No. 01-1269

In the

Supreme Court of the United States

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CITY OF CUYAHOGA FALLS, et al.,

Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, et al.,

Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. In considering a claim against a municipal corporation for intentional discrimination arising out of a facially neutral and judicially upheld referendum petition, may the court inquire into the motivations of a handful of the citizens who expressed support for the referendum and impute those motivations to the entire municipal organization?

2. In light of the constitutional freedom of political expression, can a disparate impact claim under the Fair Housing Act be maintained against a municipal corporation for the alleged impact of filing of a facially neutral and judicially upheld referendum petition?

3. Does the Due Process Clause of the Constitution require a municipal corporation to issue building permits when the underlying conditions for issuance of building permits have not been met and the municipal corporation's withholding of the permits is required by the judgments of state courts of competent jurisdiction?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Center for Equal Opportunity, respectfully submit this brief amicus curiae in support of neither party. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest. PLF has participated in numerous cases involving discrimination on the basis of race including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). PLF is also interested in the substantive due process issue. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

The Center for Equal Opportunity (CEO) is a Virginia nonprofit corporation. CEO's main purpose is to study issues concerning race and ethnicity. CEO has participated actively in a wide variety of civil rights cases including: *Alexander v. Sandoval*,

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[1] Pursuant to Supreme Court Rule 37.6, Amici affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

532 U.S. 275 (2001); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). CEO is participating only in Part I of this brief.

STATEMENT OF THE CASE

The facts of the case are set forth in *Buckeye Community Hope Foundation v. City of Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001). Buckeye Community Hope Foundation (Buckeye) purchased real property in the City of Cuyahoga Falls (City) for the purpose of developing a low-income housing complex. Buckeye submitted a "site plan" for the project which was approved by the City planning commission and City Council over the objections of the mayor and some members of the public. *Id.* at 630-31.

City residents filed a referendum petition seeking a vote on the city council's approval of the site plan. The Ohio Supreme Court ultimately ruled that the referendum violated the state constitution. *Id.* at 633. Buckeye also filed an action in federal court alleging violations of the Fair Housing Act, 42 U.S.C. § 3601, *et seq*., 42 U.S.C. §§ 1981 and 1982, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, per 42 U.S.C. § 1983. *Id*. at 632. The district court eventually granted the City's motions for summary judgment on all claims. *Id.* The Sixth Circuit reversed, holding that there were genuine issues of material fact as to the equal protection claim, *id.* at 639, the Fair Housing Act claim, *id*. at 641, and the substantive due process claim, *id.* at 644. This Court granted certiorari. Amici will address only issues of the applicability of disparate impact analysis to the Fair Housing Act and the standards for determining substantive due process violations in land use cases.

SUMMARY OF ARGUMENT

The legislative history of the Fair Housing Act, as expressed by its proponents in Congress, shows that the Act was intended to

apply solely to intentional discrimination, not to acts having a disparate impact on protected classes. Disparate impact doctrine developed haphazardly in the courts with the main impetus from the federal bureaucracy. The courts mistakenly deferred to the regulatory extension of civil rights statutes from the intent standard set by Congress to an effects standard promoted by the regulatory agencies. Congress has reluctantly acceded to the courts' and agencies' adoption of disparate impact theory but has frequently acted to limit its application. This Court has also limited disparate impact by holding it inapplicable in Equal Protection cases and declining to extend it to statutes such as the Age Discrimination in Employment Act, the Equal Pay Act, and 42 U.S.C. § 1981. The Court has shown particular concern that disparate impact doctrine would lead to the adoption of quotas and preferential treatment, contrary to the will of Congress.

The federal circuits disagree on what sort of property interest is entitled to substantive due process protection in the land use context. A number of circuit courts, including the court below, require that a landowner demonstrate a "vested right" or "entitlement" to a particular use of property. That approach—borrowed from procedural due process cases claiming a property interest in continued public benefits—has no place in land use cases involving arbitrary government action that interferes with the right to use land. The Constitution and this Court's precedents require that the ownership of land implicates a property right protected by due process.

