

IN THE SUPREME COURT OF OHIO

The Ohio Fair Plan : **Case No. 2022-0244**
: **On Appeal from the Franklin County**
Appellant, : **Court of Appeals, Tenth District**
: **Court of Appeals Case No. 20-AP-351**
v. :
State ex rel. Fair Housing Opportunities :
of Northwest Ohio d/b/a The Fair :
Housing Center :
: **Appellee.** :

**BRIEF OF AMICI CURIAE ADVOCATES FOR BASIC LEGAL EQUALITY, INC.,
COMMUNITY LEGAL AID SERVICES, INC., LEGAL AID OF WESTERN OHIO,
THE LEGAL AID SOCIETY OF CLEVELAND, THE LEGAL AID SOCIETY OF
COLUMBUS, LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, AND
SOUTHEASTERN OHIO LEGAL SERVICES IN SUPPORT OF
APPELLEE FAIR HOUSING OPPORTUNITIES OF NORTHWEST OHIO**

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STATEMENT OF INTEREST OF AMICI CURIAE

The undersigned legal services programs, Advocates for Basic Legal Equality, Inc., Community Legal Aid Services, Inc., Legal Aid of Western Ohio, The Legal Aid Society of Cleveland, The Legal Aid Society of Columbus, Legal Aid Society of Southwest Ohio, LLC, and Southeastern Ohio Legal Services, serve low-income and senior Ohioans. They share the goal of securing justice and resolving fundamental problems for those who are low income and vulnerable. To that end, the Ohio legal services community assists clients in addressing a number of important legal issues, including ensuring that lower income homeowners and homebuyers, including Ohioans of color, have financial stability. For these homeowners, it is essential that the Ohio Fair Plan operate effectively and be subject to public review.

In connection with their missions, the undersigned legal services programs submit amicus curiae briefs in cases, such as the instant appeal, in which outcomes may affect important rights or obligations of Ohioans by providing input to jurists and government officials who address decisions of great public interest that affect the economic security of the vulnerable and the poor.

STATEMENT OF FACTS

Amici hereby adopt the Statement of Facts included in the merit brief of Fair Housing Opportunities of Northwest Ohio.

PROPOSITIONS OF LAW

Amici hereby adopt the Propositions of Law included in the merit brief of Fair Housing Opportunities of Northwest Ohio.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

I. The proper functioning of the Ohio Fair Plan is germane to the client population served by Amici.

To understand the reason why the Ohio Fair Plan exists, it is important to understand the historical context in which the General Assembly created the Ohio Fair Plan.

A. The Ohio Fair Plan exists to fill the gap in insurance coverage for urban Ohioans and, in particular, racial minorities.

As a result of the racial riots of 1965, 1967, and 1968, it became evident that the ongoing unavailability of homeowners' insurance in urban areas had a devastating impact on the ability of individuals and communities to recover from the losses sustained from those events. Gilmore, *Insurance Redlining & The Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 Cath.U.L.Rev. 563, 578-579 (1985). While this significant gap in the availability of homeowners' insurance gained national attention in the late 1960s, the problem had existed for decades. Dwyer, *Fair Plans: History, Holtzman and the Arson-for-Profit Hazard*, 7 Fordham Urb.L.J. 617, 618-619 (1978). The private insurance industry had specifically and intentionally not serviced geographic areas that they deemed an unreasonably high risk. Gilmore, 34 Cath.U.L.Rev. at 578-579. As a result of the practice of red-lining and racial inequality, this was a self-fulfilling outcome. *Id.* at 575-578. And with the riots, insurance companies were even more hesitant to issue policies in urban areas. Welsh, *Property Insurance for Ohio's Urban Areas*, 4 Akron L.Rev. 27, 28-29 (1973).

During this time, elected officials at both the federal and state levels realized that homeowners needed to have the ability to obtain homeowners' insurance in order to further and to sustain economic opportunity and advancement. In August 1967, President Johnson created a National Advisory Commission on Civil Disorders. Executive Order 11365, 32

Fed.Reg. 11111 (1967). That commission created the National Advisory Panel on Insurance in Riot Affected Areas, which issued a report in 1968 that included several findings. Among the Panel's findings was that "There is a serious lack of property insurance in the core areas of our Nation's cities. For a number of years, many urban residents and businessmen have been unable to purchase the insurance protection they need. Now, riots and the threat of riots are aggravating the problem to an intolerable degree. Immediate steps must be taken to make insurance available to responsible persons in all areas of our cities." Report of the National Advisory Commission on Civil Disorders at 305. The Panel then made five recommendations to Congress. Welsh, 4 Akron L.Rev. at 30. The first two recommendations were:

We call upon the insurance industry to take the lead in establishing voluntary plans in all states to assure all property owners fair access to property insurance.

