National Association of Residential Property Managers

May 23, 2008

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By: U.S. Postal Service regular mail

Re: U.S. Supreme Court 07-1373 Amicus Brief in Support of the Petition for Writ of Certiorari
Glenmont Hills Associates Privacy World at Glenmont Metro Center v. Montgomery County, Maryland

Dear Mr. Lattner,

As the Government Affairs Co-Chair 's of the National Association of Residential Property Managers (NARPM) and pursuant to Supreme Court Rule 37, please find this letter as notification that NARPM intends to file an *amicus curiae* brief in support of the petition for writ of certiorari. As delineated under the Rule, we are seeking your consent to such filing. Please notify us in writing as soon as possible as to whether the County will be consenting to our amicus filing. We can be reached at the contact information on this letterhead.

Thank you for your time and consideration.

Steven Stein John Parker

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

GLENMONT HILLS ASSOCIATES
PRIVACY WORLD AT GLENMONT METRO CENTER,
Petitioner,

v.

MONTGOMERY COUNTY, MARYLAND,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The United States

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF *CERTIORARI*

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June 2, 2008

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INTEREST OF *AMICUS CURIAE*[1]

Founded in October 1998, the National Association of Residential Property Managers ("NARPM" or the "Association") is a trade association of real estate professionals who oversee and manage mostly small non-owner occupied rental properties.[2] With 2,300 members, NARPM serves the residential property management industry. NARPM is the premier professional association for residential property managers; these include real estate agents, brokers, managers and their employees. The NARPM Code of Ethics mandates that members strive to promote, support, and comply with applicable Federal, State, and local fair housing laws.[3] Thus, within the organization, NARPM has expressed a strong

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1 Petitioners have consented to the filing of this brief. Respondents have withheld consent to file this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

2 Indeed, many NARPM members or their management clients (hereafter collective referred to as "NARPM members") manage properties with fewer than five units. A substantial number of NARPM members manage single-family dwellings.

3 The NARPM Code of Ethics outlines the high level of ethics to which members must adhere. Source: http://wwww.narpm.org/about/code-of-ethics.html (last visited May 30, 2008).

commitment to ensuring that property managers and landlords provide quality rental property to the public. An ethics complaint link, available to the public on the NARPM website, further demonstrates the depth of NARPM's commitment to promoting the highest ethical standards among its members. The Association also advocates for the interests of its members in setting public policy, including tax laws, other relevant legislation, legal document requirements, accounting practices, insurance, building codes, zoning, and utilities.[4]

NARPM recognizes that prospective tenants should be treated equally and without discrimination; the Association's internal controls demonstrate this commitment. However, NARPM is at the same time particularly concerned that compelling small property owners to comply with the extensive requirements of the Federal Housing Choice Vouchers Program ("HCVP") would require strict compliance with a number of federal laws. This is an undertaking that a substantial number of NARPM members have chosen to forego for a number of legitimate reasons. Thus, while NARPM is committed to non-discriminatory rental practices, its members believe that no state or locality should, through the artifice of anti-discrimination legislation, force its members to participate in a purely voluntary federal program that is unsuitable for most small landlords.

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[4] Source: http://www.narpm.org/about/index.html (last visited May 28, 2008).

SUMMARY OF ARGUMENT

1. A local government cannot, through the enactment of a law prohibiting discrimination against prospective tenants based upon "source of income," compel landlords to participate in the purely voluntary Federal Housing Choice Vouchers Program ("HCVP") without running afoul of the stated public policy and statutory purpose of the federal law.

2. The Maryland Court of Appeals' characterization of the mandatory requirement that landlords participate in a purely voluntary federal program as neither "amending, or conflicting with federal law in any material sense," was fundamentally flawed, thereby compelling review by this Court in order to determine whether the local ordinance is in direct conflict with the federal law and thus preempted.

3. By compelling landlords to participate in a purely voluntary federal program, the Montgomery County government has engaged in an unconstitutional "taking" as defined by the Fifth and Fourteenth Amendments; the statute eliminates landlords' freedom to rent their property free of the federal regulations and requirements outlined in the Housing Choice Voucher Program.

4. The Montgomery County "source of income" anti-discrimination legislation, versions of which have been replicated in other states and localities, will contract the amount of available, affordable housing to low income tenants to Montgomery County residents; this conflicts directly with the stated purpose of federal housing laws.

