No. 01-1269

In the Supreme Court of the United States

CITY OF CUYAHOGA FALLS, ET AL., PETITIONERS

v.

BUCKEYE COMMUNITY HOPE FOUNDATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The United States will address the following question:

Whether the court of appeals erred in holding that, in considering a claim against a city for intentional discrimination from the delay arising out of a facially-neutral, citizen-initiated referendum petition, a court may inquire into the intent of the citizens supporting the referendum petition and impute that intent to city officials, who had no discretion under the City's Charter but to delay proceedings in response to the properly filed petition.

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INTEREST OF THE UNITED STATES

This case involves an application of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq.*, to a local government's referendum process. The United States Department of Housing and Urban Development (HUD) has responsibility under the Fair Housing Act to receive, investigate, and attempt to resolve complaints of discrimination through conference, conciliation, and persuasion. 42 U.S.C. 3610. The United States Department of Justice is responsible for enforcing the Act by bringing actions addressing patterns and practices of discriminatory conduct and pursuing individual cases referred by HUD. See 42 U.S.C. 3614. The United States has addressed similar issues concerning Title VIII in this

Court in *Town of Huntington* v. *Huntington Branch, NAACP*, 488 U.S. 15 (1988).

STATEMENT

1. Section 804 (Title VIII) of the Civil Rights Act of 1968, 42 U.S.C. 3604, as amended by the Fair Housing Amendments Act of 1988 (Fair Housing Act or FHA), Pub. L. No. 100-430, 102 Stat. 1619, provides, in pertinent part, that it is unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. 3604. Title VIII further provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. 3615.

2. The referendum procedure has long been part of the democratic process in Ohio, particularly at the local level. Since 1912, the Ohio Constitution has expressly reserved the right of the people to enact or change the law, including the state constitution, through referendum. Ohio Const. Art. II, §§ 1-1g; see Richard A. Chesley, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. Cin. L. Rev. 541 (1984). Article II, Section 1f of the Ohio Constitution

expressly reserves that referendum power "to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action."

The Charter of the City of Cuyahoga Falls also expressly reserves to the people the right of referendum. It provides that "[t]he electors shall have the power to approve or reject at the polls *any ordinance* or resolution passed by the [City] Council." App., *infra*, 3a (emphasis added). "Within thirty (30) days after the passage by the Council of such ordinance * * * a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance * * * be either repealed or submitted to a vote of the electors." *Ibid.* The Charter further provides that when a referendum petition is filed, "the Clerk shall first ascertain the sufficiency of the petition." *Ibid.* If it is sufficient, "the [City] Council shall * * * reconsider such ordinance." *Ibid.* "If upon such reconsideration the ordinance * * * is not repealed, the Council shall provide for submitting it to a vote of the electors." *Ibid.* Moreover, to further protect the referendum process, the Charter expressly provides that "[n]o * * * ordinance * * * [subject to a properly filed referendum petition] shall go into effect until approved by a majority of those voting thereon." *Ibid.*

2. Buckeye Community Hope Foundation, a not-for-profit corporation, develops affordable housing through the use of low- income housing tax credits. Pet. App. 2a-3a. The Foundation—along with Buckeye Community Three Limited and Cuyahoga Housing Partners, Inc. (collectively, respondents)—sought to build a low-income apartment complex in Cuyahoga Falls, Ohio. *Id.* at 3a, 17a. On June 12, 1995, respondents purchased

land in Cuyahoga Falls that was zoned for apartments. *Ibid.* On February 21, 1996, respondents submitted their site plan to the Cuyahoga Falls Planning Commission. *Ibid.* Several members of the public at that meeting expressed concerns about safety, and one resident stated that there will be a "different class of people living there." *Ibid.* The mayor did not attend this meeting. *Id.* at 4a. The Cuyahoga Falls Planning Director recommended approval of the site plan subject to nine conditions, one of which was that respondents erect a fence on one side of the property. *Ibid.* Respondents agreed to all nine conditions, and the Planning Commission unanimously approved the site plan at its February 21 meeting. *Ibid.*

The site plan was then submitted to the City Council for approval. At the March 4, 1996, City Council meeting, members of the public again voiced their concerns about the project. Pet. App. 4a. For example, one resident expressed concern about the "extra crime and drugs" that come with low-income housing. *Ibid.* At this meeting, the mayor opposed the site plan and referred to an article entitled "Stuck in the Ghetto," which discusses problems associated with Section 8 housing, another type of low-income housing. *Ibid.*