We look to the states to cooperate with the industry in establishing these plans and to supplement the plans, to whatever extent may be necessary, by organizing insurance pools and taking other steps to facilitate the insuring of urban core properties.

Report of the National Advisory Commission on Civil Disorders at 309 (1968). The Panel made its reasoning behind these recommendations clear: "The resources and talents of the insurance industry and of local, state and Federal governments must be marshalled to assure property owners everywhere fair access to insurance." *Id.* at 308. Congress adopted many of those recommendations into the Urban Property Protection and Reinsurance Act of 1968, which was included in the Housing and Urban Development Act of 1968. Pub.L. 90-448. The two recommendations set forth above were codified in 12 U.S.C. 1749bbb-3, which said, "Each insurer reinsured under this title shall cooperate with the State insurance authority in each State in which it is to acquire such reinsurance in establishing and carrying out statewide plans to assure fair access to insurance requirements (FAIR plans)." P.L. 90-448, § 1211(a),

82 Stat. 558, Title XII, Part A – Statewide Plans to Assure FAIR Access to Insurance Requirements (subsequently repealed).

Based on this federal statute, the Ohio General Assembly passed the bill that created the Ohio Fair Plan, H.B. 465, in July 1969. Welsh, 4 Akron L.Rev. at 33. The General Assembly created the Ohio Fair Plan with two primary purposes: to assure that no property would be denied basic insurance without an inspection to determine the property’s insurability and to create a joint association of all property insurers doing business in Ohio to make coverage available to insurable urban property that had been declined by the regular insurance market. *Id.*; R.C. 3929.43. The Ohio Fair Plan’s plan of operation was approved by Ohio’s Superintendent of Insurance and the plan of operation became effective in November 1969. Welsh, 4 Akron L.Rev. at 34.

Initially, the Ohio Fair Plan was geographically limited to Akron, Canton, Cincinnati, Cleveland, Columbus, Dayton, Lima, Springfield, Toledo, and Youngstown. The geographic scope of the Ohio Fair Plan expanded to cover the entire state, which allowed all Ohioans in properties that private insurance companies deem “uninsurable” to be able to access homeowners’ insurance. The success of the Ohio Fair Plan led to its expansion into other forms of insurance coverage.

B. A properly functioning Ohio Fair Plan helps create financial and housing security for Amici’s client population.

The missions of Amici are to address the civil legal needs of the low-income and senior populations in every Ohio county. As part of the work to address the civil legal needs of their client populations, Amici are committed to work with community partners, businesses, non-profits, financial institutions, state and local governments, and others in order to help create economic opportunity in the areas they serve. The client population of Amici

and the client population of Amici's partners are best served by a properly functioning Ohio Fair Plan.

Absent a properly functioning Ohio Fair Plan, Amici's client population will be denied an important tool in their efforts both individually and collectively to be able to achieve economic advancement, self-sufficiency, and success beyond their current situation. An Ohio Fair Plan that does not properly function will affect Amici's client population in a broad sense as a result of the dampening effect it will have on creating and maintaining opportunities for individual and community economic development and advancement. On a personal level, it will also affect Amici's client population because of the direct and indirect effects of economic stagnation and decline in their households, neighborhoods, and communities. Without reasonable access to homeowners' insurance, the ability to build individual financial security through homeownership and community wealth becomes a much more elusive goal. No financial institution wants to lend money for purchase, rehabilitation, improvement, or repair without reasonable guarantees of recovery, and the availability of homeowners' insurance is a critical component in its loan underwriting process. "Lenders require their borrowers to secure property insurance. No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable." *N.A.A.C.P. v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297-298 (7th Cir.1992).