OPINION BELOW

On November 30, 2007, the Maryland Court of Appeals issued an opinion in this matter, reversing a decision of the Circuit Court for Montgomery County, Maryland. The Circuit Court previously held that HCVP vouchers[5] could not be regarded as a "source of income" under the County's housing discrimination law.[6] The Court of Appeals' decision is officially reported at 402 Md. 250, 936 A.2d 325, and reproduced in the Appendix to Petitioner Glenmont Hills Associates Privacy World at Glenmont Metro

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5 "HCVP" vouchers refers to a provision of the federal Housing and Community Development Act of 1974 (P.L. 93-383), 42 U.S.C. §§ 1437 *et seq.* (LexisNexis 2008), which provides a means for low income families to obtain rent subsidies from the federal government without being required to live in public housing projects. Essentially, a landlord who voluntarily chooses to participate in this program accepts rent from two (2) sources: the tenant and the federal government, through local public housing authorities ("PHAs"), which makes up the difference between what the tenant can afford (pursuant to a schedule adopted by the U.S. Department of Housing and Urban Development, or "HUD") and the rent charged for the unit in question. The manner in which the voucher system provided under HCVP operates is accurately described in the Department of Housing & Urban Development's *Housing Choice Voucher Program Guidebook*, which may be found at: http://www.hud.gov/offices/pih/programs/hcv/forms/guidebook.cfm (hereinafter, "HUD VOUCHER PROGRAM GUIDEBOOK") (last visited May 28, 2008).

6 Montgomery County (Maryland) Code, Chapter 27, Article I, Section 27-12, which is reprinted in relevant part at Appendix G, page 228a of the Petitioner's Petition for Writ of *Certiorari*.

Center's ("Petitioner" or "Glenmont") Petition for Writ of *Certiorari* ("Writ") at App. A, pp. 12a – 46a.

ARGUMENT

I.

In its opinion, the Court of Appeals of Maryland correctly identified that there are three types of federal preemption: 1) express, 2) preemption by occupation, and 3) preemption by direct conflict. 402 Md. at 267. Federal law also supports the notion of preemption by direct conflict.[7] *Geier v. American Honda Motor Co., Inc.,* 529 U.S. 861, 884-85, 120 S.Ct. 1913, 1927 (2000) (". . .[C]onflict preemption is different in that it turns on the identification of 'actual conflict,' and not on an express statement of pre-emptive intent . . . While pre-emption fundamentally is a question of congressional intent, [the Supreme Court] traditionally distinguishes between express and implied pre-emptive intent, and treats conflict pre-emption as an instance of the latter"). Although Congress did not include specific preemption language in the federal housing statute that it enacted,[8] its policy declaration (codified as 42

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[7] Although the Maryland Court of Appeals uses the words "direct conflict" and the U.S. Supreme Court uses the terminology "actual conflict," they are substantially synonymous, and are treated as such in this brief.

[8] The *Geier* Court also made clear that an agency's failure to clearly express its intent to fully regulate a particular area is not damaging to its preemption claim. 529 U.S. at 884 ("The failure of the Federal Register to address pre-emption explicitly is thus not determinative.") This also demonstrates that even in the absence of a specific pre-emption provision in the federal law a state statute that

U.S.C. § 1437) and its low income housing statute (codified as 42 U.S.C. § 1437f) illustrate a specific Congressional intent to encourage voluntary participation in the housing program by private citizens.[9] The Montgomery County housing discrimination statute, which mandates compulsory participation in the federal program, creates a direct conflict with the stated Congressional intent. Pursuant to the doctrine of implied preemption, the Montgomery County source of income provision (as it applies to HCVP vouchers) is invalid.

The direct conflict in this case derives from the landlords' statutorily-derived duty to participate in a federally-voluntary program. The fact that the federal statute states that landlord participation is voluntary (*see* 42 U.S.C. § 1437f(d)(1)(A)), and that the local statute makes participation compulsory, creates this direct conflict. The local mandate is

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conflicts with the stated purpose of the federal law may be preempted by that federal law.

[9] 42 U.S.C. § 1437(a) discusses, almost entirely, the responsibilities of the federal, state, and local governments in housing underprivileged citizens. The only reference in the statute to private landowners is found in 42 U.S.C. § 1437 (a)(4), where it states that "our Nation should promote the goal of providing decent and affordable hosing for all citizens through the efforts and *encouragement* of Federal, State, and local governments, *and* by the independent and collective actions of private citizens, organizations, and the private sector." (Emphasis added.) The use of the conjunctive word *and*, to include private citizens, organizations, and others in the private sector, makes clear that the purpose of the low income housing statute's responsibilities lie primarily with state governments, and not private landowners. Montgomery County's mandate that private landowners participate in this program is thus plainly violative of this statutory mandate.

contradictory to the express public policy defined in the federal statute, and thus is in direct conflict with the federal statute.