ARGUMENT

I

DISPARATE IMPACT ANALYSIS IS NOT APPLICABLE TO THE FAIR HOUSING ACT

A. The Plain Language of the Fair Housing Act Limits Its Applicability to Intentional Discrimination

The Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq*., declares that it is unlawful to "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 wording of the FHA focuses on whether people of different races are treated differently *because of* their race or other stated grounds. This language plainly prohibits only intentional discrimination. However, the Sixth Circuit went further and held:

> Even if plaintiffs fail to prove that defendants intended to discriminate on the basis of race, they also have a valid claim under the FHA on the theory that defendants' actions had a disparate impact based on race.

Buckeye, 263 F.3d at 640.

The court held that "at least under certain circumstances, a violation of the Fair Housing Act can be established by a showing of discriminatory effect without a showing of discriminatory intent." *Id*. Thus, if a municipal action disproportionately impacts members of a minority group it violates the FHA, even if there was no intent to discriminate.

This Court specifically reserved the question whether disparate impact analysis applies to the FHA in *Town of Huntington v. Huntington Branch, National Association for the Advancement of Colored People*, 488 U.S. 15, 18 (1988). The legislative

history of the Act and public policy strongly support the argument that it does not.

B. Congress Intended the Fair Housing Act to Ban Intentional Discrimination, Not Facially Neutral Laws That Merely Have a Disproportionate Effect

The legislative history of the FHA shows that Congress intended the Act to apply only to intentional discrimination. Because the FHA was offered as a floor amendment in the Senate there are no committee reports. The legislative history thus consists of statements on the floor of the Senate and House. Significantly, neither the supporters nor the opponents suggested that the Act would ban as racially discriminatory local land use regulation that had a disproportionate effect on minorities. This would have had the extraordinary impact of invalidating innumerable local zoning regulations that, without any intent to discriminate, impose lot size or type of unit restrictions (*e.g.*, zoning restricting development to single family dwellings) on residences. Since such restrictions impose economic means tests on residents and certain minorities are disproportionately less able to afford single family residences, such zoning has a disparate impact on members of those minority groups. Instead, the legislative history shows that Congress was concerned with prohibiting intentional refusals to sell or rent housing because of the race of the renter or buyer and intended that financial ability should remain the single most important factor in such transactions.

Senator Mondale, a leading sponsor of the FHA, stated: "The bill simply reaches the point where there is an offering to the public and the prospective seller refused to sell to someone solely on the basis of race." 114 Cong. Rec. 4974 (Mar. 4, 1968). Senator Hart concurred: "When you go to a property that is publicly offered, let us not run the litmus test of how I spell my name, or where I went to church . . . or what color God gave me." *Id.* at 4976. Senator Mondale stressed the limits on the bill's reach: "The

bill permits an owner to do everything that he could do anyhow with his property—insist upon the highest price, give it to his brother or wife, sell it to his best friend, do everything he could ever do with property, except refuse to sell it to a person solely on the basis of his color or his religion. That is all it does. It does not confer any right. It simply removes the opportunity to insult and discriminate against a fellow American because of his color, and that is all." *Id.* at 5643 (Mar. 7, 1968). Congressman Steiger declared: "You cannot, because of one reason—race—refuse to sell or rent property. All of the legitimate criteria which a homeowner uses to judge the prospective buyer remain unimpaired." Senator Brooke, another leading cosponsor, stated:

> I believe that all we are saying in this amendment is that we are giving the opportunity for people to live where they want to live and where they can live . . . . A person can sell his property to anyone he chooses, as long as it is by personal choice and not because of motivations of discrimination.

Id. at 2283 (Feb. 6, 1968). Senator Tydings also emphasized that the issue was intentional discrimination: "Just a year ago, in this Chamber . . . I made the observation that—purposeful exclusion from residential neighborhoods, particularly on grounds of race, is the rule rather than the exception in many parts of our country." *Id.* at 2528 (Feb. 7, 1968). He later noted that "the deliberate exclusion from residential neighborhoods on grounds of race—and all the problems that go with it—are still with us today . . . ." *Id.* at 2530.