Households of color – and Black households in particular – lag far behind white households in all steps of homeownership. From 2007 through 2018, Black households had their mortgage loan applications denied more than forty percent of the time. White households, on the other hand, had their mortgage loan applications denied about twenty-five percent of the time. Ohio Housing Finance Agency, *These Five Charts Show the True*

Struggle for Black Homeownership, <https://ohiohome.org/news/blog/august-2020/racialinequality.aspx> (Aug. 25, 2020). This disparity exists even in high-income brackets; among households with more than \$100,000 in income, in 2018, Black households had their mortgage loan applications denied thirty-one percent of the time while white households had their mortgage loan applications denied fourteen percent of the time. *Id.* This affects the rate of homeownership: in 2018, thirty-five percent of Black householders owned a house while seventy-two percent of white householders owned a house. *Id.* Making homeowners' insurance properly available – either through the private market or through the Ohio Fair Plan – eliminates one barrier to homeownership for Black households.

The availability of homeowners' insurance better ensures financial security for historically disadvantaged populations. Homeownership is a potential building block for creating greater financial opportunities and security. Herbert, McCue, and Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households? (Was It Ever?)*, Harvard University, Joint Center for Housing Studies (September 2013) at 48-49, <https://www.jchs.harvard.edu/sites/default/files/hbtl-06.pdf>. If homeowners' insurance is not available, then no loan will be extended for the purchase of a new house or the repair of an existing house. It is for these reasons that the proper operation and functioning of the Ohio Fair Plan is essential.

The lack of proper access to homeowners' insurance serves as a direct impediment to the future financial security, well-being, and advancement of a number of individuals and families served by Amici, as well as the neighborhoods and the communities in which they live. With respect to community-building and neighborhood rehabilitation, stabilization, and

advancement, the 1968 report of the President's National Advisory Panel on Insurance in Riot-Affected Areas observed:

Insurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not – and cannot – make loans. New housing cannot be constructed, and existing housing cannot be repaired. New businesses cannot be opened, and existing businesses cannot expand or even survive.

Without insurance, buildings are left to deteriorate; services, goods, and jobs diminish. Efforts to rebuild our Nation's inner cities cannot move forward. Communities without insurance are communities without hope.

Report of the National Advisory Commission on Civil Disorders at 305. As the United States District Court for the Southern District of Ohio held, "Insurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not and cannot make loans." *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F.Supp. 1106, 1109 (S.D. Ohio 1979).

The lack of access to reasonable homeowners' insurance can affect a landlord's decision as to what, if any, maintenance and rehabilitation they will perform on their rental properties. Kaersvang, *The Fair Housing Act and Disparate Impact in Homeowners' Insurance*, 104 Mich.L.Rev. 1993, 2017-2018 (2006). The lack of access to reasonable homeowners' insurance can affect decisions made concerning the availability of housing or developers' decisions concerning the construction of affordable housing. As the *Dunn* court said, "the availability of appropriate insurance is a necessary predicate to the availability of financing, and financial assistance is a precondition to securing the availability of adequate housing." *Dunn*, 472 F.Supp. at 27. *Accord United States v. Mass. Indus. Fin. Agency*, 910 F.Supp. 21, 27 (D.Mass.1996) (stating, "Few, if any, banks make home loans to uninsured borrowers. Thus, property insurers in effect have the power to make housing unavailable to

potential buyers.”); *Nevels v. W. World Ins. Co.*, 359 F.Supp.2d 1110, 1119 (W.D.Wash.2004) (stating, “Plaintiffs * * *, now without liability insurance, face significant financial risk, and their ability to provide housing for disabled individuals is threatened.”).

The lack of reasonable access to homeowners’ insurance can also affect the decision-making of businesses in terms of where they will locate and invest in their communities, and where they will provide services. *Kaersvang*, 104 Mich.L.Rev. at 2017-18. These decisions impact the location of businesses, and the services, goods, and jobs that accompany a business. *Id.* at 2018. Businesses locate in the affected areas are less likely to survive if financing is at risk as a result of reasonable access to homeowners’ insurance. *See Dunn*, 472 F.Supp. at 1111.

The disclosure of insurance-related information in reply to a reasonable request by interested parties to determine the operation and the effectiveness of the Ohio Fair Plan will serve to enhance the potential for an Ohio Fair Plan to achieve its stated purpose and goals. R.C. 3929.41 and R.C. 3929.43(A). A properly functioning Ohio Fair Plan will in turn help create an environment that facilitates economic activity and financial security benefiting the client population Amici serve.