Where a state or local statute is in direct conflict with a federal statute, the local statute is impliedly preempted by the federal statute. *See Geier*, *supra*. The doctrine of "implied preemption" has the same effect on the local statute as does express preemption; it invalidates the local statute. The local statute at bar here, because its text and implementation fly in the face of the expressed federal policy declaration, must be invalidated according to the doctrine of implied preemption.

In its November 30, 2007 opinion, the Maryland Court of Appeals' asserted that "there is nothing in any of the relevant Federal statutes even to indicate, much less establish, that voluntary participation by landlords was an important Congressional objective." 402 Md. at 269. However, Congress' policy statement found at 42 U.S.C. § 1437(a), makes quite clear that Congress intended for private landowners to voluntarily *supplement* the Federal and state government programs, not be compelled to participate in them. The Court's assertion that there is no established law that expresses Congress' intent to make participation voluntary therefore is not accurate. *Amicus* posits that the Court's holding on preemption (which was entirely based on the belief that there was no legislative intent to make the HCVP program voluntary) was thus fundamentally flawed, and is now ripe for consideration by this Court.

The heretofore purely voluntary participation of landlords in the HCVP program obligates them, as a condition of participation, to a myriad of

bureaucratic, recordkeeping, and substantive obligations. These include: (a) limitations (both in point of time and substantively) on the ability of landlords to terminate a tenancy for nonpayment of rent; (b) the landlords' ability to allow HCVP participants to engage in profit-making activity on the premises (even though non-HCVP participants may be restricted from doing so); (c) mandating that landlords use a standard federally-approved Housing Assistance Program ("HAP") contract which the landlord may not modify;[10] (d) granting authority to the public housing authority to terminate assistance to a tenant, thereby effectively terminating the lease without advance notice to the landlord; (e) mandating that landlords satisfy federally administered and enforced HUD quality standards, permitting frequent inspections by the public housing authority (and mandating such inspections annually);[11] (f) a requirement that landlords prove that they have not charged rents for HCVP units at a different rate than comparable units that are not subject to HCVP tenancy agreements; (g) a requirement that HCVP-covered units be accessible to the disabled, which could require thousands of dollars in repairs and upgrades to existing facilities; and, most notably (h) a mandated limitation on a landlord's right to raise

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[10] The Housing Assistance Program form contract, an eleven-page document that derives authority from 24 C.F.R. Part 982, must be used for HCVP participants, and may not be modified. Housing Assistance Program Contract, Part B, Section 2 (App. K, pp. 278a-296a of the Writ).

[11] The HUD inspection guidelines are found at 24 C.F.R. § 982.401, which is attached as App. G, pp. 214a-224a of the Writ.

rents based upon a determination of "reasonableness" by the public housing agency. 402 Md. at 276, 936 A.2d at 340; *see also* HUD VOUCHER PROGRAM GUIDEBOOK, n.2 *supra*.[12] Additionally, landlords are granted only nominal notice of the PHA's intent to change payment benefits to an HCVP recipient. This significantly impacts tenants' ability to pay future rents, and compromises landlords' ability to rely on full, timely rental payments each month.

By compelling Montgomery County, Maryland landlords to accept HCVP participants who present vouchers under the HCVP program (through the risk of being deemed liable for housing discrimination based upon "source of income") the Montgomery County government has made mandatory that which Congress intended to remain purely voluntary. This practice has been adopted in no fewer than at least twelve other states and eighteen other localities, and risks spreading to even more jurisdictions if this Court does not definitively put a halt to it.[13]

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[12] At least one court determined, in dicta, that "it seems questionable . . . to allow a state to make a voluntary federal program mandatory." *Knapp v. Eagle Property Management Corp.,* 54 F.3d. 1272, 1282 (7th Cir. 1995). In *Knapp*, the Seventh Circuit discussed federal preemption in the context of HCVP vouchers, much like the statute at issue here.

