No. 11-1507

In the Supreme Court of the United States

Township of Mount Holly, *et al.*,
Petitioners,

v.

Mt. Holly Gardens Citizens in Action, Inc., *et al.*,
Respondents.

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

AMICUS CURIAE BRIEF FOR THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a non-profit, professional organization of over 3,500 local government entities, including cities, counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Members of IMLA continually develop and improve blighted areas to ensure the health, safety, and general welfare of their residents. Therefore, IMLA has a strong interest in the Court's resolution of this dispute, namely, whether so-called "disparate impact" claims are tenable under the Fair Housing Act when the allegation is simply that improving a neighborhood with a high crime rate

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[1] Petitioners and Respondents have filed blanket consents to amicus briefs. This brief was not written in whole or in part by counsel for a party. No person or entity other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief. *Amicus curiae* and its counsel were not compensated in any way.

disproportionately affects protected classes. Every one of IMLA's members, and by extension their respective residents, would be adversely affected if "disparate impact" claims may be lodged against a municipality merely because the city seeks to improve or renovate, in a generally-applicable, facially-nondiscriminatory manner, a neighborhood or area for the health and safety of residents.

SUMMARY OF ARGUMENT

By its plain language, and consistent with governing regulations and several court decisions, 42 U.S.C. § 3604 of the Federal Housing Act ("FHA") limits potential liability to persons or entities such as real-estate sellers and landlords whose actions directly deny housing on an improper discriminatory basis. Petitioners were not sued as sellers or landlords, nor in any other capacity in which they could be said to have directly denied dwelling availability. Rather, they are accused of seeking to improve a blighted, high crime area in an effort to protect the health and safety of their residents. In such capacity Petitioners did not deny (directly or otherwise) the provision of housing. In these circumstances Petitioners cannot be a proper target for FHA liability.

Having no control over who will live in the redeveloped area, and certainly not denying housing on a discriminatory basis, a city cannot be liable under the FHA simply for redeveloping an area to promote safe and sanitary housing conditions to protect the welfare of all residents. The Court should, accordingly, reverse the Third Circuit Court of Appeals and confirm that liability under § 3604 of the FHA is sustainable only when a defendant has directly denied a housing opportunity on an unlawful, discriminatory basis.

ARGUMENT

I. The FHA's Plain Language Contemplates Liability Only for Direct Denials of Housing on a Discriminatory Basis.

This case presents a straight-forward matter of statutory construction. Respondents have premised their claims on an alleged violation of the FHA, specifically 42 U.S.C. § 3604(a):

> [I]t 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.

Respondents do not allege that Petitioners violated the FHA with regard to the "sell[ing]" or "rent[ing]" of a dwelling. Therefore, the disposition of this case turns upon the legislative meaning of "otherwise make unavailable or deny."

In giving effect to Congress's words it is axiomatic that federal legislation be read in context and subdivisions be read in harmony with one another. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (confirming that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *see also Graham Cnty. Soil & Water Conservation Dist. v. United States*, 130 S. Ct. 1396, 1404 (2010) (stating

that "[s]tatutory language has meaning only in context"). Accordingly, it is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995) (stating that courts have a "duty to construe statutes, not isolated provisions").

The "context" for construing the FHA is provided by the specificity which Congress employed. Section 3604 prohibits certain discriminatory actions in the "sell[ing]" and "rent[ing]" of housing. In both categories the statute acts to restrict parties directly engaged with and taking action toward would-be buyers or renters of a dwelling. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("The Fair Housing Act itself focuses on prohibited acts."). Thus, the reach of "otherwise make unavailable or deny" is informed by, and must be reflective of, the direct housing actions associated with "sell[ing]" or "rent[ing]" housing. *See Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996) ("Although the 'otherwise make unavailable or deny' phrase seems all-encompassing, its scope is not limitless. It is axiomatic that for an official to make a dwelling unavailable, that official must first have the authority and power to do so. In other words, the

official must be in a position to directly effectuate the alleged discrimination.").[2]

This Court employed an analogous contextual analysis in *Dolan v. United States Postal Serv.*, 546 U.S. 481 (2006). *Dolan* arose when a postal customer sued the Postal Service under the Federal Tort Claims Act ("FTCA") because she suffered injuries from tripping over mail negligently left on her porch by postal employees. *Id.* at 483. As an arm of the United States the Postal Service had generally waived its immunity to suit (28 U.S.C. § 2674), but the lower courts broadly construed a statutory exception to that general waiver that applied to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. § 2680(b). Interpreting the exception's "negligent transmission" language, the district court

