No. _____

In the

Supreme Court of the United States

CITY OF CUYAHOGA FALLS; MAYOR DON L. ROBART;
CITY ENGINEER GERALD DZURILLA, AND
CLERK OF COUNCIL GREGG WAGNER,
Petitioners,

v.

BUCKEYE COMMUNITY HOPE FOUNDATION;
CUYAHOGA HOUSING PARTNERS, INC.;
BUCKEYE COMMUNITY TREE L.P.; AND
FAIR HOUSING CONTACT SERVICE, INC.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

VIRGIL ARRINGTON, JR.
(Counsel of Record)
LAW DIRECTOR
CITY OF CUYAHOGA FALLS
821 SECOND STREET
CUYAHOGA FALLS, Ohio 44221

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

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 corporation?

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 the 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 the 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?

4. Does 28 U.S.C. 1738 require a Federal District Court to apply *res judicata* to dismiss a federal case arising out of the same factual transaction as an earlier case decided by Ohio state courts?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioners

The petitioners are the City of Cuyahoga Falls, its Mayor, Don L. Robart, its former City Engineer, Gerald Dzurilla, and its former Clerk of City Council, Gregg Wagner. Petitioners were the defendants in the District Court and appellees/cross-appellants in the Court of Appeals. Since this case was filed in 1996, both Gerald Dzurilla and Gregg Wagner have left their positions with the City.

Respondents

The respondents are Buckeye Community Hope Foundation, a not-for-profit corporation that seeks to construct housing projects utilizing low-income housing tax credits, Buckeye Community Three, L.P., a limited partnership that operates the housing project in question, Cuyahoga Housing Partners, Inc., a for-profit corporation acting as the general partner of Buckeye Community Three, L.P., and the Fair Housing Contact Service, a not-for-profit housing advocacy organization. Respondents were plaintiffs in the District Court and appellants/cross-appellees in the Court of Appeals. Petitioners are unaware of any publicly held companies owning 10% or more of the stock of any of the respondent entities.

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STATUTES, CHARTER AND CONSTITUTIONAL PROVISIONS AND TREATISES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion was issued June 15, 2001, and is reported at *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 263 F.3d 627 (6th Cir. 2001) (Appendix A at 1a). The unreported decision of the District Court, per Judge Dan Polster, granting summary judgment in favor of Petitioners was rendered on November 19, 1999, and is reproduced at App. B at 35a. An earlier decision of the District Court, per Judge Sam Bell, denying summary judgment, is reported *sub nom* at 970 F.Supp. 1289 (N.D. Ohio 1997) and reproduced at App. C at 55a. A report and recommendation of Magistrate Judge James Thomas recommending dismissal on the basis of *res judicata* is reproduced at App. D at 132a. An order denying rehearing *en banc* was issued December 4, 2001, and is reproduced at App. E at 192a. In addition, because this case involves the issue of *res judicata*, the following state court decisions are reproduced in the appendix: *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539 (July 16, 1998) (App. F at 194a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998) (App. G at 214a); *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit App. No. 17933, unreported (12/11/96) (App. H at 246a) and *Buckeye Community Hope Foundation v. Cuyahoga Falls*, Summit C.P. No. CV 96-05-1701, unreported (5/31/96) (App. I at 255a.)

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on June 15, 2001, and denied a timely filed petition for rehearing *en banc* on December 4, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions, which are reproduced in the Appendix at App. J at 258a, et. seq.:

A. The First Amendment to the United States Constitution.

B. Section 1 of the Fourteenth Amendment to the United States Constitution.

C. 28 U.S.C. 1738.

D. 42 U.S.C. 3604.

E. Article IX, Section 2, Cuyahoga Falls Charter.

STATEMENT OF THE CASE AND FACTS

In January, 1996, Respondents (collectively referred to as "Buckeye") applied to the City of Cuyahoga Falls to construct an affordable housing project. Due to the size of the project, before building permits could be issued, a site plan had to be approved by the Cuyahoga Falls Planning Commission and City Council. Three public hearings were held and, between the three, some sixty of the City's 49,000 residents exercised their constitutional right to attend and express their opinions about the project. Some supported the project while others opposed it.