At a second City Council meeting on March 18, 1996, members of the public once again expressed their opposition to the project. Pet. App. 4a-5a. The mayor also expressed his continued opposition. He stated that "the issue was not whether the project was properly zoned, but rather the issue was low-income housing." *Id.* at 5a. He noted that "people who spent a lot of money on their condominiums simply don't want people moving in their neighborhood that are going to be renting for $371." *Ibid.*

Despite the public opposition, the City Council, at its April 1, 1996, meeting, approved the site plan in Ordinance No. 48-1996 by a vote of six to three with two abstentions. Pet. App. 5a. Because the mayor neither signed nor objected to the ordinance, it was deemed "approved" ten days after passage. *Id.* at 7a. Pursuant to Ohio law, the ordinance was to take effect thirty days after the City Council's vote, on May 2, 1996. *Id.* at 8a. In the interim, respondents applied for a building permit. *Id.* at 63a.

In the wake of the City Council's vote, on April 9, 1996, the "Citizens for the Preservation of Voter Rights" held a meeting to discuss "taking the ISSUE OF A 72 UNIT HOUSING DEVELOPMENT ON PLEASANT MEADOW BLVD. to the vote of the people of Cuyahoga Falls in November." Pet. App. 5a. The mayor spoke at this meeting and stated that he supported the referendum effort. *Ibid.* On or about April 29, 1996, a referendum petition, signed by approximately 10% of the electors in Cuyahoga Falls, was submitted to the Clerk of the City Council. *Id.* at 5a, 102a. The Board of Elections, as required by City Code, approved the referendum petition on May 1, 1996. *Id.* at 5a. Under the City Charter, an ordinance challenged by referendum and not repealed "cannot 'go into effect until approved by a majority' of the electorate." *Id.* at 8a.

3. On May 1, 1996, respondents sued petitioners in state court to enjoin the referendum, alleging that the Ohio Constitution does not authorize referenda on administrative actions taken by municipal legislative bodies, and that Ordinance No. 48-1996 was such an administrative act. Pet. App. 5a-6a. The state trial court denied respondents' motion for injunctive relief on May 31, 1996. *Id.* at 6a, 255a-257a. Accordingly, the

City denied respondents' request for a building permit due to the pending referendum on June 26, 1996. *Id.* at 6a. The citizens of Cuyahoga Falls rejected the ordinance when the referendum was placed on the ballot in November 1996. The state court litigation over the propriety of the referendum continued, with the state court of appeals affirming the trial court on December 11, 1996, *id.* at 6a, 246a-254a, and the Ohio Supreme Court affirming on May 6, 1998, *id.* at 6a, 214a-245a.

On July 16, 1998, however, the Ohio Supreme Court, upon a motion for reconsideration, held that the referendum at issue violated the Ohio Constitution because the Ohio Constitution authorizes referendum proceedings only on local legislative actions and the City Council's approval of "the Planning Commission's application of existing zoning regulations to plaintiffs' site plan" in Ordinance No. 48-1996 was "clearly administrative and not legislative." Pet. App. 10a, 202a-206a. Thereafter, the City issued the necessary building permits, and respondents constructed the low-income housing complex. Pet. Br. 4.

4. On July 5, 1996, respondents commenced this action for injunctive relief and damages, alleging that the refusal of city officials to issue the building permits until after the resolution of the referendum process violated the Fair Housing Act and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Pet. App. 6a. The district court denied respondents' motion for a preliminary injunction in November 1996.

a. *First Summary Judgment Decision.* On June 20, 1997, District Court Judge Bell held that genuine issues of material fact precluded summary judgment for the City. Pet. App. 57a-58a. With respect to respondents'

equal protection and FHA claims based on intentional discrimination, Judge Bell found that statements by project opponents at the public meetings and by the organizers of the referendum drive, when viewed in the light most favorable to respondents, precluded summary judgment. *Id.* at 122a-123a.

b. *Second Summary Judgment Decision.* On April 2, 1998, respondents filed a motion for partial summary judgment with respect to their substantive due process claim. Pet. App. 35a. The City, on June 22, 1998, filed a second summary judgment motion on all claims. *Ibid.* While those motions were pending, Judge Bell retired and the case was reassigned to Judge Polster. *Id.* at 10a. On November 19, 1999, on cross motions for summary judgment, Judge Polster granted summary judgment to the City on all claims. *Id.* at 35a-54a.

