IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ORAL HEARING REQUESTED

ROBERT F. LAUFMAN, et al,

Plaintiffs : Civil Action No. C 1 74-1[illegible]

vs.

OAKLEY BUILDING AND LOAN COMPANY, et al,

Defendants : DEFENDANTS' BRIEF IN REPLY TO PLAINTIFFS' AND AMICUS CURIAE MEMORANDA CONTRA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This reply memorandum is addressed to all memoranda contra defendants' motion for summary judgment now before this Court.

The main thrust of plaintiffs' and Amicus Curiae's argument in opposition to defendants' motion for summary judgment is that the alleged redlining is unlawful. They base their argument on the contention that Title VIII of the Civil Rights Act of 1968, 42 USC Sec. 3601 et seq. "is a comprehensive fair housing law by which Congress sought to eliminate all forms of housing discrimination" which should be given "a generous construction" by this Court so as to make unlawful "all discriminatory housing practices whenever race is a factor."

Title VIII of the Civil Rights Act of 1968, 42 USC Sec. 3601 et seq., is clear and unambiguous; it is specific in delineating those practices which it makes unlawful; it is a carefully tailored piece of legislation designed to effect specific results. It would be improper for this Court to enlarge the unambiguous terms of 42 USC Sec. 3601 et seq.

> "There is no room for the construction of an unambiguous statute; not even where the purpose is to remove an apparent hardship".
> Federal Deposit Insurance Corp. v. Winter, 131 F2d 780, 782 (6th Cir., 1942)

> "We may not, under the guise of construction, find a Congressional intent that is contrary to the clear language employed by it. Where a statute is unambiguous it should be given effect according to its literal language."
> Hilliard v. U.S., 310 F2d 631, 632 (6th Cir., 1962)

Nevertheless, plaintiffs argue that "it is well establi[illegible] civil rights statutes generally should be read expansively" and [illegible] Court to include redlining among those practices which Congress [illegible] lawful. It is not the function of the judiciary to "expand" sta[illegible]

> "In our anxiety to effectuate the congressional purp[illegible] of protecting the public, we must take care not to [illegible] the scope of the statute beyond the point where Co[illegible] indicated it would stop."
> 62 Cases, etc. v. U.S., 340 US 593, 71 S Ct. 515, 95 [illegible] 566 (U.S. Supreme Court, 19[illegible])

> "Neither administrative officers nor courts may supp[illegible] omissions, or enlarge the [illegible] of statutes."
> Slough v. CIR, 147 F2d 8[illegible] (6th Cir., 19[illegible])

> "The argument that courts should hesitate to rely [illegible] principles [illegible] in a given [illegible] manner that [illegible] is premised primarily on [illegible] first, th[illegible] judicial deter[illegible] in light of the leg[illegible] lature's superior [illegible] for fact [illegible] second, that [illegible] solution are [illegible] likely to run [illegible] popular will."
> U.S. v. [illegible] Vill[illegible] 337 F Supp. [illegible] (1972) [illegible] other ground [illegible] F2d [illegible], cert denied [illegible] U.S., 412 U.S. 9[illegible], [illegible] 2732, 37 L Ed[illegible] on remand 365 F Supp [illegible]

> "But where Congress has [illegible] qualified committee [illegible] enacted s[illegible]cific, [illegible] tailored legislation, [illegible] court to undertake [illegible] extensions of the pri[illegible] reflected in [illegible] desirable, especially [illegible] of the [illegible] that Co[illegible] saw fit not to provi[illegible]."
> U.S. v. General [illegible] Senior Vil[illegible] 470 F2d 675, 679 (2nd Cir., 1972) reversing [illegible] 955, cert denied Nassau County v. U.S., 412 U.S. [illegible] 93 S. Ct. 2732, 37 L Ed2d [illegible], on remand 365 F. S[illegible]

> "It may appear harsh . . . but our vi[illegible] not [illegible] stituted for the clearly [illegible] intent of [illegible]"
> State of [illegible], 4[illegible] F2d [illegible] (5th Cir., 19[illegible]) cert [illegible] 401 U.S. 994, 91 S. C[illegible] 28 L Ed.2d 5[illegible]

> "The courts are not at liberty to add to or deviate from words in a statute . . . that thwart the court's will, or that of an administrative agency, upon the Congress."
> Arkansas Valley Industries, Inc. v. Freeman, 415 F2d 713, 718 (8th Cir., 1969) (emphasis added)

Chaplowsky v. Wisconsin Mortgage Co., 297 F. Supp. . . . Wisconsin, 1968) holds that while it has been stated that sta . . .