Despite any expressed opposition, however, both the

Planning Commission and City Council approved the project, Council's approval being in the form of Ordinance 48-1996. The site plan approval was subject to several conditions which had to be met before building permits could issue, none of which were objectionable to Buckeye. Although Mayor Don Robart personally opposed the project, he silently approved the ordinance by not exercising his veto power. The District Court, per Judge Polster, stated that Mayor Robart voted against the project. This was an unfortunate error as, in Cuyahoga Falls, the Mayor has no vote on City Council. Rather, his role in legislation is to either approve it by signing it, or veto it. If he does neither, the ordinance is deemed approved the same as if he had signed it. Mayor Robart took this latter action, approving the ordinance by doing nothing with it.

Although Ordinance 48-1996 was passed, it did not retain emergency status, meaning it was scheduled to take effect on May 2, 1996. This would have been the earliest date the City could issue building permits to Buckeye, assuming it fulfilled all of the conditions of site plan approval — which it did not. However, on April 29, 1996, over 4,300 citizens exercised their right to petition the government by timely filing a facially neutral referendum petition seeking a popular vote on Ordinance 48-1996. Under Article IX, Section 2 of the Cuyahoga Falls Charter (App. J at 264a), the referendum petition stayed the effectiveness of Ordinance 48-1996, meaning the City could not issue building permits until the efficacy of the ordinance was resolved.

On May 1, 1996, Buckeye filed an action in the Summit County Common Pleas Court seeking to enjoin the referendum process, arguing that the referendum violated the Ohio Constitution. Specifically, the Cuyahoga Falls Charter permits referenda to review "any ordinance or resolution" and does not distinguish between legislative and administrative actions of

City Council. Article IX, Section 2, Cuyahoga Falls Charter. (App. J at 264a) By contrast, the Ohio Constitution provides for referenda to review only legislative actions. At issue in Buckeye's state court action was whether the people of home-rule chartered cities could reserve unto themselves broader referendum rights than are reserved by the Ohio Constitution.

Trial was held and, on May 31, 1996, the Common Pleas Court entered final judgment upholding the referendum and denying the request for injunctive relief. (App. I at 255a) The referendum election went forward in November, 1996, and Ordinance 48-1996 was defeated. In the meantime, Buckeye pursued appeals to the Ohio Ninth District Court of Appeals (App H at 245a) and Ohio Supreme Court, which resulted in further orders upholding the referendum petition as lawful. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 81 Ohio St.3d 559 (May 6, 1998). (App. G at 214a) Both courts held that home-rule cities could reserve greater referendum rights than were reserved under the Ohio Constitution. Throughout this time period, the City obeyed these orders and honored the judicially upheld referendum and its preemptive effect on the City's ability to issue building permits.

Then, on July 16, 1998, the Ohio Supreme Court reconsidered its decision and reversed itself, ruling that home-rule cities are limited to the specific referendum provisions found in the Ohio Constitution. *Buckeye Community Hope Foundation v. Cuyahoga Falls*, 82 Ohio St.3d 539, (July 16, 1998). (App. F at 194a) As before, the City obeyed this judgment and informed Buckeye that once it complied with all of the conditions of the site plan approval, the City would issue building permits. After Buckeye complied with the agreed-upon site plan conditions, the City issued building permits. The project has since been constructed.

After the Common Pleas Court entered final judgment denying injunctive relief, Buckeye filed this lawsuit in District Court, again seeking to enjoin the referendum election. Buckeye also sought damages under federal civil rights laws. Buckeye claimed that, by honoring the referendum process, the City violated the equal protection and due process clauses of the Constitution and the Fair Housing Act. 42 U.S.C. 3604, et. seq.