II. Issues of discrimination still permeate the private insurance market.

The market within which the Ohio Fair Plan operates and the information that Fair Housing Opportunities of Northwest Ohio d/b/a The Fair Housing Center (“The Fair Housing Center”) requested from the Ohio Fair Plan is pertinent to the ongoing discrimination that our client population currently faces. As discussed above, the purpose of the Ohio Fair Plan is to alleviate the gap in the homeowners’ insurance market in urban areas exposed by the race riots of the 1960s because insurance is a necessary part of homeownership. *Dwyer*, 7

Fordham Urb.L.J. at 618-619. “It is elementary that without insurance, mortgage financing will be unavailable, because a mortgage lender simply will not lend money on the property. Without mortgage financing, homes cannot be purchased. Thus, the availability of insurance and the ability to purchase a home go hand in hand and vary, in direct proportion, to one another.” *McDiarmid v. Economy Fire & Cas. Co.*, 604 F.Supp. 105, 107 (S.D.Ohio 1984). Thus, the Ohio Fair Plan’s role within the insurance market underlies the need for requested information and public disclosure.

A. Despite *de jure* racial discrimination in the administration of home mortgages ending decades ago, the effects of that racial discrimination linger in the private insurance industry.

The Fair Housing Act, 42 U.S.C. 3601, et seq., banned the practice of banks using “credit discrimination based upon the characteristics of the neighborhood surrounding the borrower’s dwelling” when determining whether to offer financing for the purchase of the home – a practice commonly known as redlining. *Conference of Fed. S & L Assns. v. Stein*, 604 F.2d 1256, 1258 (9th Cir.1979). *Accord* Gilmore, 34 Cath.U.L.Rev. at 563 (discussing how the effects of redlining are “devastating and well-documented” and “although the forms of redlining have become more subtle, they have not been eliminated”). Courts have generally held that the Fair Housing Act applies to the provision of homeowners’ insurance. *E.g.*, *Nationwide Mut. Ins. v. Cisneros*, 52 F.3d 1351 (6th Cir.1995). In 2016, HUD reaffirmed its position that homeowners’ insurance coverage is subject to the Fair Housing Act. 81 Fed.Reg. 69012-02, 69013. In addition, HUD declined to exempt FAIR plans from discriminatory effects liability under the Fair Housing Act. *Id.* at 69019.

The availability of homeowners’ insurance and racial discrimination have long been intertwined. By its nature and by the way that insurance underwriters view risk, the homes in

neighborhoods that had experienced redlining would either be denied typical insurance coverage or have higher rates. Squires & Kubrin, *Racial Profiling, Insurance Style*, 24 J. of Ins.Reg. 4 (Summer 2006). “The unavailability of insurance coverage stemming from redlining has contributed to the deterioration of American urban centers and has effectively frustrated attempts at urban revitalization.” Byrne, *Application of Title VIII to Insurance Redlining*, 75 Nw.U.L.Rev. 472, 472 (1980). “Disinvestment and building abandonment in redlined areas is accelerated by skyrocketing maintenance and operating costs. Families with the means to do so flee redlined areas, leaving behind the higher insurance costs and the stigma of the residual market. Hard-pressed owners who have forgone property insurance lack the capacity to rebuild after a fire. White flight, which accompanies disinvestment, almost invariably leads to accelerated racial and economic segregation.” Badain, *Insurance Redlining and the Future of the Urban Core*, 16 Colum.J.L. & Soc.Probs. 1, 35 (1980).

Discrimination involving homeowners’ insurance is not a relic of the past. From 2010 through 2020, the National Fair Housing Alliance – a consortium of nonprofit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States – reported about 300 complaints involving homeowners’ insurance transactions.¹ This number likely understates the problem because, as the National Fair Housing Alliance says, “Discrimination in the provision of homeowners insurance is very difficult to identify because it is rarely overt.” National Fair Housing Alliance, *2021 Fair Housing Trends Report* at 11, https://nationalfairhousing.org/wp-content/uploads/2021/07/2021-Fair-Housing-Trends-Report_FINAL.pdf (accessed May 18, 2022).

¹ The total is calculated from the National Fair Housing Alliance’s annual reports, which are available at <https://nationalfairhousing.org> (accessed on May 18, 2022).