With respect to the claims based on intentional discrimination, Judge Polster found not only that respondents failed to raise a material issue of fact concerning whether city officials, as opposed to citizens, acted with discriminatory intent, but also that respondents had produced no evidence that the city officials responsible for certifying the referendum petition and denying the building permit acted with racial animus. Pet. App. 44a-51a. The court also held that *Arthur* v. *City of Toledo*, 782 F.2d 565, 573-574 (6th Cir. 1986), precluded courts from inquiring into the electorate's motives "absent a referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated." Pet. App. 46a. Based in part on the statements made by citizens at the public hearings, the court found that there were multiple, race-neutral grounds for the referendum petition, and that an inquiry into the intent of the referendum

supporters was, therefore, not appropriate. *Id.* at 47a-48a.

Judge Polster also held that the City did not violate substantive due process because, *inter alia*, the City's Charter required the City to submit a petition for referendum with the requisite number of signatures to the Board of Elections. Pet. App. 41a-45a.

c. *Court Of Appeals' Decision.* The Sixth Circuit reversed Judge Polster's order, finding genuine issues of material fact. Pet. App. 2a, 33a. With respect to intentional discrimination under the Equal Protection Clause and the FHA, the court held that Judge Polster erred by failing to determine if there was evidence that Cuyahoga Falls residents were motivated in part by racial bias when they organized and submitted the referendum petition. By focusing only on the motives of city officials, the court of appeals held, the district court's "analysis begs the question of whether the public opposition to the housing project was animated by racial bias and whether city officials improperly gave effect to that racial bias by allowing the fate of the project to be decided by referendum." *Id.* at 12a. The panel also criticized the Sixth Circuit's earlier statement in *Arthur*, 782 F.2d at 574, that courts may not inquire into the electorate's motives behind a facially-neutral referendum in an equal protection challenge, Pet. App. 17a-19a.

Applying the multi-factored test from *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-268 (1977), for determining whether official action was motivated by discriminatory intent, the court of appeals found that statements made by referendum supporters and project opponents at the public hearings, and the circumstances of the opposition to the ordinance (*e.g.*, that this was the first

time the City had submitted a site plan ordinance to a referendum), "raise[] a genuine issue of material fact as to whether this deviation from the procedural norm was predicated on racial bias, especially in light of the disproportionate impact the decision had on blacks." Pet. App. 15a-17a. The court of appeals also reversed the district court's holding that the City's actions were not arbitrary and capricious because it was simply following its own laws, even though the City's actions were affirmed by the Ohio Supreme Court in its first consideration of the issue. *Id.* at 33a.

SUMMARY OF ARGUMENT

This case implicates both the First Amendment rights of citizens to criticize and petition the government and constitutional and statutory prohibitions on discrimination in housing. The court of appeals held that federal courts may analyze the statements of citizens who supported a referendum petition to determine the intent of city officials, even though the officials' actions followed automatically from the filing of the citizen petition. Such an inquiry into the motives of those who supported a referendum threatens to chill important First Amendment activities. Although the courts need to strike a careful balance between vital interests in petitioning the government and fair housing, the balance struck by the court below placed insufficient weight on preserving the right to petition.

To protect the core First Amendment rights inherent in the referendum process, this Court should make clear that government officials cannot be held liable under the Fourteenth Amendment or the Fair Housing Act for the procedural ramifications of a facially neutral referendum petition, absent evidence that the petition was a sham for unlawful discrimination. Moreover,

regardless of the standard applied, the court of appeals erred in finding evidence of intentional discrimination on the part of petitioners, who had no discretion under the City's Charter but to give effect to a neutral, properly filed, citizen-initiated referendum petition.[1]

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING EVIDENCE OF INTENTIONAL DISCRIMINATION

A. Courts Should Protect The Actions Of Local Officials In Giving Effect To A Facially-Neutral, Citizen-Initiated Referendum Petition

In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court set forth the general test for determining whether official action was motivated by discriminatory intent. Under that test, federal courts examine four non-exclusive factors probative of discriminatory purpose: (1) the disproportional racial impact of the official action; (2) the historical background of the decision, particularly where it reveals a series of official actions taken for invidious purposes; (3) the specific

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[1] The Court also granted certiorari on the question whether a disparate-impact claim may be maintained under the Fair Housing Act. Although the court of appeals addressed the issue, that question does not appear to be properly presented in this case. Respondents' complaint did not raise a separate disparate-impact claim, and counsel for respondents has informed us that respondents do not view their complaint as addressing such a claim and do not intend to advance a disparate-impact theory before this Court. In any event, given that respondents challenge only the actions of city officials with regard to a single permit application, and do not challenge any general policy or practice on the part of the City or its officials, any attempt to apply disparate-impact analysis to this case would be inherently incoherent. Accordingly, this brief does not address the disparate-impact question.

sequence of events leading up to the challenged decision, including departures from normal procedures and from the substantive norms usually applied; and (4) the legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports. *Id.* at 266-268.