[13] California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, North Dakota, Oklahoma, Oregon, Utah, Vermont and Massachusetts have all adopted similar statutes. Additionally the cities of Costa Matera, California, East Palo Alto, California, Los Angeles, California, San Francisco, California, Washington, D.C., Chicago, Illinois, Naperville, Illinois, Urbana, Illinois, Philadelphia, Pennsylvania, Grand Rapids, Michigan, Kentwood, Michigan, Minneapolis, Minnesota, St. Paul, Minnesota, St. Louis, Missouri, Hamburg, New York, and Seattle

Congress simply did not intend this purely voluntary program to be mandated by a patchwork of state and local government legislation, either by characterizing it as an "anti-discrimination" law or otherwise. That the federal HCVP program is wholly voluntary, subjecting only those landlords willing to opt into its regulatory provisions to its terms, is fully demonstrative of Congress' intent to encourage, but not force, landlords to expand the stock of housing units available to low income families. Because Congress did not intend for the HCVP to be mandatory, Montgomery County's attempt to mandate landlord compliance with the HCVP is preempted by federal law, thus constituting this local law violative of the Supremacy Clause of the U.S. Constitution. Art. I, Cl. 2.

In practice, if this Court allowed the lower Court's decision to stand, landlords will be encouraged to raise rents prior to occupancy for the sole purpose of avoiding participation in the HCVP program.[14] This would make housing even less

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Washington have adopted similar legislation. Finally, two counties (Howard County, Maryland and King County, Washington) have enacted similar legislation. Brief of *Amici Curiae* Maryland Disability Law Center, *et al.* to Maryland Court of Appeals, at 28 n. 52. That so many state and local jurisdictions have crafted such legislation makes this case ripe for judicial review, in order to avoid further patchwork local legislation that conflicts with the already-established federal statutes and accompanying regulations.

[14] Prior to occupancy, the landlord and tenant negotiate the possible rent. 24 C.F.R. § 982.506. After negotiation, the PHA determines whether the agreed-upon rent is reasonable. 24 C.F.R. § 982.507(a)(1). If the PHA determines that the proposed rent is reasonable, then the tenant and PHA execute a lease. 24 C.F.R. § 982.507(a)(1). After executing the lease, the PHA may, at the discretion of

affordable for more families who would otherwise live in rental units that are not subject to by the Housing Choice Voucher Program.[15] Additionally, by mandating HCVP participation, landlords lose their right to determine who will occupy their rental property. Under the federal law, landlords are ostensibly permitted to choose whether to lease to a particular HCVP participant. 42 U.S.C. § 1437. There are many legitimate reasons why a landlord may choose not to rent to a particular tenant that have nothing to do with source of income; as the property owner, the landlord has a right to establish qualification guidelines that comply with current fair housing laws in determining who may occupy his property. However, the Montgomery County statute blurs this line and effectively invalidates this property right. Montgomery County landlords who

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HUD, perform periodic "rent audits" to determine whether the rent is reasonable. 24 C.F.R. 982.507(a)(2). Thus, after occupancy, HUD (acting through the PHA) can unilaterally change the definition of reasonable rent, further reducing a landlord's financial return. Landlords who voluntarily subject themselves to these standards are willing to accept this risk. Mandating that landlords subject themselves to this risk (and shoulder the burden of all low-income housing in Montgomery County) was not the result that Congress sought to create.

15 The Maryland Court of Appeals acknowledged this perverse result of compelling landlords to participate in a voluntary federal program when it observed that "a landlord is free to set the rent for its apartments high enough to make the apartment unavailable to HCVP participants tenants because of the HCVP income and reasonable rent limitations." 402 Md. at 266, 936 A.2d at 334, n.7. Surely, this was not the intention either of Congress or even the Montgomery County Council when it enacted its ill-advised legislation.

reject program participants will find themselves defending anti-discrimination suits. So the "choice" is truly a Hobson's Choice for landlords; either accept HCVP participants as tenants or risk costly civil rights litigation. Small landlords in Montgomery County, stripped of the right to choose tenants based on legitimate criteria, will be forced to allow possible HCVP participants to occupy their property at the behest of the Montgomery County PHA with the imposition of non-negotiable, burdensome, and costly HCVP contract compliance requirements. This unofficial secondary mandate is an unfortunate side effect of the original Montgomery County mandate to accept HCVP program participants as tenants, and will certainly discourage private landowners from renting property at all.

II.