Those who were denied by a private insurance agency would then likely pursue a policy from the Ohio Fair Plan. Thus, this requested information from the Ohio Fair Plan would offer important insight into the prevalence of homeowners' insurance denials in the neighborhoods in which historical discrimination occurred.

B. Federal and state public policy align to support these disclosures.

As discussed above, Congress viewed the issue to be solved by the FAIR Plans as one of practical problems. The stated purposes of the Urban Property Protection and Reinsurance Act of 1968 were: “(1) encourage and assist the various State insurance authorities and the property insurance industry to develop and carry out statewide programs which will make necessary property insurance coverage against the fire, crime and other perils more readily available for residential, business, and other properties meeting reasonable underwriting standards; and (2) provide a Federal program of reinsurance against abnormally high property insurance losses resulting from riots and other civil commotion, placing appropriate financial responsibility upon the States to share in such losses.” Pub.L. 90-448, § 1102(b), 82 Stat. 556 (subsequently repealed). The enabling statute passed by the Ohio General Assembly provided similar goals, stating, “The Ohio fair plan underwriting association is hereby created consisting of all insurers authorized to write within this state, on a direct basis, basic property insurance or any component thereof in multi-peril policies, to assist applicants in urban areas to secure basic property insurance or homeowners insurance, and to formulate and administer a program for the equitable apportionment of basic property insurance or homeowners insurance which cannot be obtained in the normal market.” R.C. 3929.43(A). The requested information falls squarely within the enabling laws at the federal and state levels, and within

the interests of Amici's client population – particularly those who are residents of formerly segregated and redlined neighborhoods.

C. Disclosure of the requested records is pertinent to addressing the issue of discrimination.

As this Court has found, what falls within the “records” subject to the Public Records Act are: “(1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of the state agencies, (3) which serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 19. The main issue in this case is whether the Ohio Fair Plan is covered by the second part of this standard – in other words, whether it is a state agency or public office. *Id.* See R.C. 149.43(A)(1) (stating that “public record” includes “records kept by any public office”). R.C. 149.011(A), in turn, defines “public office” as “any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” As explained above, the Ohio Fair Plan is an “organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” In fact, the Ohio Fair Plan exists because no non-government entity would provide the services the Ohio Fair Plan provided. *E.g.*, R.C. 3929.43(A) (stating, “The Ohio fair plan underwriting association is hereby created consisting of all insurers authorized to write within this state, on a direct basis, basic property insurance or any component thereof in multi-peril policies, to assist applicants in urban areas to secure basic property insurance or homeowners’ insurance, and to formulate and administer a program for the equitable apportionment of basic property insurance or homeowners’ insurance which cannot be obtained in the normal market.”). And if the Ohio

General Assembly wanted to exclude the Ohio Fair Plan from the definition of “public office” set forth in the first sentence of R.C. 149.011(A), it could have specifically excluded the Ohio Fair Plan from coverage as it did with Ohio Means Jobs in the second sentence of R.C. 149.011(A). The Ohio General Assembly did not specifically exclude the Ohio Fair Plan from coverage, so the definition of “public office” contained in the first sentence of R.C. 149.011(A) applies. As a result, the requested records should be disclosed.

In addition to this clear statutory case for the Ohio Fair Plan to be subject to the Public Records Act, the policy considerations that underly the analysis favor disclosure of the requested records. *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St.2d 107, 109, 341 N.E.2d 576 (1976). Homeowners’ insurance is crucial to the real estate and mortgage finance industries as a whole, as well as to neighborhoods and to individual homeowners. To be frank: “[r]eal estate is not only the largest single form of wealth, [but] also the most important form of collateral for borrowing.” Jorda, Schularick, and Taylor, *Betting the House*, Federal Reserve Bank of San Francisco, June 2014, available at https://conferences.wcfia.harvard.edu/files/peif/files/betting_the_house.pdf (accessed May 16, 2022). Beyond the clear necessity of housing as shelter, there is also a need to look at housing as a key to wealth accumulation and to the stability of a given urban neighborhood. “The traditional view of the importance of asset accumulation is that it is a ‘fundamental determinant of the long-run well-being of families and individuals.’” Yass, *Homeowner’s Insurance and Credit Score: A Critical Race Theory Perspective*, 27 Conn.Insu.L.J. 286, 290-291 (2021). Even during the Great Recession and associated housing crash, wealth gains for minority and lower-income households were on average still positive and substantial. *Id.* at 291. With a long history of both intentional and indirect discrimination, transparency in both

the private market and with any public entities involved in the market is key to making an informed decision to engage with any element of the market.