Here, respondents challenge the delay resulting from the nondiscretionary actions of city officials to comply with the City Charter's longstanding provisions allowing for citizen-initiated referenda to review *any* ordinance passed by the City Council. Under such circumstances, the "sensitive inquiry" into discriminatory intent envisioned by this Court in *Arlington Heights* requires particular sensitivity to the important First Amendment rights implicated in the referendum process. As in other contexts involving motive-based challenges to actions protected by the First Amendment, courts should only find such actions unlawful if the plaintiff can establish that the protected First Amendment activities, here the referendum petition, was a sham to disguise unlawful discrimination. Cf. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 670 (1965); *BE&K Constr. Co.* v. *NLRB*, 122 S. Ct. 2390, 2395-2396 (2002) (applying "sham litigation" standard to NLRA cases).

1. The Referendum Process Involves The Exercise Of Important First Amendment Rights

The First Amendment manifestly protects the actions of city officials taken to give effect to a facially-neutral, citizen-initiated referendum petition. This Court has made clear that the referendum is "a means

for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies," *City of Eastlake* v. *Forest City Enter., Inc.*, 426 U.S. 668, 673 (1976), and that the exercise of that power is protected by the First Amendment, see *Meyer* v. *Grant*, 486 U.S. 414, 420 (1988).

In *James* v. *Valtierra*, 402 U.S. 137 (1971), for example, this Court, without inquiring into the intent of the proponents, upheld an amendment to the California constitution that required all low-rent public housing projects to be approved by a majority of the public. *Id.* at 143. In so holding, this Court emphasized that the referendum process fosters "democratic decisionmaking" and gives citizens "a voice in decisions that will affect the future development of their own community." *Ibid.* The Court found that the amendment did not rest on "distinctions based on race" because it "require[d] referendum approval for any low-rent public housing project, not only for projects which will be occupied by a racial minority." *Id.* at 141. The Court concluded that it could invalidate this race-neutral amendment only by extending its holding in *Hunter* v. *Erickson*, 393 U.S. 385 (1969), that a race-based city charter amendment was unconstitutional, and the Court was unwilling to take this step absent proof that the amendment created a racial classification. Such facially neutral referenda, the Court concluded, "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *Valtierra*, 402 U.S. at 141.

Like the amendment in *Valtierra*, the referendum petition here was facially neutral and did not create a racial classification. Moreover, Cuyahoga Falls's referendum procedure is even more neutral than the one upheld in *Valtierra*. Whereas California's referendum

scheme *required* that *all low-income housing projects* be submitted to a referendum, the City Charter of Cuyahoga Falls merely provides that (1) citizens *may* initiate a referendum to review *any ordinance* of the City Council by submitting a petition signed by 10% of the electorate, and (2) city officials must stay any action on the ordinance pending a vote on the referendum. App., *infra*, 3a.

The courts below found, and respondents appear to concede, that both the City's referendum procedures and the particular referendum petition at issue here were facially neutral. In fact, in the present action, respondents do not directly challenge the referendum itself. Nor do they allege that the referendum petition lacked the requisite number of signatures. Rather, they have filed suit against the City and its officials for delaying the issuance of building permits. But that delay followed as a matter of course from the filing of the referendum petition. Accordingly, respondents' real complaint is not with the city officials for entering an "automatic stay," but with the citizens for filing the referendum petition, and the citizens' actions clearly implicate the First Amendment right to petition.

2. Respondents Should Be Required To Demonstrate That The Referendum Petition Was A Sham For Unlawful Discrimination

In light of the potential for chilling First Amendment rights to petition, the actions of city officials in giving effect to the properly filed referendum petition should be considered unlawful, if at all, only upon a showing that, although the petition was facially neutral, the actions of the city officials were nonetheless a sham designed to further unlawful discrimination. Such a standard would be consistent with that employed by

this Court in other contexts to avoid drawing a federal statutory scheme into unnecessary conflict with First Amendment rights.