It is perhaps ironic that this case arises in the context of opposition to low-income housing as an alleged proxy for race discrimination. The legislative history shows that members of Congress repeatedly stressed that the bill was designed to make financial ability, rather than race, the principal qualification for purchasing or renting housing. Senator Mondale noted: "We had

several witnesses before our subcommittee who were Negro, who testified that they had the financial ability to buy decent housing in all-white neighborhoods, but despite repeated good faith attempts, were unable to do so." *Id.* at 2277 (Feb. 6, 1968). Senator Hatfield emphasized: "The point is that where discrimination exists at all, where any man in any part of this country . . . is denied the right to buy a home within a community according to his economic ability, wherever he might please, merely because his skin is of a different color, there is a denial of a right that belongs to all Americans, and therefore this should be corrected." *Id.* at 3129 (Feb. 15, 1968). Senator Scott agreed: "Most persons in this country can rent or buy the dwelling of their choice if they have the money or credit to qualify. But others, even if they have unlimited funds and impeccable credit, often are denied access to decent housing simply because of the color of their skin." *Id.* at 3252 (Feb. 16, 1968). Congressman McGregor added: "How bitter it must be to find that although your bank balance is ample, your credit rating is good, your character above reproach, you may not improve your family's housing because your skin is not white." *Id.* at 9564 (Apr. 10, 1968).

The intent of the bill was summed up by Senator Mondale: "I emphasize that the basic purpose of this legislation is to permit people who have the ability to do so to buy any house offered to the public if they can afford to buy it. It would not overcome the economic problem of those who could not afford to purchase the house of their choice." *Id.* at 3421 (Feb. 20, 1968). He emphasized: "We readily admit that fair housing by itself will not move a single Negro into the suburbs—the laws of economics will determine that." *Id.* at 3422. This legislative history shows that Congress' purpose in adopting the FHA was to prohibit intentional discrimination. The members' statements refute the suggestion that the FHA was further intended to outlaw restrictions based on economic means such as the low-income housing here at issue.

The reality is that local land use decisions involve a mix of factors. Some factors are objective such as sewage, traffic, water supply, and school impacts. Others are esthetic, such as preserving open space and limiting housing density. This Court recognized these intangible quality of life factors as legitimate subjects of local land use regulation that are entitled to judicial deference in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Indeed, Senator Mondale made it clear that the FHA was not even intended to apply to land use regulation. In the hearings recorded in *Fair Housing Act of 1967: Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Committee on Banking and Currency*, 90th Cong., 1st Sess. 22-23 (1967), Senator Mondale stated that the bill was "designed to deal exclusively with the refusal to sell or rent for racial reasons, and it does not apply to the existence of other reasons or [sic] does not apply to zoning requirements, ordinances, and the rest." *Id.*

If it had wished to create an effects standard for the FHA, Congress was well aware of how to do so. In Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, Congress mandated that covered jurisdictions seek preclearance of any voting change and demonstrate that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." This language shows that Congress was aware that race-neutral practices could produce racial effects and that it knew how to prohibit such practices when it intended to do so. It did not do so here. When the statute was amended in 1988, Congress made no change in the wording of the operative parts of the statute and President Reagan in signing those amendments declared that the statute "speaks only to intentional discrimination." Remarks on Signing the Fair Housing Act Amendment Act of 1988, 24 Weekly Comp. Pres. Doc. 1140-41 (Sept. 13, 1988).

C. Extending Disparate Impact Analysis to the Fair Housing Act Would Be Contrary to Public Policy

1. Disparate Impact Analysis Developed Haphazardly at the Impetus of the Federal Bureaucracy

The doctrine of "disparate impact" saw its initial judicial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* held that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of Title VII, 42 U.S.C. § 2000e, *et seq.*, prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin, because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs*, 401 U.S. at 431-32. The ruling in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29.

The disparate impact doctrine was extended to Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). There, non-English-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 564. The Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although the Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[2] issued pursuant to Section 602 that barred acts that have the effect

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[2] The court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

of discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." *Id.* at 571 (footnote omitted). The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as Section 602 of Title VI "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" *Id.* (citations omitted).