The need for disclosure by public entities involved in the homeowners' insurance market is a part of the very foundational framework of the United States. If citizens are to have any trust in their public entities, it is vital for their right to have access to public information. Correspondingly, the Supreme Court of the United States held that the right to obtain information, "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." (Emphasis deleted.) *Bd. of Edn. v. Pico*, 457 U.S. 854, 867, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). "Without some protection for the acquisition of information about the operation of public institutions * * * by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance." *Houchins v. KQED-TV, Inc.*, 438 U.S. 1, 32, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (Stevens, J., dissenting). As President Lyndon Johnson stated, "a democracy works best when the people have all the information that the security of the Nation permits." *Presidential Statement on Signing the Freedom of Information Act*, 2 Pub.Papers 316 (July 4, 1966). This Court has echoed this understanding of the need for public disclosure: "The Public Records Act reflects the state's policy that 'open government serves the public interest and our democratic system.'" *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, quoting *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "R.C. 149.43 generally is construed liberally in favor of broad access, and any doubt must be resolved in favor of disclosure of public records." *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 246, 643 N.E.2d 126 (1994).

The request by The Fair Housing Center is perfectly in line with the public information necessary to make an informed evaluation of the Ohio Fair Plan and insurance underwriting decisions statewide. This information is germane to our client population in determining whether unfair discrimination factors are being utilized, and as it is precisely the role carved out by the Ohio General Assembly when it established the Ohio Fair Plan.

It is impossible to verify the Ohio Fair Plan's progress in meeting the goals of the Ohio General Assembly without public access to information. By its very nature, insurance seeks to accept "good" risk while rejecting "bad" risk, and unfair discrimination can – and often does – permeate the process of assigning risk. In making an informed decision to participate in the real estate market that drives the state and national economies, residents need to clearly see the functioning of the public program. This access to information is harmonious with the goals of the Ohio General Assembly and Ohio's residents.

III. Disclosure of the records The Fair Housing Center seeks from the Ohio Fair Plan would benefit all Ohioans and, in particular, people of color in Ohio's urban areas.

The client population of Amici will benefit from the disclosure of the information sought by The Fair Housing Center for three main reasons. First, the purpose of Ohio's Public Records Act is to submit the decision-making of state institutions to public scrutiny. Second, the general population of Ohio has an interest in the information sought by The Fair Housing Center in order to determine whether the Ohio Fair Plan is fulfilling its statutory purpose in an appropriate manner. Third, because the information sought from the Ohio Fair Plan could help illuminate if the Ohio Fair Plan is discriminating in the provision of homeowners' insurance to people of color in urban areas, it is imperative that the client population of legal services organizations receive this information. Therefore, this Court should find that the Ohio Fair

Plan must divulge the information sought by The Fair Housing Center through its Public Records Act request.

A. The purpose of the Public Records Act is to submit the decision-making of state institutions to public scrutiny and hold state decision-makers accountable for their actions.

It is vital that the general population can see and understand the inner workings of our government. The Public Records Act provides this opportunity, which in turn holds the government more accountable for its actions. *White v. Clinton Cty. Bd. of Comms.*, 76 Ohio St.3d 416, 420, 667 N.E.2d 1223 (1996). The Ohio General Assembly created the Ohio Fair Plan because private insurance, when left free, did not appropriately insure urban markets.

Transparency keeps government entities accountable to the public they serve. The Public Records Act provides this necessary transparency. “[T]he purpose of Ohio’s Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy.” *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355, 673 N.E.2d 1360 (1997), citing *White* at 420. Further, this Court has recognized transparency’s importance and will construe R.C. 149.43 “liberally in favor of broad access and resolve any doubt in favor of disclosure of public records.” *State ex rel. Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13. Even if an entity’s public status is in doubt, courts should err on the side of disclosure. *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156, 684 N.E.2d 1239 (1997). In addition, the fact that an entity is a private entity does not necessarily preclude the entity from the Ohio Public Records Act. *E.g., State ex rel. Schiffbauer v. Banaszak*, 142 Ohio St.3d 535, 2015-Ohio-1854, 33 N.E.3d 52, ¶ 11-12. These cases show that this Court recognizes the Ohio Public Records Act’s

significance. Allowing citizens to unearth any potential government misconduct is central to our democracy.