Most notably, in the antitrust context this Court has held that "the Sherman Act does not prohibit * * * persons from associating * * * in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Noerr*, 365 U.S. at 136. The Court later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670; see *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511 (1972) (extending *Noerr*-Pennington immunity principles to situations where groups "use * * * courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors"). This immunity, however, does not extend to "illegal and reprehensible practice[s] which may corrupt the * * * judicial process[]," *California Motor Transp.*, 404 U.S. at 513, or to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144. As this Court recently explained, "[t]his line of cases thus establishes that while genuine petitioning is immune from antitrust liability, sham petitioning is not." *BE&K Constr. Co.*, 122 S. Ct. at 2396.

Because of the First Amendment rights involved, the plaintiff's burden of proving a "sham" is a heavy one. In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc*, 508 U.S. 49 (1993), the

Court adopted a two-part definition of sham antitrust litigation: first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "conceal[] an attempt to interfere *directly* with the business relationships of a competitor * * * through the use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id.* at 60-61 (internal quotation marks omitted; emphasis in original); see *BE&K Constr. Co.*, 122 S. Ct. at 2396 ("For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively.").

More generally, this "sham" standard reflects this Court's recognition that the First Amendment often requires that protected activities be given some "breathing space." See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341-342 (1974) (noting the need to protect some falsehoods to ensure that "the freedoms of speech and press [receive] that 'breathing space' essential to their fruitful exercise") (quoting *NAACP* v. *Button*, 371 U.S. 415, 433 (1963)). As the Court recently explained, another "example of such 'breathing space' protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity." *BE&K Constr. Co.*, 122 S. Ct. at 2399 (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, 285 (1964)); see 122 S. Ct. at 2399 ("It is at least consistent with these 'breathing space' principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no First Amendment interests of their own.").

In light of the vital First Amendment rights involved in the referendum process, this Court should apply a similar standard to this case. The Fair Housing Act and, *a fortiori*, the Fourteenth Amendment safeguard critically important rights. But when a challenge is brought to a facially neutral referendum and the actions taken by city officials as a direct, and for the most part automatic, response to the filing of a petition, the resulting legal analysis should take account of the important First Amendment interests at stake. The resulting test would not immunize the referendum process from scrutiny, but it would force a party challenging a facially neutral referendum and referendum process to meet a demanding standard by showing that actions that purport to be protected First Amendment conduct are, in fact, a sham.

Applying such a heightened standard here would preclude any finding of liability on the part of the City or its officials. Not only is it undisputed that the referendum petition was facially race-neutral, Pet. App. 18a-19a, but it is also clear that there were many non-racially based concerns that led to the citizen-initiated referendum, as each of the courts below recognized. *Ibid.* (court of appeals: "It is undisputed that the referendum in this case was facially neutral and that there were other hypothetical justifications for the referendum apart from racial bias."); *id.* at 47a-48a (Judge Polster: "The Court now finds that racial discrimination, if present, was not the only possible explanation for the 1996 referendum. It is quite possible that the citizens of Cuyahoga Falls may have demanded the referendum for, *inter alia*, safety or economic reasons. This is in fact borne out by the testimony of referendum proponents."); *id.* at 120a-121a n.32 (Judge Bell: "[R]acial bias [was not] 'the only possible rationale' for

the citizen's petition * * *. Other possible rationales * * * include, for example, concern about the effect of low-income housing on property values of surrounding properties, or worries over increased demand on public services or schools.").

Accordingly, presented as they were with a neutral, properly filed, objectively reasonable referendum petition, city officials did the only thing they could do consistent with the City Charter (and, indeed, the First Amendment): they placed the referendum on the ballot and delayed issuing building permits until the referendum vote occurred. Indeed, the only decision the city officials made that involved even a modicum of discretion was the decision to accept the petition as "sufficient" and properly filed. See App., *infra*, 3a ("When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition."). Even there, however, it is undisputed that the referendum petition contained the necessary signatures, was timely, and otherwise fully complied with the requirements of the City Charter. The other decisions—including the decision to delay issuance of the building permits which is at the heart of respondents' complaint—followed as a matter of course. And although the Ohio Supreme Court ultimately found the referendum, and the City Charter's longstanding provision subjecting *all ordinances* of the City Council to the referendum process, improper on a motion for reconsideration, all three courts that reviewed the petition before the November, 1996 referendum—including the Ohio Supreme Court itself—concluded that the petition and the City's referendum process were lawful. See Pet. App. 214a-245a. As the district court below properly concluded, "[t]he fact that the highest state court issued contradictory 4-3 rulings on [the legality of the petition] in less than three months shows

just how close this question of state law was. Surely, the Cuyahoga Falls Clerk (or any other city official) cannot be charged with any greater knowledge of the law than the state courts of Ohio." *Id.* at 43a. Under these circumstances, the decision to accept the petition for filing cannot be attributed to a racial motive.[2]