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[2] Although the cause of action against the city in *Meadowbriar* survived the dismissal stage, *id.* at 532, the claim asserted was not one of "disparate impact" by way of indirect influence on a seller or landlord (as is alleged by Respondents), but rather one of direct discrimination. *Id.* at 532 n.9 ("In relevant part, Plaintiff's complaint states, inter alia: 'This is a case involving discriminatory housing practices directed at a health care provider of services and facilities.'"). Absent such an allegation of direct discrimination, the claims against the *Meadowbriar* city should have been dismissed for the same reason the claims against its agents were dismissed: the city exerted no direct control rendering a housing opportunity unavailable and therefore the FHA was not implicated.

concluded (and the appellate court affirmed) that an allegation of postal employee negligence in leaving mail on a porch was sufficient to trigger § 2680(b)'s exception to the general waiver, which had the effect of barring the customer's suit. 546 U.S. at 485.

This Court reversed, concluding that the lower courts had read the provision "negligent transmission" too broadly and out of statutory context. *Id.* at 486. Given the applicability of the Court's analysis to the case *sub judice*, the rationale employed warrants extensive quotation:

> If considered in isolation, the phrase "negligent transmission" could embrace a wide range of negligent acts committed by the Postal Service in the course of delivering mail, including creation of slip-and-fall hazards from leaving packets and parcels on the porch of a residence. . . . Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Here, we conclude both context and precedent require a narrower reading . . . . The phrase does not comprehend all negligence occurring in the course of mail delivery.
>
> Starting with context, the words "negligent transmission" in § 2680(b) follow two other terms, "loss" and "miscarriage." Those terms, we think, limit the reach of "transmission." "[A]

> word is known by the company it keeps"-a rule that "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 . . . (1961); see also *Dole v. Steelworkers*, 494 U.S. 26, 36 . . . (1990) ("[W]ords grouped in a list should be given related meaning" (internal quotation marks omitted)). Here, as both parties acknowledge, mail is "lost" if it is destroyed or misplaced and "miscarried" if it goes to the wrong address. Since both those terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if "negligent transmission" swept far more broadly to include injuries like those alleged here . . . .

Id. at 486-87. Accordingly, the Court construed the statute in context as appropriately limiting those circumstances in which the general "negligent transmission" language could be brought to bear.

Dolan's interpretive rationale is squarely applicable to the narrow question in this case. There is no evidence in the statutory text or elsewhere that Congress drafted § 3604 of the FHA to impose liability upon every possible person or entity whose actions theoretically could have some indirect impact upon a housing-related transaction. Had that been the goal, Congress would not have employed the very specific and direct actions of selling or renting a

dwelling as the touchstone of FHA liability. Instead, the FHA's specific reference to prohibited selling and renting practices necessarily informs the meaning of the more general "otherwise makes unavailable or deny." *See, e.g.*, *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1357 (6th Cir. 1995) (discussing "'ejusdem generis,' which states that where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words"). Properly so construed, "otherwise makes unavailable or deny" refers to an action, such as refusing to sell or rent, which actually and directly makes housing unavailable on a discriminatory basis.

To endorse the contextually-detached interpretation of § 3604 employed below would give the FHA an "unintended breadth." *See Dolan*, 546 U.S. at 486. Without the limitation made apparent through Congress's direct and specific words, a plaintiff could assert an FHA claim on nothing more than an attenuated theory that some city action—indisputably removed from the actual decision and action to make a dwelling available—had some upstream influence on a party in control of selling, renting, or otherwise making housing available. The FHA's plain terms do not support such an unbridled scope of federal power, and thus the Court should clarify that when read in proper context claims like those of Respondents will not be sustained.

Moreover, other courts' FHA interpretations also support this plain-meaning, common-sense limitation to the scope of "otherwise make unavailable or deny." Several different courts have construed the statute in context to limit its scope to

police conduct which directly renders housing unavailable. *See, e.g.*, *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 799 F. Supp. 695, 711 (E.D. Mich. 1992) (recognizing that the scope of "otherwise make unavailable or deny" is "not limitless" but rather "limited to those individuals who are in a position to make a dwelling unavailable"); *Burrell*, 815 F.2d at 1130-31 (concluding that city's failure to timely process rent subsidies "did not directly affect the availability of housing to minorities"); *Devereux Found., Inc. v. O'Donnell*, No. 89-6134, 1990 WL 2796, at *6 (E.D. Pa. Jan. 12, 1990) ("Even the most expansive interpretations of the Fair Housing Act 'do not extend coverage beyond entities that directly provide housing or those that are integrally involved in the sale or financing of real estate.'") (quoting *Steptoe v. Beverly Area Planning Ass'n*, 674 F. Supp. 1313, 1320 (N.D. Ill. 1987)); *see also Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 345 (6th Cir. 1994) (recognizing that the "entire language" of the FHA "was designed to target those who owned or disposed of property, and those who, in practical effect, assisted in those transactions of ownership and disposition").