The Ohio Fair Plan attempts to hide behind a concern for privacy of residents in underserved urban areas. However, the purpose of the Ohio Public Records Act is not to divulge sensitive information. Rather, the statute lists exemptions to protect sensitive information. R.C. 149.43(A)(1)(a)-(oo). Similarly, this Court has stated that:

It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.

State ex rel. Toledo Blade Co. v. Univ. of Toledo Found., 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992). Allowing transparency into the Ohio Fair Plan will not harm underserved urban areas; in fact, it will help shed light on this government activity, which is essential not only to residents' daily lives, but democracy.

B. The general population has an interest in the disclosure of the information The Fair Housing Center is seeking from the Ohio Fair Plan because this information would illuminate whether the Ohio Fair Plan is fulfilling its statutory purpose.

It is axiomatic that every Ohio citizen has an interest in knowing whether state institutions are fulfilling the purpose for which the Ohio General Assembly created them. The Public Records Act was enacted to facilitate citizens getting information about the inner workings of state institutions so that citizens could ensure that those institutions are effectively fulfilling their purpose. *E.g., Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 16 (finding, "Public records are one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing

sovereign mischief and malfeasance”); *White*, 76 Ohio St.3d at 420, 846 N.E.2d 811 (stating “[P]ublic scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and to hold government accountable.”). In fact, this Court has stressed the importance of citizens not only knowing a “final decision on a matter, but the ways and means by which those decisions were reached.” *Id.* at 419.

As discussed above, the provision of insurance to people of color in urban areas was one of the main reasons that the Ohio General Assembly originally created the Ohio Fair Plan, R.C. 3929.41(A). Since the Ohio General Assembly created the Ohio Fair Plan to increase the availability of homeowners’ insurance in underserved urban areas, the general public needs to be able to hold insurance companies participating in the Ohio Fair Plan accountable to determine whether discrimination is occurring in the provision of homeowners’ insurance to people of color living in historically redlined areas. Therefore, because the information The Fair Housing Center seeks from the Ohio Fair Plan would help to elucidate whether the Ohio Fair Plan is achieving its statutory purpose, the disclosure of this information is in the interest of the general population of Ohio.

C. Disclosure of the information that The Fair Housing Center is seeking from the Ohio Fair Plan may be the only manner in which people of color living in Ohio urban areas can discover if discrimination is occurring in the provision of homeowners’ insurance to them.

The client population served by Amici has an especially vital interest in the disclosure of the information The Fair Housing Center is seeking from the Ohio Fair Plan through the Public Records Act. Obtaining homeowners’ insurance is a critical step in being able to purchase a home. The Sixth Circuit Court of Appeals has recognized that “the availability of property insurance has a direct, immediate affect [sic] on a person’s ability to obtain housing.” *Nationwide Mut. Ins.*, 52 F.3d at 1360. *Accord Lumpkin v. Farmers Group, Inc.*,

W.D.Tenn. No. 05-2868 Ma/V, 2007 WL 6996584, *5 (Apr. 26, 2007) (stating, “Noting that the availability of property insurance has a direct, immediate effect on the ability to obtain housing, the Sixth Circuit has adopted the HUD understanding that insurance underwriting practices are governed by the [Fair Housing Act].”).

Insurance companies base their decisions about whether to insure a prospective homeowner on their underwriting policies. Gilmore, 34 Cath.U.L.Rev. at 576 (stating, “Insurance underwriting is the process by which companies determine whether to accept or reject an application for insurance coverage.”); Dwyer, 7 Fordham Urb.L.J. at 624 (stating that under FAIR plans “[t]he ultimate discretion is left to the insurer to determine whether the risk [of insuring a particular person] meets the ‘reasonable underwriting standards’ criteria”). Accordingly, because insurance companies base their coverage decisions on their underwriting policies, such policies are critical to understanding why such companies insure some people, but not others, as well as the size of the premiums paid by insureds. Stated more plainly, insurance companies’ underwriting policies are key to determining whether insurance companies are engaging in discrimination.