The Sixth Circuit nonetheless held that "if there is evidence that residents of Cuyahoga Falls were motivated, in part, by racial bias, the City can not give effect to that bias simply because its City Charter provides for referendum." Pet. App. 13a. That standard appears to contemplate an obligation of local officials to consider the motivations of citizens in signing and filing a referendum petition and to refuse even to accept a facially neutral and otherwise proper petition if its sponsors "were motivated, in part, by racial bias." That approach would seriously compromise the right of citizens to petition their government, as well as to vote on facially race-neutral measures that affect their communities. See *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) ("It is unrealistic * * * to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the

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[2] Indeed, given the essentially ministerial acts of the city officials in accepting the petition for filing and automatically staying the effect of the ordinance approving respondent's site plan, the actions of the city officials were analogous to those of a court receiving pleadings later alleged to be shams. In the latter context, even if the pleadings are ultimately proven to be shams, the petitioning party, not the court, is subject to liability. By analogy, it may be that the only parties potentially liable for filing a sham petition here should be the petition supporters, rather than the city officials. In any event, the city officials certainly cannot be liable where, as here, the underlying petition cannot be shown to be a sham.

decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.").

The Sixth Circuit's approach would place local officials in an untenable position and would chill core First Amendment activities and values. Precisely because the referendum petition was facially neutral and not obviously the product of racial animus, the Sixth Circuit test would force city officials to attempt to divine whether some percentage of the thousands of citizens who supported the referendum had improper motivations. At a minimum, city officials would presumably need to question those who signed the petition. Such official cross-examination, however, self-evidently would chill voters from exercising their political rights to propose or support petitions seeking referenda and to otherwise engage in the political process without fear that their thought processes will be open to public scrutiny.

The more limited inquiry into whether the referendum petition was, both objectively and subjectively, a sham greatly reduces those First Amendment concerns. It does so, moreover, without creating a significant loophole in the enforcement of the Fourteenth Amendment or the Fair Housing Act. As an initial matter, the possibility that discriminatory motives may be exercised by some voters is subject to review during the referendum process itself. Voters on one side of the issue can always seek to convince other voters that a vote for or against a particular race-neutral question may in fact implement racial motivations. While the political speech during the referendum process will not root out all discriminatory motives, it bears emphasis that an unfettered debate, protected by the First Amendment, itself will help expose improper motives.

Moreover, a referendum, like any other law, may be impermissible if it is facially race-based or creates a racial classification. See *Hunter*, 393 U.S. at 390-393. Thus, in *Washington* v. *Seattle School District No. 1*, 458 U.S. 457, 465 (1982), this Court held that a statewide referendum initiative that prohibited school districts from reassigning and busing students *only for desegregation purposes* was based on racial bias and violated the Equal Protection Clause. *Id.* at 462-463. Although the Court observed that the referendum "nowhere mentions 'race' or 'integration'" and therefore, at least superficially, the referendum was "facial[ly] neutral[]," the Court concluded that the text of the referendum left "little doubt that the initiative was effectively drawn for racial purposes" and it plainly resulted in a racial classification. *Id.* at 471. Thus, because "*the text of the initiative* was carefully tailored to interfere only with desegregative busing" and the proponents of the initiative candidly acknowledge that its purpose was limited solely to prohibiting busing for desegregation purposes, the Court held that "[i]t is beyond reasonable dispute * * * that the initiative was enacted because of, not merely in spite of, its adverse effects upon busing for integration." *Ibid.* (emphasis added; citation and internal quotation marks omitted). In contrast, no such discriminatory purpose appears on the face of the referendum petition in this case, or on the City's plainly neutral referendum procedure. Cf. *Southern Alameda Spanish Speaking Org.* v. *City of Union City*, 424 F.2d 291, 295 (9th Cir. 1970) (stating that "question of motivation for the referendum (apart from a consideration of its effect)" is not "an appropriate one for judicial inquiry"); *Ranjel* v. *City of Lansing*, 417 F.2d 321, 324 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970).