In *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), a majority of the Court's members held that proof of purposeful discrimination is a necessary element of a valid claim under Title VI itself. Black and Hispanic members of the city police department had challenged the city's "last-hired, first-fired" policy as having a disparate impact on the basis of race. In a badly splintered decision, the Court affirmed the Second Circuit's denial of relief under Title VI. In their concurring opinion, *id.* at 610-11, Justices Powell, Rehnquist, and Chief Justice Burger observed that in *Regents of the University of California v. Bakke*, 438 U.S. 265, Justice Powell held that Title VI proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment. *Id.* at 287. Justices Brennan, White, Marshall, and Blackmun reached the same conclusion in *Bakke*: "'Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's.'" *Id.* at 352. Since the Constitution requires proof of discriminatory intent, Justices Powell, Burger, and Rehnquist held that *Bakke* necessarily required rejection of the decision in *Lau* that discriminatory impact suffices to establish liability under Title VI. *Guardians*, 463 U.S. at 610-11.

Justices Brennan, White, Marshall, and Blackmun concurred: "'In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.' " *Id.* at 639. Justices Stevens, Brennan, and Blackmun further concurred, noting that the interpretation of Title VI adopted by a majority in *Bakke* was confirmed in two subsequent opinions of the court. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), distinguished Title VII from Title VI on the basis that Title VII "'was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.'" *Id.* at 207 n.6. And in *Board of Education, New York City v. Harris*, 444 U.S. 130 (1979), the Court concluded that the 1972 Emergency School Aid Act (ESAA) contemplates funding cutoffs in response to forms of discrimination that are not "'discrimination in the Fourteenth Amendment sense.'" *Id.* at 149 (citation omitted). *Harris* then made a critical point in distinguishing the ESAA from Title VI:

> A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found.

Id. at 150.

Justices Stevens, Brennan, and Blackmun concluded in *Guardians*:

> If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress. Title VI must therefore mean what this Court has said it means, regardless of what some of us may have thought it meant before this Court spoke. Today, proof of invidious

> purpose is a necessary component of a valid Title VI claim.

463 U.S. at 641-42.

Justices Stevens, Brennan, and Blackmun, however, opined that proof of discriminatory impact was sufficient to establish violation of regulations adopted to enforce Title VI. *Id.* at 643-45. These justices did not explain how they could cite *Harris* for the principle that Congress intended to limit the application of Title VI to intentional discrimination because of the drastic nature of cutting off all federal funds, yet permit agency regulations to achieve that selfsame drastic outcome.

This inconsistency was strongly opposed by Justice O'Connor who declared:

> Justice Stevens' dissent argues that agency regulations incorporating an "effects" standard reflect a reasonable method of "[furthering] the purposes of Title VI." If, as five Members of the Court concluded in *Bakke*, the purpose of Title VI is to proscribe *only* purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply "further" the purpose of Title VI; they go well *beyond* that purpose.

Id. at 613.

The Court attempted to explain *Guardians* in *Alexander v. Choate*, 469 U.S. 287 (1985), a case brought under Section 504 of the Rehabilitation Act of 1973, which the Court said was patterned after Title VI. *Id.* at 294. While recognizing that no opinion commanded a majority in *Guardians* and that members of the Court offered widely varying interpretations of Title VI,

Alexander nonetheless found that *Guardians* created a two-pronged holding on the nature of the discrimination proscribed by Title VI. First, that Title VI directly reached only instances of intentional discrimination. Second, that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. *Id.* at 293. The Court found that by 1973, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, every other Cabinet Department, and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. *Id.* at 294. The main impetus behind disparate impact liability was thus the federal administrative agencies.