The City argued that the case was barred by *res judicata* in light of the judgment that had been rendered in the state case. See 28 U.S.C. 1738. The District Court referred the matter to Magistrate Judge James Thomas, who agreed with the City and recommended that the case be dismissed. (App. D at 132a) District Judge Sam H. Bell, however, disagreed and refused to dismiss the case. 970 F.Supp. 1289. (App. C at 55a) Discovery continued after which Judge Bell invited summary judgment motions on the merits of the case. As the motion pleadings were being filed, Judge Bell retired and was replaced by Judge Dan Polster, who granted the City's motion for summary judgment on the merits, without addressing the issue of *res judicata.* (App. B at 35a) Buckeye appealed to the Sixth Circuit Court of Appeals, which reversed, holding that the City could be held liable for honoring the referendum even though it was both facially neutral and upheld by three Ohio courts. (App. A at 1a) The City timely filed a motion for rehearing *en banc* which was overruled on December 4, 2001. (App. E at 192a)

REASONS FOR GRANTING THE WRIT

This case of constitutional import is one of first impression in this Court. The Sixth Circuit held that the City's honoring of a facially neutral and judicially upheld referendum petition could constitute a violation of the equal protection and due process clauses of the Constitution as well as the Fair

Housing Act. This holding is not only erroneous, but constitutionally dangerous. The threat of liability caused by the Sixth Circuit's ruling will chill the exercise of the freedom to peaceably assemble, attend public meetings, express political opinions and petition the government. It will also seriously erode any confidence parties can place in their reliance upon valid court judgments. Indeed, the Sixth Circuit's opinion places cities in the precarious position of having to choose to disobey valid state court judgments in order to avoid liability in federal court. Such is the very dilemma the doctrine of *res judicata* was intended to prevent. For this reason, federal courts are required to give full faith and credit to the judgments of state courts. 28 U.S.C. 1738.

I. The Decision of the Court of Appeals Seriously Jeopardizes the First Amendment Freedoms of Political Expression.

The Court of Appeals ruled that the City could be held liable for honoring the political acts of its citizens who pursued a referendum petition. It must be emphasized that this case does not involve the *result* of a referendum vote. Indeed, Buckeye commenced this lawsuit some four months *before* the vote took place, for it was the *filing* of the referendum petition that prevented the City from issuing building permits. Thus, the Court of Appeals held that the City could be held liable for the mere filing of a referendum petition and the expression of political views on the subject matter of that petition. This Court has never taken such an extreme position.

Quite the contrary, this Court has long recognized the need to preserve and protect the right of referendum. See, *e.g.*, *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). In *Meyer v. Grant*, 486 U.S. 414 (1988), this Court recognized that the right of initiative — functionally the same as referendum — involved "core political speech," and that the

right to petition for political change and engage in discussions about that change "is guarded by the First Amendment." Following this guidance, the First Circuit Court of Appeals ruled that not holding a scheduled election would violate due process by disenfranchising an entire city. *Bonas v. North Smithfield*, 265 F.3d 69, 74 (1st Cir. 2001). See also *James v. Valtierra*, 402 U.S. 137 (1971), where this Court upheld a California constitutional provision that *required* a referendum on all low-income housing projects.

Similar decisions from the Ohio Supreme Court have upheld the people's right to seek and hold a referendum election even where the result of the ultimate vote may contravene the rights of others. *Jurcisin v. Cuyahoga Co. Bd. of Elections*, 35 Ohio St. 3d 137 (1988); *State ex rel. Bond v. Montgomery*, 63 Ohio App. 3d 728 (1989). In accordance with these cases, and in compliance with its charter, the City honored the referendum petition filed in this matter. The City's reverence for the referendum was reaffirmed when all three levels of Ohio courts upheld its validity under the Ohio constitution. The fact that the Ohio Supreme Court ultimately reversed itself — saying the people could not use a referendum to review an administrative act — does nothing to minimize the federal constitutional interest in preserving the right of the people to assemble, attend public meetings, express their political views, and petition the government. While not all referenda have the same legal effect, the right of the people to pursue such petitions should not be impaired by a fear of judicial reprisal. See *Meyer v. Grant*, *supra*.

It is within the context of this need to preserve the freedom of political expression that this case must be analyzed. However, the court below failed in that analysis, and in its failure, placed in jeopardy the very constitutional rights the judiciary is duty-bound to uphold.