Thus, as other courts have implicitly recognized, Petitioners' actions here—redeveloping a blighted area for the safety and welfare of its residents—is simply too attenuated to the statute's aim to trigger FHA liability. *See, e.g.*, *Bloch v. Frischholz*, 587 F.3d 771, 777 (7th Cir. 2009) (stating that "otherwise makes unavailable or deny" refers to actions "which directly affect the availability of housing to minorities"); *Burrell*, 815 F.2d at 1131 ("[W]e refuse to conclude that every action which produces discriminatory effects is illegal. Such a per

se rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases.") (internal quotation marks omitted) (citation omitted); *Babin*, 18 F.3d at 345 (noting that a broad interpretation of the FHA would render "any action that results in the unavailability of housing for protected classes . . . actionable, no matter how attenuated," which would be a "huge and unwarranted expansion of the [FHA], with no hint of any congressional authority"). In light of the FHA's plain terms this Court should confirm the properly-limited scope of "otherwise makes unavailable or deny" to preclude liability on Respondents' allegations that the Township of Mount Holly has planned redevelopment to improve a blighted area and to protect the health and safety of its residents.

II. Endorsing Respondents' Claims Would Defeat the FHA's Purpose.

Finally, condoning the claims against Petitioners would defeat the FHA's purpose of ensuring a level playing field in the provision of safe and reliable housing to all classes. *See* 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."). In the time leading to the passage of the FHA, residential segregation had created "urban crises" in which minorities were forced to live in deteriorating, overcrowded, and inferior housing. *See To Prescribe Penalties for Certain Acts of Violence or Intimidation: Hearings on H. Res. 1100 Before the H. Comm. on Rules*, Pt. I, 90th Cong. 4 (1968) (hereinafter "*Hearings*") (statement of Rep. Emanuel Celler, Chairman of H. Comm. on the Judiciary). These

urban ghettoes were not only rampant with crime, disease, and high infant mortality, but created larger, cyclical problems:

> Segregated housing isolates racial minorities from the public life of the community. It means inferior public education, recreation, health, sanitation, and transportation services and facilities, and often means denial of access to training and employment and business opportunities. Too often it prevents the ghetto inhabitants of liberating themselves. . . . The subjective dimensions . . . include resentment, hostility, despair, apathy, and self-depreciation.

Id. at 4, 8; *see Relative to Racial Discrimination in Housing, Education, Voting Etc., and Recommendations for Legislation: Before the House of Representatives*, 90th Cong. 2884-85 (1967) (Civil Rights Message from the President of the United States) (hereinafter "*Civil Rights Message*"). Moreover, Congress acknowledged that previous attempts to solve these on-going problems—including the National Housing Act of 1949, state and local laws, executive orders, and actions of private volunteer groups—had fallen short. *See Hearings*, at 4.

Congress adopted the FHA in large part to correct these previous shortcomings, and give real and lasting effect to the National Housing Act's promise of "a decent home and a suitable living environment for every American family." *Id.* at 8; *see Civil Rights Message*, at 2884-85 (stating that federal

housing legislation is necessary to address deteriorating and overcrowded housing in segregated urban communities); Robert M. Downing, Cong. Research Serv., Civil Rights Legislation in the 90th Congress LRS 30 (1969) (same). In creating federal legislation, Congress purposefully sought to impose fair housing standards "to everyone in the housing business" and thereby "free [all] individuals in the business to deal fairly with those seeking housing." Downing, at LRS 31. Accordingly, there is an inherent purpose in the FHA to impose a fair housing standard that—applied across the entire nation—will effectively create "[a] decent home and a suitable living environment" for all and, conversely, no longer subject minorities to a lesser standard of habitability. *See Civil Rights Message*, at 2884-85 (stating that the FHA is "not directed simply at relieving the problems of any particular minority group, [but seeks to] relieve conditions found in their most acute form in the urban ghetto").

The foregoing is exactly what Respondents are attempting to create for all of its residents. Thus, to allow the claims against Respondents for the "offense" of revitalizing a blighted area in a facially-nondiscriminatory manner would circumvent one of the primary goals of the FHA. Amicus respectfully submit that such cannot be a rational construction of this Nation's anti-discrimination laws.

CONCLUSION

Congress specified the FHA to reach those persons and entities refusing to "sell" or "rent" or "otherwise make unavailable or deny" housing on a discriminatory basis. Read in context, the term "otherwise make unavailable or deny" must refer to

those actions which—like refusals to sell or rent—directly deny housing opportunities for discriminatory purposes. Such a construction supports the purpose of the FHA and is the only result that makes legislative sense. For these reasons, the decision of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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