The lower Court's insistence that landlords in Montgomery County run afoul of its anti-discrimination law by refusing to participate in the voluntary HCVP program creates a restriction on the use of real property to unwilling landlords that effectively amounts to a regulatory "taking" without due process, violative of the Fifth and Fourteenth Amendments of the United States Constitution. Without conducting any analysis, the Court below concluded that the State's regulation of property via the Montgomery law was a "reasonable" exercise of its police power.[16] Yet dictating landlords' selection of

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[16] In *Davis v. Department of Revenue of Kentucky*, ___ S.Ct. ___, 2008 WL 2078187 (2008), which was just decided by this Court on May 19, 2008, Justice Kennedy in dissent observed that the concept of a state's "police power" was

tenants by forcing them to accept individuals and families who, by virtue of their participation in the Housing Choice Voucher Program requires landlords to undertake a host of obligations and restrictions which they would otherwise chose to forego – and which will undoubtedly increase their cost of maintaining rental units by virtue of compliance with, *inter alia*, detailed "quality standards" (*see* Appendix A, pages 214a – 227a of the Writ of *Certiorari*) – effectively reduces the owners' constitutional property rights. Additionally, a landlord risks significant exposure to civil rights litigation when multiple applicants apply for a single residence, and one of those applicants is an HCVP participant.

Such unwanted restrictions and maintenance obligations forced upon unwilling landlords constitute regulatory takings, and thus violate the "Takings Clause" of the Fifth Amendment. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646 (1978) (holding that regulatory takings are tantamount to an exercise of eminent domain, and thus subject to due process requirements guaranteed by the Fifth Amendment).

"long abandoned as a mere tautology . . . the Court ha[s] ceased to view the concept as saying anything instructive. A law may contravene a provision of the Constitution even if enacted for a beneficial purpose." *Id.* at *21 (Kennedy, J., dissenting). Justice Souter's majority opinion in *Davis* continues to recognize the State's right to exercise such powers, but insisted that in doing so, it ought to be "supporting a traditional public function." *Id.*, at * 7, n.9. *Amicus* in this case cannot discern what "traditional public function" has been served by a local law that would force its members to participate in a voluntary federal housing voucher program.

The Fifth Amendment Takings Clause provides that private property shall not be taken for public use without just compensation. U.S. Const., Amend. 5; *see also Lingle v. Chevron U.S.A., Inc.,* 544 U.S. at 536. Impermissible "takings" may include a government's direct appropriation of private property for governmental use, *Id.* at 537, *citing United States v. Pewee Coal Co.,* 341 U.S. 114, 71 S.Ct. 670 (1951), or governmental regulation of private property "that is so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle,* 544 U.S. at 537; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158 (1922) ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") By compelling landlords to participate in the federally-voluntary HCVP housing assistance program, the regulation at issue in this case imposes onerous regulations upon landlords. *Amicus* submits that burden to those landlords' property rights constitutes a regulatory taking, and that the Montgomery County Code provision is unconstitutional even in light of the fact that the landlord receives a limited monetary benefit from the government by virtue of such participation.[17]

Montgomery County Code Chapter 27, Article I, Section 27-12 provides, in relevant part:

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[17] Allowances to HCVP participants area subject to federal budget considerations. 42 U.S.C. §1439(d); *see also* 24 C.F.R §982.l01. Thus, HCVP payments to landlords are only available to the extent that federal funding permits. When federal funding evaporates in a local Market, the local PHA may unilaterally terminate the lease. 24 C.F.R. § 982.454. When this happens, landlords lose significant income that they would have earned if not compelled to rent a HCVP participant, and landlords have no recourse whatsoever.

> (a) A person must not, because of . . . source of income . . .
>
> (1) Refuse, or refuse to negotiate, to sell, broker, appraise, lease, sublease, rent, assign, or otherwise transfer the title, leasehold, or other interest in any housing;
> (2) Represent that housing is not available for inspection, sale, lease, sublease, rental, assignment, or other transfer when it is available;
> (3) Otherwise deny or withhold any housing from any person;
> (4) Include in the terms, conditions, or privileges of any sale, lease, sublease, rental, assignment, or other transfer or any housing, any clause, condition, or restriction discriminating against any person in the use or occupancy of that housing;
> (5) Discriminate in the furnishing of any facilities, repairs, improvements, or services, or in the terms, conditions, privileges, or tenure of occupancy of any person . . . (App. G, p. 228a, of the Writ.)