II. The Honoring of a Facially Neutral and Judicially Upheld Referendum Petition does not Violate the United States Constitution or the Fair Housing Act.

A. The Court of Appeals Improperly Inquired into the Motives of a Handful of Citizens to Find a Basis for Liability Against an Entire City for Alleged Intentional Discrimination.

This Court has held that an equal protection violation can be found where a government decision-maker is motivated by racial discrimination. *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). Intentional discrimination can also violate the Fair Housing Act. *Selden Apts. v. United States Dept. of H.U.D.*, 785 F.2d 152 (6th Cir. 1986). Buckeye claimed that the City's withholding of building permits resulting from the filing of the referendum petition was motivated by an intent to racially discriminate. Yet, rather than looking to the motivations of the City's decision-maker, Buckeye focused its attack on the motives of various citizens who expressed support for the referendum. The District Court properly rejected this approach, holding in reliance upon *Arlington Heights*, that "a showing of discriminatory intent on the part of *City officials* is necessary for the Plaintiffs to prevail on their equal protection claim." (App. p. 46a) [emphasis in original] The Court of Appeals disagreed and held that the City could be held liable for intentional discrimination based on the motivations of its *citizens* as opposed to those of its government *decision-makers*. This holding is contrary to *Arlington Heights.*

In *Arlington Heights*, many citizens expressed opposition to the project at issue on arguably racial grounds. However, this Court limited its analysis to the motivations of government decision-makers and did not examine the motives of the citizenry. This Court stated that relevant evidence of

motivation may include the historical background of "official actions," or "contemporary statements by members of the *decisionmaking body*." *Arlington Heights*, *supra*, 429 U.S. at 267-268 [emphasis added]. The Court did not include in its inquiry evidence of the comments and actions of the citizenry.

Arlington Heights was followed and further explained in the Sixth Circuit case of *Arthur v. Toledo*, 782 F.2d 565 (6th Cir. 1986). In facts very similar to the instant case, the court held that, where a referendum is facially neutral, courts may not inquire into the motivations of the citizenry to find intentional discrimination. While both courts below found the instant referendum to be facially neutral, the Court of Appeals erroneously went on to require the very inquiry *Arthur* prohibits. In rejecting such an inquiry, the *Arthur* court warned at 782 F.2d 574, "Carried to its logical extreme, plaintiffs-respondents could establish a violation of the equal protection clause if one voter testified that racial considerations motivated the voter's vote * * *."

This "logical extreme" has taken firm root in the instant case under the Court of Appeals decision. The decision-makers in this case were City Council with respect to the site plan approval and the City Engineer with respect to the issuance of building permits. Thus, under *Arlington Heights* and *Arthur*, any analysis of motives must focus on the motives of City Council and the City Engineer.

Since City Council approved the site plan, its motives were of no interest to Buckeye. While Mayor Robart voiced opposition to the project, City Council rejected the Mayor's comments and approved the site plan. Furthermore, when it came to official action, the Mayor eschewed his own opposition and allowed the site-plan ordinance to be "pocket approved" by not exercising his veto power. Thus, with respect to the approval of the site plan, all voiced opposition was

rejected by the government decision-makers. Moreover, concerning the decision to withhold building permits, Buckeye never presented any evidence that the City Engineer was motivated by an intent to discriminate; rather all evidence was that he was motivated solely by the need to obey the law as that law was presented to him, first by the Law Director, and later by the Ohio courts.

Without evidence of discriminatory intent on the part of the City decision-makers, the Court of Appeals strayed from *Arlington Heights* and tried instead to divine the motives of the citizens who supported the referendum. The referendum, however, was signed by over 4,300 electors, whose identities and motives were completely undisclosed on the record. Not finding discriminatory intent among the actual referendum petitioners, the court then turned to analyze the comments of some sixty people who attended the various public hearings. While most of the comments were about perfectly valid concerns, such as the impact of the project on taxes, traffic, the schools and City infrastructure, the court found literally a handful of comments concerning safety and "downgrading" the community, and concluded that those comments veiled underlying racial discrimination. Then, the court improperly imputed those comments, first to the referendum petitioners and then to the City itself. This result is contrary to *Arlington Heights* and *Arthur* and wrongfully punishes an entire City for the political comments of a few citizens.