However, insurance companies often are very opaque about the underwriting policies they use to determine to whom they provide homeowners’ insurance and what claims they pay. Flitter, *Black Homeowners Struggle to Get Insurers to Pay Claims*, New York Times (Dec. 29, 2020), available at <http://www.nytimes.com/2020/12/29/business/black-homeowners-insurance-claims.html> (accessed on May 16, 2022) (stating, “Insurers keep a tight lid on their policy sales and claims data. They have long argued that the size and timing of payouts, and the neighborhoods where claims are registered and addressed, are proprietary information, and that sharing that data would hurt their ability to compete.”). This lack of

information about underwriting policies potentially could hide racially discriminatory practices.

Moreover, as discussed above, due to redlining and the discrimination that historically has been present in the provision of homeowners' insurance, many people of color who live in urban areas are relegated to FAIR Plans to insure their home – if they are even able to obtain insurance at all. *See Dunn*, 472 F.Supp. at 1111, quoting U.S. Department of Housing of Urban Development, *Insurance Crisis in Urban America*, at 43 (1978) (finding, “[d]enied access to a voluntary market, many decent risks are treated as second-class consumers who must seek insurance protection under the FAIR plan or in the surplus lines market”). *See also* Gilmore, 34 Cath.U.L.Rev. at 579 (stating, “Denied coverage in the voluntary market for whatever reasons, rejected applicants found themselves paying appreciably higher premiums for less coverage [under FAIR plans].”). Unfortunately, FAIR Plans have historically subjected homeowners to higher premiums, forced them to insure less than the full replacement cost of their home, or made them live without insurance altogether if the FAIR plan rates are higher than they can afford to pay. *See Dunn* at 1111 (noting that those individuals who have to obtain insurance from FAIR plans “pay more for less coverage than their suburban counterparts”), quoting *Insurance Crisis in Urban America* at 43; Gilmore, 34 Cath.U.L.Rev. at 579-80 (stating that some FAIR plan rates “were over three times those of the voluntary market” and that “[e]xperience has shown that those denied voluntary coverage and unable to afford the exorbitant FAIR rates forego insurance coverage altogether”). The requested information might show why some homeowners end up using the Ohio Fair Plan.

Consequently, the lack of availability of reasonably priced homeowners' insurance has helped to stifle the development of housing in Ohio's urban areas. The Ohio Housing Finance

Agency stated in their 2020 Ohio Housing Needs Assessment that “[s]ince 2010 Ohio has added only 89,897 housing units, a net increase of 1.8%. Much of this growth has happened in suburban areas, while Ohio’s urban cores have seen housing stock decline (–1.1%).” Ohio Housing Financing Agency, *Ohio Housing Needs Assessment*, 10 (2020), available at <https://ohiohome.org/news/documents/2020-HNA-ExecutiveSummary.pdf> (accessed May 10, 2022). Without fair access to homeowners’ insurance, the availability of houses to urban residents declines even further. Thus, transparency into the Ohio Fair Plan, one of the entities that ultimately decide whether these residents can purchase a home, is vital to eliminate any illegal biases that may exist.

Nonetheless, due to insurers’ lack of transparency as to their underwriting policies, people seeking to insure a house under a FAIR plan do not know why they must pay higher premiums. Or, if they are rejected for a FAIR plan and, consequently, cannot buy a house, they do not know exactly why the insurer decided to reject their homeowners’ insurance application. As a result, the disclosures sought by The Fair Housing Center through the Ohio Public Records Act may be the only manner that individuals subject to a FAIR plan for homeowners’ insurance can use to evaluate the probity of these decisions by FAIR plan insurers. This information will illuminate whether the Ohio Fair Plan has been providing homeowners’ insurance to people of color living in urban areas in an appropriate manner.

As the Report of the National Advisory Commission on Civil Disorders found, “Communities without insurance are communities without hope.” Report of the National Advisory Commission on Civil Disorders at 305. As a result of this report, the Ohio General Assembly created the Ohio Fair Plan. The Public Records Act request at issue attempts to find whether the Ohio Fair Plan has provided hope to Ohio’s communities. Therefore, this Court

should affirm the lower court's determination that the Ohio Fair Plan must respond to The Fair Housing Center's request.

CONCLUSION

This Court should follow the text of the Public Records Act and the policy behind the creation of Ohio Fair Plan. This Court should affirm the decision of the Tenth District Court of Appeals regarding the disclosure of the requested records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2022, a copy of this Brief was served via email upon the following pursuant to S.Ct.Prac.R. 3.11(C)(1):

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