In addition, when a referendum is advisory only, and municipal officials must exercise their discretion when deciding whether and how to implement the results of the referendum, the motives of those officials are fully subject to review under the tests this Court set forth in *Arlington Heights*. See *Smith* v. *Town of Clarkton*, 682 F.2d 1055, 1066-1067 (4th Cir. 1982); *United States* v. *City of Birmingham*, 727 F.2d 560, 564-565 (6th Cir.), cert. denied, 469 U.S. 821 (1984).

B. Under Any Conceivable Standard, The Court Of Appeals Erred In Finding Evidence Of Intentional Discrimination

Regardless of whether the Court adopts a heightened, First Amendment standard in this context or applies the general *Arlington Heights* factors, the court of appeals erred in finding evidence of discriminatory intent on the part of city officials. The City's Planning Commission, City Council, and Mayor Robart (by not exercising his veto power) *approved* respondents' site plan despite public opposition to the proposed housing complex. The subsequent actions by city officials to delay issuance of the building permits pending resolution of the referendum were *required* by the City Charter. As noted, the only decision adverse to respondents that involved even a modicum of discretion was the decision to accept the petition for filing. However, the Charter makes clear that the Clerk of the City Council *must* accept the referendum petition once he determines its "sufficiency," and it is undisputed that the petition was timely, contained the requisite number of signatures, and otherwise complied fully with the City Charter's provisions governing referenda. Indeed, in light of the varying judicial opinions on the propriety of the referendum, the city officials cannot be faulted

(let alone, assigned a discriminatory intent) for accepting the petition. Accordingly, respondents' real complaint is not with the city officials (whom they named as defendants), but with the *citizens'* action of petitioning the government—in the form of the referendum petition.

The court of appeals, however, failed to account for the fact that the building-permit delay followed as a matter of course from the filing of the petition. It therefore erred in finding evidence of discriminatory intent *on the part of city officials*, even under the general *Arlington Heights* standard. For example, in concluding that there was sufficient evidence that city officials had departed from normal procedures to preclude summary judgment under the *Arlington Heights* test, the court of appeals relied solely on the fact that this was the first time the referendum process had been used to halt a proposed housing development in Cuyahoga Falls. Pet. App. 14a-15a. But the fact that this was the first time residents of Cuyahoga Falls were sufficiently concerned about a housing project to initiate the City's longstanding referendum procedures does not mean that city officials departed from normal procedures in handling the permit requests. To the contrary, it is undisputed that the City's referendum procedures, including the requirement that city officials stay any action on an ordinance once a properly filed referendum petition is received, were in place long before respondents submitted their site plan for approval and had been employed in response to petitions filed on other subjects. And it appears to be undisputed in this case that city officials followed those preexisting referendum procedures to the letter. See *id.* at 48a ("The Court finds that plaintiffs have provided absolutely no evidence that the Clerk or City Engineer had

any racial animus in carrying out their ministerial functions.").

The court of appeals also failed to recognize that the "referendum process" was not begun by the City or any of its officials, but rather by 10% of electors signing a petition seeking to have a referendum on the issue. Thus, the court of appeals erred in comparing this case to *Smith*, 682 F.2d at 1066-1067, and *City of Birmingham*, 727 F.2d at 564-565. In *Smith*, town officials were found to have violated the FHA by halting the construction of public housing after conducting, *for the first time*, an opinion poll of the residents regarding the proposed development. Similarly, in *City of Birmingham*, the court held that the City's unusual "decision to conduct an advisory referendum" concerning a proposed low-income housing project departed from the City's normal procedures and, taken together with other departures from normal procedures, was probative of discriminatory intent.

Unlike the court of appeals below, however, the courts in those cases were not attempting to determine the intent of the voters or to use that intent as a proxy for the intent of city officials. Instead, the courts were simply considering the context of the legislators' decision to ascertain whether the *legislators*' actions were motivated by discriminatory animus.