The court mistakenly justified its approach on the basis of *United States v. City of Birmingham*, 727 F. 2d 560 (6th Cir. 1984). In *Birmingham*, the city was faced with an unpopular housing project which drew much public comment, much of which evidenced discriminatory motives. In response to the discriminatory comments of its citizens, and "for the sole purpose" of effectuating those comments, the city decision-makers voluntarily submitted the matter to a non-binding

referendum. The referendum was the choice of the decision-makers, not the citizenry as no referendum petition was filed. In essence, the decision-makers sought to relieve themselves of the obligation to make a decision by passing the buck to the electorate. By voluntarily choosing to act to advance the discriminatory motives of the citizenry, Birmingham's decision-makers effectively adopted those motives as their own.

Such is not the case here. In this case, no one, including Buckeye and the Court of Appeals, has ever suggested that the City acted for the "sole purpose" of effectuating improper discrimination. In fact, the very opposite is the case. When members of the public expressed opposition to the project, the City decision-makers *rejected* that opposition and approved the project. In fact, each act within the City's discretion was taken *in favor* of Buckeye's project. The City withheld building permits only when its discretion was removed from it by the facially neutral and judicially upheld referendum petition. Thus, unlike *Birmingham*, the City honored the referendum because it was required to by law, not out of a discretionary and voluntary choice to effectuate unlawful discrimination.

The Court of Appeals has strayed from this Court's holding in *Arlington Heights*. It has diligently sought intentional discrimination, even to the point of seeking it in non-government decision-makers. In doing so, it threatens to hold municipalities liable for nothing more than the political speech of their citizens. The court's holding goes far beyond any legal precedent and cannot be allowed to stand.

B. The Court of Appeals Improperly Recognized a Substantive Due Process Claim in the Absence of a Legitimately Held Property Interest, a Decision that Conflicts with a Decision from the Fourth Circuit.

This Court has held that, to establish a due process

violation, the plaintiff must first establish a property interest in the thing denied. *Board of Regents v. Roth*, 408 U.S. 564 (1972) Buckeye claimed that the referendum improperly denied it the benefit of a site plan approval and the resulting issuance of building permits. In agreeing with this argument, the Sixth Circuit deviated from this Court's holding in *Roth*.

Courts have repeatedly held that, as long as the governing body retains some discretion in denying the sought-after permit or approval, there can be no property interest subject to federal due process protection. *Triomphe Investors v. Northwood*, 49 F.3d 198 (6th Cir. 1995); *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992).

Rather than following these cases, the Sixth Circuit weakly attempted to draw distinctions. For example, the court below stated that, in *Triomphe*, the proposed use of property did not comport with the existing zoning code, whereas in this case the site plan did. This simply is not true. *Triomphe* specifically relied upon an earlier state court finding that "all the zoning requirements set forth in the City Code were satisfied." *Id*. at 49 F.3d 198.

This is precisely the same claim made here by Buckeye, that its proposed use satisfied all of the City's zoning requirements. However, that was not enough to establish a due process property right in *Triomphe*, nor is it enough here. Buckeye must also establish that the site plan approval process itself left the City with no discretion. However, the process in Cuyahoga Falls reserves discretion to the City in considering site plans. Cuyahoga Falls Ord. 1144.04 (App. J at 266a). That being the case, *Triomphe* requires a finding that Buckeye has no property interest in the site plan approval. To the extent that the Court of Appeals held otherwise, its decision is not only inconsistent with its earlier decision in *Triomphe*, but is also inconsistent with a similar decision from the Fourth

Circuit. *Gardner v. Baltimore Mayor and City Council*, 969 F.2d 63 (4th Cir. 1992) Thus, a decision by this Court is necessary to resolve this newly created conflict among the circuits.