> "shall be liberally construed so that their purpo . . may be subserved, that does not mean that a remedy not provided in the statutes, will necessarily be read into them."

> "The Court, in giving effect to the underlying pol . . . the statute, should not, by judicial legislation, r into the express terms of the statute, a provision . . . the . . . legislature did not see fit to include."
> Occidental Life Insurance Co. of California v. Fri . . . 245 F. Supp. 211, 217 (D.C. Conn., 1965)

> "Preliminarily, it should be noted that judicial . . . cannot properly be exercised to supply an essential word or phrase which has been omitted and is not necessarily included in the meaning of the context."
> Hoffman v. Joint Council of Teamsters . . . 230 F. Supp. 661, 666 (N.D. Calif., 1962)

In arguing that this Court should make redlining . . . tiffs point out that redlining "represents a personal injustice . . . dividual misfortune to the would-be-borrower" and, moreover, "a the entire neighborhood." The Federal Home Loan Bank Board's . . . cusses the undesirable results of redlining at great length. T . . . be that redlining causes all the results attributed to it, this . . . empowered to make it unlawful.

> ". . . the accomplishment of this good policy should . . . left to the legislative branches of the national and state governments and should not be brought about by executive fiat, with the judiciary withholding legal interference."
> American Bank & Trust Co. v. Saxon, 373 F2d 203 (6th C . . . 1967)

Plaintiffs argue that 42 U.S.C. Sec. 3601 et seq. mak . . . lawful because the regulations issued thereunder by the Federal

Bank Board say so. This puts the cart before the horse. Regulations are issued pursuant to the law; the law is not made pursuant to the regulations. What is here involved is no less than the basic constitutional principle of the separation of powers upon which our tripartite system of government is founded. It would violate that principle were this court to allow an agency to usurp the legislative function and enact new law through the expediency of "regulations."

Article I, Section 1 of the Constitution of the United States provides that

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

> "Administrative determinations must have a basis in law and must be within the granted authority. In this final analysis statutory construction is a legal function, and the courts may examine the construction of the administrative agency."
> U.S. v. Fort Peck Irrigation District, 197 F. Supp. 812, 822 (D.C. Montana, 1961)

> "The construction and interpretation of a statute are judicial functions, and where administrative interpretations and judicial constructions conflict, the latter must prevail."
> U.S. v. One 1960 Ford, 213 F. Supp. 562, 563 (E.D. [illegible])

It is therefore defendants' position that Title VIII of the Civil Rights Act of 1968, 42 USC Sec. 3601 et seq. is clear and unambiguous and not properly subject to construction. But, should it be the choice of this court to construe its provisions, it will nevertheless conclude that plaintiffs have not as yet been made unlawful.

42 USC Sec. 3601 declares the policy of the Fair Housing Act:

> "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."

Thus we see that the first thing the Congress tells us, the most powerful law-making body in the country, recognizes that

constitutional limitations on what it may do to provide for fair ho... We are told that fair housing can be "provide(d) for" but not gu... Is in the succeeding sections that the Legislature goes on to spec... forth that which it has determined it should do to provide for ... It is that Legislative determination as expressed therein, as ... wishes of plaintiffs and the Federal Home Loan Bank Board, amic... in, which is decisive of the question now presented and is contro... Court.

At page 13 of their memorandum contra plaintiffs cit... v. Fowlton Construction Corp., 370 F Supp. 643, 648 (N.D. Cali... the effect that 42 USC Sec. 3604 (a)

> "appears to be as broad as Congress could have made it, and all practices which have the effect of denying dwellings on prohibited grounds are therefore unlaw..."

It is clear from the Court's language that a finding that a pa... effect of denying dwellings does not necessarily mean that the... unlawful. A second element must be found present. It must be... practice had the effect of denying dwellings "on prohibited g... list which the Congress has proscribed is a prohibited ground. ... what constitutes prohibited discrimination in the financing of ... Legislature has seen fit not to designate redlining a prohibi... Court may not allow plaintiffs or amicus curia to substitute ... for that of the Legislature as to what is or is not a prohibi...