To the extent that Mayor Robart attended the organizational meeting for the referendum on April 9, 1996, his participation does not constitute action by the City, or attributable to the City, to solicit the filing of the referendum petition. None of the courts below found evidence that the referendum petition was initiated by anyone other than the voters of Cuyahoga Falls. See Pet. App. 128a-129a ("A review of the evidence cited by Plaintiffs reveals that there is no proof

that the Mayor contributed to the referendum process aside from lending support by answering some procedural questions. * * * The facts in evidence do *not* sustain Plaintiffs' unsupported assertions that the Mayor organized the petition drive in question, that he secured meeting places for the citizen group opposed to the project, that he certified the petition, or that he submitted the referendum question to the Board of Elections."); *id.* at 44a ("Judge Bell previously found that the evidence did not support [respondents'] assertions that the Mayor organized the petition drive, secured meeting places for the citizen group opposed to the project, certified the petition, or submitted the referendum question to the Board of Elections. Plaintiffs have provided no additional evidence otherwise."). Indeed, the mayor (by not exercising his veto power) and City Council, *approved* the site plan despite the expressed public opposition to the project at the three City Council hearings.

In addition, because respondents are challenging only the actions of city officials in giving effect to the facially neutral referendum petition, the court of appeals erred in inquiring into the motivations of the referendum proponents and imputing that motive onto city officials. This Court has held that courts may inquire into contemporary statements made by legislators to determine if racial discrimination is one basis for the challenged governmental action. See *Arlington Heights*, 429 U.S. at 268. But this Court has never held that courts may consider the statements of the proponents of a facially-neutral referendum, as well as those who supported or signed the petition, much less impute those statements to city officials who had no discretion but to give effect to petition once it was filed. Cf. *Arthur* v. *City of Toledo*, 782 F.2d 565, 574 (6th Cir. 1986) ("[A]bsent a

referendum that facially discriminates racially, or one where although facially neutral, the only possible rationale is racially motivated, a district court cannot inquire into the electorate's motivations in an equal protection clause context."). For the reasons set forth above, that inquiry improperly and unnecessarily infringes on the rights of voters to petition their government and to participate fully in the political process.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

42 U.S.C. 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the

neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

* * * * *

Ohio Const., Art. II: Legislative.

Section 1. *In whom power vested.* The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

* * * * *

Section 1f. *Power of municipalities.* The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law.

Art. IX, § 2, Charter of the City of Cuyahoga Falls, OH.

The electors shall have the power to approve or reject at the polls any ordinance or resolution passed by the Council, except as hereinafter provided. Only electors of the City may circulate referendum petitions. Within thirty (30) days after the passage by the Council of such ordinance or resolution or its repassage over the Mayor's veto, whichever is later, a petition signed by at least ten percent (10%) of the electors of the City may be filed with the Clerk of the Council, requesting that such ordinance or resolution be either repealed or submitted to a vote of the electors. If said petition is signed by twenty percent (20%) or more of such electors, the date of the election may be fixed therein, not less than ninety (90) days from the time of filing thereof. When such petition is filed, the Clerk shall first ascertain the sufficiency of the petition, and if found sufficient, the Council shall thereupon, within thirty (30) days of the filing of such petition, reconsider such ordinance or resolution. If upon such reconsideration the ordinance or resolution is not repealed, the Council shall provide for submitting it to a vote of the electors on the date so fixed, or, if not so fixed, at the first general election in any year occurring more than ninety (90) days from the filing of such petition. No such ordinance or resolution shall go into effect until approved by a majority of those voting thereon, in which event such ordinance or resolution shall go into effect on the fifth day after the day on which the Board of Elections certifies the official vote thereon. When the Council by general law or under provisions of general ordinance is required to pass more than one ordinance or resolution necessary to make and pay for any public improvement, the referendum provision

shall apply only to the first ordinance or resolution required to be passed and not to any subsequent ordinances or resolutions relating thereto.

In addition, ordinances providing for an annual tax levy or for improvements petitioned for by the owners of a majority of the foot front of the property benefitted and to be specially assessed therefor, and appropriation ordinances limited to the subject of appropriations shall not be subject to referendum, but, except as herein provided, all other ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, including emergency ordinances and resolutions necessary for the immediate preservation of the public peace, health or safety, shall be subject to referendum, except that such emergency ordinances and resolutions shall go into effect at the time indicated therein. If, when submitted to a vote of the electors, an emergency measure be not approved by a majority of those voting thereon, it shall be considered repealed as regards any further action thereunder; but such measure shall be deemed sufficient authority for payment, in accordance therewith, of any expense incurred previous to the referendum vote thereon.

Ordinances or resolutions submitted to the Council by initiative petition and passed by the Council either with or without change, but not submitted to a vote of the electors shall be subject to referendum in the same manner as other ordinances or resolutions.