A due process violation also requires that the government's action be arbitrary and capricious in the strict sense, that there is no rational basis for it. *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). However, the City had the most rational of bases for honoring the referendum and withholding permits; it was required to by law. By local charter, the filing of the referendum stayed the effectiveness of the site plan approval. For over two years, this charter provision and the resulting referendum petition were judicially upheld until the Ohio Supreme Court finally overruled itself. Due process does not guarantee that a city will never make an incorrect decision that gets overturned through litigation. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976).

As the withholding of building permits was required by a judicially upheld referendum petition, there was neither a property interest in the desired permits, nor was the City's withholding of the permits arbitrary, capricious or without a rational basis. To the extent the Court of Appeals held otherwise, its decision is contrary to this Court's ruling in *Board of Regents v. Roth*, *supra*, and the circuit court decisions in *Triomphe Investors v. Northwood*, *supra*, *Gardner v. Baltimore Mayor and City Council*, *supra*, and *Pearson v. Grand Blanc*, *supra*.

C. The Court of Appeals Improperly Recognized a Disparate Impact Claim Under the Fair Housing Act for the Filing of the Referendum Petition.

Buckeye also claimed that the referendum had a disparate impact on protected classes contrary to the Fair Housing Act. This Court has never held that a disparate impact

claim can be established by the impact of a facially neutral referendum. Furthermore, until this case, the Sixth Circuit had likewise refused to recognize such a claim. *Arthur v. Toledo, supra; Clarke v. City of Cincinnati*, 40 F.3d 807 (6th Cir. 1994). Thus, the instant decision of the Sixth Circuit plows new legal ground that improperly exalts statutory interests over greater rights guaranteed by the Constitution.

Liability under the FHA for disparate impact in the case of a referendum will all but eliminate the exercise of first amendment rights in the context of low-income housing. For this reason, *Arthur v. Toledo, supra*, held that, in the referendum context, mere impact alone will not support a finding of an FHA violation. *Arthur* stated at page 575, "Given the strong policy considerations underlying referendums, we fear that *recognizing a cause of action* in such instances goes far beyond the intent of Congress and could lead courts into untenable results." [emphasis added]

Given this Court's abiding respect for the referendum petition, the *Arthur* court's refusal to base an FHA disparate impact claim on the filing of a referendum petition is understandable. However, the Sixth Circuit strayed from it's earlier holding in *Arthur*, and found in the instant case that the mere filing of a facially neutral referendum petition could indeed be the basis of a disparate impact claim under the Fair Housing Act.

The court below justified its holding on what it believed to be "highly unusual circumstances." Yet, the circumstances of this case are no more unusual than those found in *Arthur*. For example, the Court of Appeals found it highly unusual that this was the first referendum in the City concerning low-income housing. Using circular reasoning, the court found that this referendum could be illegal under the FHA because the City never before violated the law by filing a similar

referendum. Conversely, under the court's logic, if this were but one of many referenda concerning low-income housing, then it would not be highly unusual and, therefore, not the basis of FHA liability.

The Sixth Circuit also found it highly unusual that the Ohio Supreme Court ultimately found the referendum to be beyond the scope of the Ohio Constitution. However, that finding cannot be viewed apart from its placement in time. Before overruling the referendum, the Supreme Court *affirmed* the findings of the lower courts upholding it. As long as those decisions remained intact from May, 1996, until July, 1998, the City was bound to obey them and it cannot be said to be highly unusual that it would do so.

The Court of Appeals' torturous attempt to find an exception to *Arthur* only underscores *Arthur's* concern about courts reaching untenable results. In holding as it did, the Court of Appeals has exalted the FHA over the first amendment and that, by itself, creates the climate for untenable results. Nothing can be more untenable than punishing a City because its citizens petitioned their local government or because the City officials had the audacity to actually obey valid court decisions upholding the validity of the petition. Accordingly, it is imperative that this Court reaffirm the wisdom of *Arthur* that a facially neutral — and, in this case, judicially upheld — referendum petition cannot be the basis of a disparate impact claim under the FHA.