2. The Court Has Mistakenly Deferred to Administrative Agency Construction

In *Alexander v. Choate*, the Court thus said that, even though Congress in enacting Title VI provided that it would apply only to intentional discrimination, regulations adopted by administrative agencies could change the scope of the statute to encompass activities that merely had an adverse disproportionate effect on minorities. *Id.* at 293. But in following administrative regulations that contradicted the intent of the statute, the Court was ignoring its own standards. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233 (1986), ruled that the Court will not defer to an agency construction where "the legislative history of the enactment shows with sufficient clarity that [it] is contrary to the will of Congress." Similarly, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), held:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the

> power to adopt regulations to carry into effect the will of Congress as expressed by the statute.

Id. at 213-14 (internal quotation marks omitted). And *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), ruled that deference to an administrative regulation is appropriate only "if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Id.* at 483. As these citations make plain, administrative regulations cannot create federal law. Thus Justice O'Connor's concurrence in *Guardians*, 463 U.S. at 613, was entirely correct. If Congress intended that civil rights laws apply only to intentional discrimination, administrative agencies have no power to change that purpose to include acts that merely have a disparate impact on certain groups. The same rationale applies to the Fair Housing Act.

3. Congress Has Acted to Limit Disparate Impact

Although Congress has acknowledged the courts' imposition of disparate impact analysis on some of its statutory schemes, it has shown its discomfort with the concept by moving to limit its application. For example, Title VII specifically provides in the employment context that seniority systems are exempt from disparate impact. Section 703(h).[3] *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905 (1989).

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[3] Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

Congress further attempted to restrict the use of disparate impact analysis with regard to ability tests for employment in Section 703(h) which provides in part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results *is not designed, intended or used to discriminate because of race,* color, religion, sex or national origin.

42 U.S.C § 2000e-2(h) (emphasis added).

Congress also addressed the use of disparate impact in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(*l*).

Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(l) from adjusting those scores to achieve a more proportional result. Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in disparate impact cases. Thus, an action brought under Section 706 of the Civil Rights Act, 42 U.S.C. § 2000e-5, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but only compensatory damages where the

charge is merely one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

4. This Court Has Limited the Sweep of Disparate Impact

a. Fourteenth Amendment Violations Require Discriminatory Intent

Although this Court has recognized the concept of disparate impact, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. The Court held that the petitioners had failed to prove a violation of the Equal Protection Clause, finding that discriminatory intent is the critical element in an equal protection claim and, while disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.* at 242.

In *Village of Arlington Heights v. Metro Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land into a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. The Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. The Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial

discrimination.' " *Id.* at 253 (quoting *Washington v. Davis*, 426 U.S. at 242).

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an equal protection claim that the award of veterans preference in employment had a disparate impact on women, proportionately fewer of whom were veterans. The Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But the Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results. *Feeney* held that this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74.

In *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), the Court reemphasized the holding of *Washington v. Davis*.

> There we flatly rejected the idea that a law neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, solely because it has a . . . disproportionate impact.

Id. at 375 (internal citations and quotation marks omitted).

As the Court summarized: "At bottom, *Davis* was a recognition of the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than the indigent. Under a disparate-impact theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

The Court did not discuss why these same considerations would not apply, indeed with far greater force, to disparate-impact regulations adopted by administrative agencies.

b. This Court Has Been Reluctant to Extend Disparate Impact Theory to Other Statutes

When given the opportunity to extend disparate analysis to other civil rights statutes this Court has usually declined. In the latest example, the Court granted certiorari in *Adams v. Florida Power Corporation*, 122 S. Ct. 643 (2001), which raised the question whether disparate impact applied to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq*. The Court,

after briefing, then dismissed the writ as improvidently granted, 122 S. Ct. 1290 (2002), leaving intact the Eleventh Circuit holding that disparate impact was inapplicable to the ADEA. *Adams v. Florida Power Corporation*, 255 F.3d 1322 (11th Cir. 2001). But the Court had already declined the invitation to extend disparate impact to the ADEA in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). There Justice O'Connor, speaking for a unanimous Court, pointed out that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Id.* at 610 (citations omitted). Justice Kennedy, joined by the Chief Justice and Justice Thomas, concurred to emphasize that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII . . . ." *Id.* at 618.