Plaintiffs have not cited a single case wherein a ... a party guilty of racial discrimination absent discrimination a... particular individual because of his race. Such a finding of racial ... nation against an individual because of his race is a fundamental ... Plaintiffs suggest that this prerequisite was dispensed with in ... Metropolitan Life Insurance Co., 409 U.S. 205, 93 S. Ct. 364, 3...

(U.S. Supreme Court, 1972) but it was not. The court therein [illegible] finding of discrimination against an individual because of his race then did the court go on to hold that upon this requisite finding of discrimination against an individual because of his race, a third party demonstrate that he was thereby injured has standing to sue even though himself was not the one discriminated against. The fatal flaw in this action is the failure to allege that any individual has been discriminated against because of his race.

In articulating its recognition of constitutional limits what it could do to provide for fair housing and in drafting 42 USC 3601 et seq. so as to make unlawful only those acts whereby an individual discriminated against because of his race, the Congress was doing no abiding by the fundamental constitutional principle that those civil guarantees which 42 USC Sec. 3601 et seq. protect are guarantees of liberties.

It is on this basis that "racial steering" is distinguished redlining. In racial steering an individual, because of his race, is discriminated against and "steered" only to certain neighborhoods. Not such discrimination in redlining. Even plaintiffs admit at page 3 memorandum contra that "the key element in 'redlining', unlike other forms of housing discrimination, is not the race of the borrower racial composition of the neighborhood."

Plaintiffs claim that redlining is made unlawful by 42 Sec. 3604 (a), 3605, 3617 and 2000 (d). Only 42 USC 3605 is applicable is in this section that the Congress has specifically dealt with discrimination in the financing of housing. It is a fundamental rule of statutory construction that a specific statute controls over a general one.

> ". . . for it is a familiar law that a specific statute controls over a general one." Bulova Watch Co. v. United States, 365 US 753, 81 S.Ct. 864, 6 L Ed.2d 72 (U.S. Supreme Court, 1961)

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute."
D. Ginsberg & Sons v. Popkin, 285 U.S. 204, 52 S. Ct. 322, 76 L Ed 704 (U.S. Supreme Court, 1932)

"In rejecting the . . . suggested interpretation . . . we are mindful of the maxim that general language of a statute usually does not apply to a matter specifically dealt with in another part of the same statute."
AT&T v. FCC, 487 F2d 864, 877 (2nd Cir., 1973)

"It is a long recognized rule of statutory construction that where one statute contains a specific provision or direction . . . and another statute dealing with the same or similar subject matter contains a more general provision or direction . . . the particular or specific provision must control."
United States v. Aquino, 3[illegible] F Supp. 1003, 1005 (E.D. Mich., S.D., 1972)

"Fundamental maxims of statutory construction require that a specific section be found to qualify a [illegible] section. A specific statutory provision will govern even though general provisions, if standing alone, would include the same subject."
Monte Vista Lodge v. Pyramid Life Insurance Co. of America, 384 F Supp. 126, 1[illegible] (9th Cir., 1967) cert denied 390 US 950, 88 S Ct. 1041, 19 L Ed 2d 1142

"It is a cardinal principle of statutory construction that the more specific controls over the general."
Central Commercial Co. v. CIR, 337 F2d 387 (7th Cir., 1964)

"Where a particular and a general enactment may both be applicable, it is settled statutory construction that the particular . . . will control."
Essenfeld v. CIR, 311 F2d 209, 210 (2nd Cir., 1962)

Plaintiffs contention that 42 USC Sec. 3604 (a) is "[illegible] phraseology" making unlawful "all practices which have the effect of dwellings unavailable on the basis of race" violates this settled [illegible] it necessarily implies that the Legislature passed a useless statute, enacted 42 USC Sec. 3605 if 42 USC Sec. 3604 (a) already made all [illegible]

enumerated in 42 USC Sec. 3605 unlawful. If Congress intended 42 USC Sec. 3604 (a) to be a broad general prescription, why did it enact 42 USC

> "To borrow the homely metaphor of Judge Aldrich in the First Circuit, "If there is a big hole in the fence for the big cat, must there be a small hole for the small one"? (278 F2d 153) The statute admits a reasonable construction which gives effect to all its provisions. In these circumstances we will not adopt a strained reading which renders one part a mere redundancy."
> Jarecki v. G.D. Searle & Co., 367 US 303, 81 S Ct. 1579, 6 L Ed2d 859 (US Supreme Court, 1961)

42 USC Sec. 3604 applies, as its title indicates, to "discrimination in the sale or rental of housing." Plaintiffs allege discrimination by defendants in the financing of housing, but they do not allege discrimination by defendants in the sale or rental of housing. 42 USC Sec. 3604 has no applicability to this case.