The Montgomery County Code ("MCC") further defines a "source of income" in § 27-6 as "any lawful source of money, paid directly or indirectly to a renter or buyer of housing, including income from . . . any government or private assistance, grant, or loan program." MCC § 27-6. Taking these two definitions as a whole, the Maryland Court of Appeals held that

"source of income" under the Montgomery County Code includes HCVP vouchers. MCC ch. 27 § 6, 12; *see also Montgomery County v. Glenmont Hills Associates Privacy World at Glenmont Metro Centre*, 402 Md. 250, 261 (2007). The primary factors for determining whether a government agency's action constitutes a "taking" under the Fifth Amendment are: 1) the economic impact on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations, and 3) the character of the governmental action. *Lingle*, 544 U.S. at 538-39. The ordinance at issue here fails all three elements of this test, and must therefore be held violative of the Fifth Amendment's Takings Clause.

Montgomery County's requirement is characteristic of a taking under the Fifth Amendment. As a condition of accepting HCVP tenancies, landlords must endure property inspections. 24 C.F.R. § 982.305. The requirements, outlined in 24 C.F.R. § 982.401, include comprehensive housing quality standards ("HQS") that a landlord must meet prior to a tenant's occupancy and upon each annual lease extension.[18]

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[18] The housing quality standards inspection requires inspection of the following elements of the proposed dwelling: 1) sanitary facilities, 2) food preparation and refuse disposal, 3) space and security, 4) thermal environment, 5) illumination and electricity, 6) structure and materials, 7) interior air quality, 8) water supply, 9) lead-based paint, 10) access, 11) site and neighborhood, 12) sanitary condition, and 13) smoke detectors. The Department of Housing and Urban Development ("HUD"), which is responsible for implementing the inspections, has the authority to grant certain limited variations, due to local housing codes, other codes adopted by the PHA, or local climatic or geographic conditions. 24 C.F.R. §

In practice, initial property inspections take several weeks (if not months) to complete under the current (voluntary) system.[19] Montgomery County's wish to make all landlords comply with the voluntary federal housing choice voucher program will succeed only in delaying the availability date of rental properties in the county. This will have a diametrically different impact on both landlords and tenants than the federal law ever imagined. This is but one example of how the local statute conflicts with the stated legislative intent in 42 U.S.C. § 1437.

Landlords' property rights are significantly affected by the MCC. Landlords must endure inspections, accept HCVP participants as tenants, and (during the tenancy) run the risk of the PHA losing the funding necessary to support the program (and thus immediately terminating the lease). In

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982.401(a)(4)(ii). However, these variations may only be approved by HUD if they meet or exceed performance requirements, or if those variations "significantly expand affordable housing opportunities for families assisted under the program." 24 C.F.R. § 982.401(a)(4)(iii). In short, the variations available to landlords (granting leniency with respect to the occupancy requirements outlined in 24 C.F.R. § 982.401) are not widely available, and most landlords will be required to comply with the inspection requirements outlined in the regulation.

19 Where a landlord fails an initial inspection, that landlord must make necessary improvements and await a return visit from a Montgomery County housing official prior to offering the property for rent. This is an additional administrative hoop through which landlords must jump in order to comply with the Montgomery County requirements. If landlords were not required to endure this additional administrative hoop, landlords of smaller properties could freely rent to the tenants of their choice without risk of running afoul of a voluntary federal law.

total, landlords' property rights are substantially diminished by this compulsory program, without a guarantee of just compensation (and a reduced profit margin, brought on by the landlord's increased maintenance costs). This, by its very nature, constitutes a Fifth Amendment taking.

By making participation in the HCVP mandatory, the County also makes mandatory the federal qualifying requirements for all landlords (even those who previously chose not to participate in the program). The heightened tenancy requirement and the "reasonable rent" requirement will diminish the profit margin available to Montgomery County landlords. The economic impact of this statutory requirement on landlords in Montgomery County, combined with the diminished right to discern proper use and occupancy of their rental property, is sufficiently onerous to constitute an unconstitutional regulatory taking under the Fifth Amendment. The character of the governmental action (using private property for public use without guaranteeing just compensation for the inconvenience) is by definition, a taking. Montgomery County's legislation thus fails all three aspects of the *Lingle* test and it must be overturned.