Similarly, the Court has never recognized a disparate impact cause of action under the Equal Pay Act, 29 U.S.C. § 206(d), observing in *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981), that it "was designed differently" from Title VII. The Court also held in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 391 (1982), that 42 U.S.C. § 1981 is limited to disparate treatment and can be violated only by purposeful discrimination.

c. Disparate Impact Analysis Encourages the Use of Racial Quotas

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988), expressed the Court's concern that the disparate impact doctrine could be extended to require the adoption of quotas. The Court found that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures" and observed that "Congress has specifically provided that employers are *not* required to avoid 'disparate impact" as such." *Id.* at 992.

The Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (citations omitted). The Court observed, *id.*:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . .

5. Disparate Impact Doctrine Injures the Public

In *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999), the court found that requiring freshman student athletes to meet standardized test score and grade point average requirements as a condition of eligibility for varsity athletics had an unjustified disparate impact on African-Americans in violation of Title VI and implementing regulations. *Id.* at 714. The Third Circuit reversed on the basis that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact doctrine, pointing out that neither Congress nor the Departments of Health and Human Services or Education has considered what the consequences would be if disparate impact regulations were expanded beyond their current program specific limitations. "It might well be that such expanded regulations could subject all aspects of an institution of

higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended." *Id.*

In 1983, California adopted the California Basic Education Skills Test (CBEST), a test to measure teacher proficiency in basic reading, writing, and mathematics skills. Minority applicants have disproportionately received failing scores on CBEST. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000). A class action was brought under Titles VI and VII on behalf of all Latinos, African-Americans, and Asians adversely affected by CBEST. *Id.* Although based on the technical allegations that CBEST had not been properly validated, *id.* at 584, and that the cut-off score was too high, *id.* at 589, the basic thrust of the lawsuit was that the test was too hard. Finding that the test had been properly validated and that there was no suggestion that CBEST was intended to discriminate on the basis of race, the Ninth Circuit, en banc, ruled that " 'the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers.' " *Id.* at 589-90 (quoting *Association of Mexican-American Educators v. California*, 937 F. Supp. 1397, 1420 (N.D. Cal. 1996)). The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education.

Another example of the abuse of the disparate impact standard is *African American Legal Defense Fund, Inc. v. New York State Department of Education*, 8 F. Supp. 2d 330 (S.D.N.Y. 1998). This lawsuit, brought under the implementing regulations to Title VI, claimed that the State of New York's statutory policy of funding the public schools based on attendance had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than nonminorities, schools with large minority populations received proportionately less state funding than schools

with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The court, however, found that plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, was not remediable under Title VI's disparate impact regulations. "[C]learly it is not [the schools'] practices that have produced the absenteeism." *Id.* at 338-39. The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

Cureton, Association of Mexican-American Educators and *African American Legal Defense Fund* showcase the counter-productive impact of the disparate impact doctrine. In the name of avoiding discrimination, these lawsuits sought to impose policies that would have had an extremely detrimental impact on society in general and minorities in particular. Dumbing down high school grade and test score requirements in *Cureton* may have made more black athletes eligible to compete at the varsity level as freshmen, but by removing the incentive to study in high school, the policy would have ensured a high failure rate for these individuals in college and ultimately in life. Dumbing down the CBEST in *Association* would have qualified more minorities to teach, but would have removed any incentive for those individuals to improve their knowledge of basic academics and would have provided an inferior education, not to mention a negative role model, for their students. Lastly, the policy of ignoring minority absenteeism in the public schools, sought in *African American Legal Defense Fund*, would send the negative message that absenteeism is an expected characteristic of minority students and therefore must be accepted.

It is time for the courts to rethink the use of disparate impact. When a disparity is caused by intentional racial discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the Fair Housing Acts and the other civil rights laws. But when a disparity is the result of policies that result not from intentional discrimination but from factors such as socio-economic disadvantage, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can guard against outcomes that, while well-meaning in intent, are disastrous in practice.