III. 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984), Require that this Federal Litigation be Dismissed on the Basis of *Res Judicata.*

Federal courts are required to give full faith and credit

to the judgments of state courts. 28 U.S.C. 1738. (App. J at 258a) Applying the doctrine of *res judicata*, final judgments from state courts are entitled to the same preclusive effect in federal courts as they have in their home states. *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

Under Ohio law, a final judgment in an action "bars *all* subsequent actions based upon *any claim* arising out of the transaction or occurrence that was the subject matter of the previous action * * * " *Grava v. Parkman Township*, 73 Ohio St. 3d 379 (1995), Syl. [emphasis added] Magistrate Judge James Thomas followed this holding in recommending dismissal. Judge Bell disagreed and, in doing so, created an exception to *res judicata* that does not exist in Ohio law. Judge Bell's was the last analysis of *res judicata* in this case; Judge Polster did not address it in granting summary judgment and the Court of Appeals simply deferred to Judge Bell's opinion.

The holding in *Grava* cited above is based on the Restatement of Judgments 2d, Sections 24-25, which apply the transactional view of *res judicata.* Under that view, all actions arising out of a single factual transaction must be brought at the same time or forever be barred. *Res judicata* applies even where the plaintiff seeks a different remedy in the second case than was sought in the first action. *Grava, supra*. Magistrate Judge Thomas set forth very clearly that both the state and federal lawsuits arose out of the same transaction — see App. D at 186a-190a — and neither Buckeye nor Judge Bell seriously contended this point. Thus, *Grava* would require dismissal of this case.

Section 33 of the Restatement, however provides an exception to *res judicata.* Under Comment c of that section, *res judicata* does not bar a second lawsuit where the first lawsuit sought *solely* a declaratory judgment. The Ohio Supreme Court has never addressed or adopted this provision

of the Restatement, although it was applied in one case from an Ohio appellate court predating *Grava*. *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, 96 Ohio App. 3d 678 (1994).[1] While the *Jamestown* court applied the declaratory judgment exception, it emphasized at page 687 that the initial lawsuit sought "a declaratory judgment — nothing more."

The seeking of any form of coercive relief in the first case, such as an injunction, destroys the exception to *res judicata*. See *Mandarino v. Pollard*, 718 F.2d 845 (7th Cir. 1983); *Minneapolis Auto Parts Co. v. Minneapolis*, 739 F.2d 408 (8th Cir. 1984); *Cimasi v. Fenton*, 838 F.2d 299 (8th Cir. 1988); *Smith v. Chicago*, 820 F.2d 916 (7th Cir. 1987). In fact, one of the cases relied upon in *Jamestown* held, "However, a plaintiff who brings an action for both declaratory and coercive relief is thereafter barred from bringing a suit for further coercive relief, *either legal or equitable*, based upon the same cause of action." *Radkey v. Confalone*, 133 N.H. 294 (1990). [emphasis added]

Nothing in Ohio law permits a plaintiff to bring successive actions for coercive relief, including injunctive relief, arising out of a single transaction. Buckeye's state law action sought both declaratory and coercive relief. Thus, even under the *res judicata* exception found in *Jamestown*, Buckeye's second action would be barred under Ohio law. That being the case, it is barred in federal court. 17 U.S.C. 1738; *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

Judge Bell, and hence the Court of Appeals, erred in not

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[1] A second case discussed the declaratory judgment exception. *Ketchel v. Bainbridge Twp.*, 79 Ohio App. 3d 174 (1992). This case, however, is of no precedential value as the court affirmed the dismissal of the case due to an insufficient record. Any discussion of *res judicata* is, therefore, *dictum*.

applying Ohio law to this case. Rather, Judge Bell attempted to minimize Buckeye's request for injunctive relief in the state courts saying that it was only incidental to the paramount request for declaratory relief.

However, it is apparent that Buckeye's state case was, first and foremost, one for injunctive relief. The Common Pleas Court began its decision by saying, "This cause came on before this Court on the 15th day of May, 1996, *for preliminary and permanent injunction* * * * " and ended by saying, "For all of the above reasons, the Motion for Preliminary or Permanent Injunction of the Plaintiffs [Buckeye] is hereby denied." (App. I pp. 255a, 257a) [emphasis added] Likewise, the state Court of Appeals opened its opinion with the words, "Appellant Buckeye Community Hope Foundation appeals the decision of the Summit County Court of Common Pleas denying *preliminary and permanent injunctive relief*" and ended with "The decision of the trial court denying *preliminary and permanent injunctive* relief is affirmed." (App. H pp. 247a, 253a) [emphasis added] Clearly, Buckeye's request for injunctive relief was not merely incidental to its request for declaratory relief. Rather, the request for injunctive relief was the heart of Buckeye's case.