Montgomery County – in the name of providing affordable housing to all – has succeeded only in making that same housing *less* available and *less* affordable. Landlords, forced to make substantial structural changes to their property, will be forced to finance those changes with higher rental rates. The federal government and the local PHA, who will pay the majority of the increased rental rate, will be forced to dig deeper into already strained public housing funds in order to pay the increased rental

rates.[20] Tenants all over Montgomery County – still responsible for 30% to 40% of the rental rate – will also suffer increases in their rent. The Montgomery County plan, thus, will not only not serve its ostensibly noble goal, it will certainly counteract it, causing rental rates to skyrocket in Montgomery County and likely causing widespread flight to outlying counties, both for landlords and tenants. This likely end certainly makes clear *why* Congress stated specifically that participation in the Housing Choice Voucher Program was entirely voluntary for landlords; those landlords are uniquely able to assess whether their participation in the program is worth the associated requirements. Montgomery County's nonsensical mandate will not serve this intended Congressional goal.

III.

NARPM's members will be dramatically impacted if MCC § 27-6 stands. Landlords, many of whom own buildings with only a few units, will be forced to spend more money on repairs, remodeling, and maintenance (both before and during occupancy) in order to keep their HUD certification. This will result in inflated rent prices in Montgomery County. Landlords may not choose their tenants; those landlords who choose not to rent to particular HCVP tenants will have to fight the presumption that decisions to reject HCVP participants are

[20] Alternatively, government agencies will be forced to spend their already-limited funds much more quickly, thus causing more unilateral terminations of rental agreements with private landowners.

discriminatory and violative of the Montgomery County law. Families trying to earn additional income by renting their surplus property will lack the incentive to do so; this statute could spur a widespread attempt to sell rental property in Montgomery County. Small landlords will do whatever is necessary to avoid the Hobson's Choice provided to them by the County Code.

Unfortunately, those who wish to remain landlords (and many who already provide low-income housing) will be required by law to update and maintain their rental facilities according to guidelines found in the Code of Federal Regulations or suffer the consequences of losing the ability to rent the property altogether. If a landlord does not have two working outlets in a given room, then that landlord may not rent the property. If a landlord does not have sufficient counter space (as adjudged by a Montgomery County inspector), that landlord may not rent the property. If the property is not "reasonably free from disturbing noises" (as adjudged by a Montgomery County inspector, even if the property is located in a neighborhood surrounded by other inhabitants), then the landlord may not rent the property. If the streets surrounding the property have "excessive vehicular traffic," (as adjudged by a Montgomery County inspector), then the landlord may not rent the property. If the property does not have a window in the living room, then the landlord may not rent the property.[21] Any of these criteria could easily make a HCVP participating property

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[21] This is but a small sampling of the inspection requirements found in 24 C.F.R § 982.401.

untenable and unaffordable to own and to manage. Surely, there are properties in Montgomery County that will not meet these exacting requirements, and it is even more likely that properties owned by small landlords will fall short of the strictures prescribed for participants in the HCVP program.

The Court is well aware of the growing housing crisis marked by an alarming rise in the number of home foreclosures occurring in every part of the country.[22] As cash-strapped homeowners seek to keep their homes, many have turned to renting them to others. The decision of the Maryland Court of Appeals in this case will only exacerbate this problem by removing from the potential rental market hundreds (if not thousands) of private homes whose owners could no longer quickly turn to the rental market to generate the cash needed to fend off foreclosure of their homes. Instead, potential landlords of single family dwellings would have to first undergo the cumbersome pre-rental and lease renewal inspection and repair process prescribed by HUD regulations for HCVP-approved housing, a process that could take weeks or even months during which time their home mortgage debt would remain unpaid, thereby furthering the likelihood that their home would fall into foreclosure and fuel property devaluations for the neighboring properties as well.

Many NARPM members provide housing for tenants who might not otherwise be able to afford to live in Montgomery County. NARPM members –

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[22] *See, e.g., "Renters Can't Escape Housing Foreclosure Crisis,"* found at http://www.usatoday.com/money/economy/housing/2008-4-21-rent-rising-eviction_N.htm (last visited May 29, 2008).

many of whom manage single family rental properties – will not be able to do that job effectively, given the nature of the Montgomery County Code. Landlords with an altruistic intent will have that intent squashed under a myriad of bureaucratic rules and regulations. The MCC, drafted in an effort to help provide low income housing to those who most need it, will have an opposite effect, as it was certainly *not* Congress' intent to create arbitrary rent inflation in rental markets across the nation. In an effort to sustain Congress' promise to provide affordable housing to the downtrodden, *amicus* presents this impassioned appeal to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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