II

THE CONSTITUTIONAL RIGHT TO MAKE REASONABLE USE OF LAND IS A PROPERTY INTEREST PROTECTED BY SUBSTANTIVE DUE PROCESS

The court below found that Buckeye has a constitutionally protected property interest arising from its city council-approved site plan. The court reasoned that "plaintiffs' property interest was securely vested upon the City's affirmative representation that the site plan conformed with the existing zoning regulations," and the alleged substantive due process violation resulted when plaintiffs were denied "the benefit of their lawfully approved site plan." *Buckeye*, 263 F.3d at 642-43. That analysis—characterizing protected property interests in the land use context as "vested rights," "benefits," or "entitlements," and failing to recognize ownership of land as a constitutionally protected property interest—misinterprets the holding in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). And the result is ironic. This Court's expansion of the definition of property interests in *Roth* serves as the basis for denying due process protection for traditional

property interests that received due process protection long before *Roth* was decided.

A constitutionally protected property interest is an essential element of a claim for violation of due process rights. *Roth*, 408 U.S. at 570. A few circuits continue to recognize the principle established prior to *Roth*—ownership of the affected real property is sufficient to establish a property interest protected by due process.[4] But the majority of federal courts have read *Roth* to require a "legitimate claim of entitlement" to a particular use of property.[5] Those courts, like the Sixth Circuit Court in this case, do not look to ownership of property. Instead, those courts ask if a property owner has a right to a permit to use property in a particular manner.

Roth and its companion case, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), are procedural due process cases alleging a property interest in continued employment at state-run colleges and universities. *See Perry v. Sindermann*, 408 U.S. at 601 ("A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."), and *Board of Regents of State Colleges v. Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for

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[4] *See, e.g., DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d 592, 594, 595-96 (3d Cir. 1995), and *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994).

[5] *See, e.g., Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63, 68-69 (4th Cir. 1992); *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202-03 (6th Cir. 1995); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir. 1989).

it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). *Roth* and *Perry* established an "entitlement approach" that is properly applied to cases seeking a property interest in valuable government benefits; the "entitlement approach" has no application when a court is asked to decide whether land use decisions involve illegitimate government action.

Substantive due process protection in land regulation cases does not depend on a vested interest in a particular permit or an entitlement to use property in a certain manner. Due process protection attaches to property ownership because landowners have a constitutionally protected interest in using their property. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), a property owner challenged a local zoning ordinance on due process and equal protection grounds. The ordinance was alleged unconstitutional on its face—no development permit had been sought. *Id.* at 386. Still, the property owner had a property interest sufficient to sustain a claim for the violation of due process rights. *Id.* The Court specifically rejected Euclid's argument that the suit was premature because the landowner had not participated in the regulatory procedure set up for obtaining permission to use property in a particular way. *Id.* Since there was no license, permit, or classification to establish a protected property interest allowing Ambler to maintain its Fourteenth Amendment claims, the foundation for that interest had to be ownership of the property. And if ownership of property establishes a protected property interest for a facial challenge, logically it must do the same for an as-applied challenge.

Village of Euclid is not at all inconsistent with *Board of Regents of State Colleges v. Roth* and *Perry v. Sindermann*. In *Roth* and *Perry*, this Court did not adopt a standard for identifying protected property interests in every context. Rather, those decisions expanded due process protection to cover more than the

traditional forms of property (e.g., ownership of real estate, chattels, or money). The Court recognized other, new forms of protected property, arising from public benefits. *Roth*, 408 U.S. at 571-72 ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money."); *Perry*, 408 U.S. at 601 (" '[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms.").

The distinction between traditional forms of property and newer forms of "property" arising from public benefits is crucial. *Roth* held that property rights are not created by the Constitution, but are created and defined by an independent source, such as state law. *Roth*, 408 U.S. at 577. But in *Roth*, the Court was concerned with public benefits ("new property"), not the traditional forms of property. *See generally* Reich, Charles, *The New Property*, 73 Yale L.J. 733 (1964). Property owners are not claiming the right to a government-established benefit when they seek to make use of their property. They are claiming the right to use property in a reasonable manner. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court explained that the protected property interest was not a permit to build, but the right to put the property to reasonable use.

> [T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit."

Id. at 833 n.2.

