* PLF Brief at 18-19. If this Court's reservation of questions has such weight, then under PLF's reasoning the *per curiam* opinion in *Huntington* is dispositive here.

15 *See*, *e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-38 (2d Cir. 1979) (noting analogy to *Griggs* reading of Title VII adopted in *Arlington Heights II*); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986-87 (4th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *United States v. Mitchell*, 580 F.2d 789, 791-92 (5th Cir. 1978); *Arthur v. City of Toledo*, 782 F.2d 565, 574-77 (6th Cir. 1986); *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) ("[e]ffect, and not motivation, is the touchstone"); *Halet v. Wend Inv. Co.*, 672 F.2d 1035, 1311 (9th Cir. 1982).

then-twelve federal Courts of Appeals had all concluded "that a showing of a discriminatory effect may be used to establish a violation," and "Congress accepted this consistent judicial interpretation." 134 Cong. Rec. S 12449 (1988).

Since 1988, moreover, the First and Tenth Circuit Courts of Appeals have joined in this consensus, and other Courts of Appeals have reiterated their previous positions. *See Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-52 (10th Cir. 1995); *see also* Schwemm, § 10:4, at 10-37 n.41 (collecting cases).

XVI. **Discriminatory effect claims under the Fair Housing Act are properly stated in this context.**

There is no reason to suggest that the FHA's disparate impact claim does not encompass the circumstances here. The City argues this Court should limit such claims in the referendum context, because "the interest in upholding referendum rights far outweighs the statutory interests of a developer." Pet. Br. at 26.[16]

There is no basis for such a limitation. First, there is no such trade-off because this case does not involve "referendum

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16 The United States' contention that the disparate impact theory cannot apply to a case involving a single government decision, *see* Br. at 10 n.1, is simply mistaken. Numerous courts have applied the disparate impact theory to a single action by a government or private housing provider. The doctrine is not limited to challenges to general policies or rules; rather, a claim may be established by demonstrating that either "the action or rule challenged has discriminatory impact." *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15, 17 (1988). Thus, for example, in *Arlington Heights II*, a single municipal refusal to rezone property that had a discriminatory effect could violate the FHA. *See* 558 F.2d 1283, 1290 (7th Cir. 1977). To suggest that such decisions actually apply disparate impact to general policies rather than single decisions because the decisions affect many individuals does not tenably distinguish this case, where the City's decision impacted housing availability for a large number of families.

rights": the City faces liability for withholding permits, not for the citizens' filing a referendum. But, as noted *supra*, even assuming "referendum rights" (if by that the City means any alleged entitlement to a "stay" in filing a referendum petition held impermissible under the Ohio Constitution) are at issue, the argument here is specious. There is no exception for statutes otherwise unconstitutional simply because they are popularly-enacted rather than legislatively or constitutionally conceived. Nor is there such an exception in the FHA, or any reason to believe that, as a categorical matter, "referendum rights" supplant the interests represented by the FHA - particularly given that it was enacted to protect the minority from discriminatory treatment by the majority.

In *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), which the City cites as refusing to extend the disparate impact approach to cases of racial steering, *see* Pet. Br. at 22, the court in fact expressly did not decide that question, choosing instead to limit its discussion to the facts of that case. *See id*. at 1533. Even there, the court recognized that the disparate impact rationale fits well in the municipal zoning context. There is no problem with applying disparate impact theories to such municipal decisions, since it is appropriate "to require a municipal government to consider the impact of its zoning decisions on the racial composition of the municipality." *Dwivedi*, 895 F.2d at 1533. Rather, it is precisely such municipal decisions - even those related to referenda - that are most apt for consideration under disparate impact theories.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals regarding the claim of intentional discrimination should be affirmed, and the judgment regarding the disparate impact claim should be vacated.

Respectfully submitted,

BARBARA ARNWINE
THOMAS J. HENDERSON*
CHERYL L. ZIEGLER
JONATHAN P. HOOKS

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW
1401 New York Ave., N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

NADINE M. COHEN

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW OF THE
BOSTON BAR
ASSOCIATION
294 Washington Street
Suite 443
Boston, MA 02108
(617) 482-1145

EVA JEFFERSON PATERSON

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS OF
THE SAN FRANCISCO
BAY AREA
131 Steuart Street
Suite 400
San Francisco, CA 94105
(415) 543-9444

REED COLFAX

WASHINGTON
LAWYERS'COMMITTEE
FOR CIVIL RIGHTS
AND URBAN AFFAIRS
11 DuPont Circle
Suite 400
Washington, DC 20036
(202) 319-1000

JAVIER N. MALDONADO

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS
UNDER LAW OF TEXAS
2311 North Flores
San Antonio, TX 78212
(210) 736-1503

* Counsel of Record

Of Counsel:

MICHAEL CHURCHILL
PUBLIC INTEREST
LAW CENTER OF
PHILADELPHIA
125 South 9th Street
Suite 700
Philadelphia, PA 19107
(215) 627-7100

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