Under any reading of Ohio *res judicata* law, a second lawsuit is barred where the first lawsuit sought coercive relief in the form of an injunction. *Grava v. Parkman Township*, *supra*; *Jamestown Village Condo. Owners Assoc. v. Market Media Research*, *supra*. The fact that Buckeye also happened to seek a declaratory judgment does not remove this case from the Ohio law dealing with *res judicata*. Otherwise, plaintiffs could always avoid *res judicata* by simply adding a count to their complaint seeking a declaratory judgment. Such is not the law of Ohio.

The doctrine of *res judicata* is crucial to this case

because the state courts repeatedly upheld the validity of the referendum that preempted the City's ability to issue building permits. Now, Buckeye wants to hold the City liable in damages for obeying the very court orders Buckeye sought in the first place. The doctrine of *res judicata* was intended to prevent this injustice and 28 U.S.C. 1738 was intended to preserve the validity of state court judgments in federal courts. By not applying *res judicata*, the Court of Appeals failed to follow 28 U.S.C. 1738 and *Migra v. Warren City School Dist. Bd. of Education*, *supra*.

CONCLUSION

The City harbors no illusions about this being an easy case; it is not. The City's appendix consists mainly of eight separate and conflicting opinions that have been rendered by the state and federal courts in litigation arising out of this matter. Seventeen different judicial officers have considered this litigation in state and federal courts. Collectively, ten of them have joined together in five opinions in the City's favor; eight of them have joined in three opinions in favor of Buckeye. Clearly, this is not an easy case and this Court's attention is required to preserve constitutional rights.

The adage, "hard cases make bad law," has, unfortunately found a home in the decision of the Court of Appeals. The law announced by the Sixth Circuit is bad. In its zeal to protect the statutory interests of a property owner, the Sixth Circuit has overlooked even greater constitutional rights, the right of citizens to assemble, to speak, to petition the government, and to vote.

The Court of Appeals in the earlier case of *Arthur v. Toledo*, *supra*, expressed concern over the possibility of "untenable results" in cases involving referenda. This case is

the fulfillment of that concern. The decision of the court below threatens the following "untenable results:"

1. The freedom of speech will no longer apply to criticism of low- income housing as any such criticism will be viewed as veiled racial bigotry.

2. City councils will need to silence citizens who wish to express unsavory opinions, because any official action taken that is consistent with the voiced opinions of even a handful of citizens will be subject to liability even if the city's actions were taken in obedience to valid court judgments.

3. Any referendum petition will be subject to the scrutiny of the motives of each and every person circulating, signing, or merely speaking in support of the referendum.

4. Innocently motivated petitioners will need to fear that another person with not so innocent motives will subject their entire city to liability.

5. Plaintiffs will be able to obtain multiple bites at the judicial apple, even obtaining inconsistent results and holding the defendants liable for obeying those inconsistent results.

If the City can be held liable in this case, it will not be because it honored a facially neutral referendum; so much was required of it by three state court decisions. It will also not be because it gave effect to the discriminatory motives of its citizenry as it exercised all discretion it had in opposition to any such motives.

Rather, any finding against the City will be because a handful of citizens exercised their first amendment right to express their political opposition to low-income housing, even though the City rejected such opposition, approved the project, and honored a referendum in obedience to court judgments upholding its validity. Liability under such circumstances

simply cannot be permitted in a constitutional republic. The first amendment cries out for this Court to grant the writ of certiorari and the City respectfully so requests.

Respectfully submitted,

Virgil Arrington Jr.
Law Director
City of Cuyahoga Falls
2310 Second Street
Cuyahoga Falls, Ohio 44221
(330) 971-8190