Judge Easterbrook, writing for the Seventh Circuit Court in *River Park, Inc. v. City of Highland Park*, 23 F.3d at 166 noted that "[t]hose things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides."

One of the defining characteristics of property ownership is that the owners are allowed to use their land. *See Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (In a due process challenge to a land use regulation the Court held: "The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution."). Although government may seek to restrict the right of the owner to use property in a particular way, the regulatory process must not be confused with the property interest at stake. *Palazzolo v. Rhode Island*, 533 U.S. at 627 (Government cannot define property by its regulations; "The State may not put so potent a Hobbesian stick into the Lockean bundle."). As stated in *River Park*, 23 F.3d at 166:

> An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property.

Protected property interests cannot be defined by the regulatory process, for the simple reason that regulating bodies have full authority to create—or not create—entitlements.[6] Courts following the "entitlement approach" focus on the degree of discretion enjoyed by the authority issuing an application or permit.[7] Where there is discretion, there is no entitlement. But the fact is that

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[6] *See* Mandelker, Daniel R., *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 2: Property Rights: Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 Wash. U. J.L. & Pol'y 61, 66, 75 (2000).

[7] *See, e.g., RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d at 918 (A constitutionally protected property interest exists only if the issuing authority has so little discretion that it is almost certain a proper application will be approved.).

all but the most routine land use decisions are highly discretionary. Judge Easterbrook offered an extreme example of why traditional forms of property must retain their status as constitutionally protected property.

> Otherwise a single local ordinance providing that "we may put your land in any zone we want, for any reason we feel like" would abolish all property rights in land overnight. The due process and takings clauses are made of sterner stuff.

River Park, Inc. v. City of Highland Park, 23 F.3d at 166.

The Third and Seventh Circuit Courts do not look to *Roth* and *Perry* to define protected property interests. Instead, those courts recognize that the right to use property, subject to reasonable limitations, is an interest protected under the Due Process Clause. In *DeBlasio v. Zoning Board of Adjustment for Township of West Amwell*, 53 F.3d at 596, appellant property owner challenged the Zoning Board's (1) determination that use of his property to house an auto body repair business violated West Amwell's zoning ordinance, and (2) refusal to approve a use variance. The Third Circuit included ownership in the set of property interests worthy of substantive due process protection. *Id.* at 600-01.

> Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Id. at 601.

The Seventh Circuit also finds a protected property interest in land ownership. *River Park*, 23 F.3d at 165-66, deals with property used as a golf course, but zoned for limited residential housing. River Park, the owner of the property, sought to have the zoning changed to allow more homes to be built on the property, but the city council delayed the rezoning decision for so long that River Park was forced into bankruptcy. *Id.* River Park sued for damages for violation of the Due Process Clause. *Id.* The complaint was dismissed because the trial court determined that River Park did not have a legitimate claim of entitlement to the rezoning permit, and thus had not been deprived of any property. *Id.* On appeal, the Seventh Circuit held that River Park was entitled to due process of law.

> River Park may well have lacked a property interest in one classification rather than another. But it surely had a property interest in the land, which it owned in fee simple, and it is therefore entitled to contend that the City's regulation of that land deprived it of property without due process. . . . An owner may build on its land; that is an ordinary element of a property interest. Zoning classifications are not the measure of the property interest but are legal *restrictions* on the use of property.

Id. at 165-66.

In this case, the court found the basis for a substantive due process claim based on Buckeye's entitlement to a city council-approved site plan. The court was correct in concluding that Buckeye has a protected property interest that gives rise to due process protection, but that property interest is not Buckeye's entitlement to an approved site plan. Ownership of the property at issue in the lawsuit, in and of itself, is a protected property interest that allows Buckeye to challenge arbitrary and capricious government action connected with the regulatory process.

CONCLUSION

For the reasons set forth herein, Amici urge this Court to reject the expansion of disparate impact liability to the Fair Housing Act and further to reject the entitlement theory as applied to substantive due process claims in land use cases, and rule that ownership of land is a property interest worthy of substantive due process protection.

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Respectfully submitted,

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