> "One method of determining legislative intent when a statute is arguably ambiguous is to inspect the titles of the legislative acts by which a statute has been enacted."
> Fifth Third Bank & Trust Co. of Princeton, Ky. v. Fauquay, 405 F2d 990, 993, 15 ALR3d 1381 (6th Cir., 1969)

> "It is also no established rule of statutory construction that legislative enactments must be considered in their entirety, and no statutory expression may be treated as superfluous or without meaning."
> In re Perry, 157 F Supp. 910, 914 (W.D. Mich. SD, 1958)

Plaintiffs' contention that 42 USC Sec. 3604(a) makes ... unlawful is like a drowning man grasping at straws. It bespeaks ... evaluation of their claim. They should not be permitted to pervert ... Legislature's words by their strained construction.

> ". . . the plain, obvious and rational meaning of a statute is to be preferred to any curious, narrow, hidden sense that nothing but the ingenuity and study of an acute and powerful intellect would discover."
> Community Bldg. Bank of Kansas City Area, Inc. v. F.T.C., 405 F2d 1011, 1013 (8th Cir., 1969)

> "Statutory explication may be an art, but it must not be artful."
> United States v. Parker, 376 F2d 402, 408 (5th Cir., 1967)

Plaintiffs also contend that 42 USC Sec. 3617 makes the [illegible] redlining unlawful. This section reads as follows:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title . . ."

The applicability of 42 USC Sec. 3617 is triggered only [illegible] finding of discrimination under one of the therein enumerated prior [illegible] In determining the "right(s) granted or protected by Section 3603, [illegible] or 3606" we must look to those specific sections and 42 USC Sec. [illegible] enlarge or diminish the prohibitions therein enumerated. Plaintiffs' [illegible] tention that they state a cause of action under 42 USC Sec. 3617 [illegible] salutary rule of statutory construction that a statute should [illegible] sible and practical interpretation in accord with common sense.

Plaintiffs also claim to have stated a claim for relief [illegible] 42 USC Sec. 2000(d) which provides that

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 USC Sec. 2000(d) prohibits subjecting a "person" to "discrimination". The Legislature does not therein define just what it is that constitutes "discrimination" against a "person." To properly interpret 42 USC Sec. 2000(d)'s application to the instant facts, we must refer to 42 USC Sec. 3605 wherein the Legislature has specifically spelled out what is to be considered racial discrimination re lending practices. As explained, 42 USC Sec. 3605 clearly evidences Congressional intent [illegible]

redlining unlawful. In contending that they state a cause of action under 42 USC Sec. 2000(d), plaintiffs once again ignore that rule of statutory construction that the specific govern the general. Once again, they have put the cart before the horse. They have sought to lift themselves up by their own bootstraps.

One aid 42 USC Sec. 2000(d) does afford us is its confirmation that the Legislature has limited its proscription to cases of discrimination against a "person."

It is clear, therefore, that the question before this Court is whether 42 USC Sec. 3605 makes redlining unlawful.

> "There can be no more reliable an indication of legislative intent than the specific statutory words selected by Congress in delineating the powers conferred."
> Ray Bellis Trash Hauling, Inc. v. Klepps, 477 F2d 696, 707 (5th Cir., 1973) rehearing denied 478 F2d 1403, cert denied 94 S Ct. 1410

In pertinent part, 42 USC Sec. 3605 provides:

> "It shall be unlawful for any . . . building and loan association . . . to deny a loan . . . to a person applying therefor for the purpose of purchasing . . . a dwelling . . . because of the race . . . of such person . . . or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan is to be made or given."

There are numerous clear evidences the Congress did not intend 42 USC Sec. 3605 to make redlining unlawful. Plaintiffs suggestion that the statute be construed to make redlining unlawful is clearly an attempt to achieve by judicial interpretation that which the Legislature chose not to do. Their claim that the phrase "dwellings in relation to which such loan is to be made" refers to other dwellings in the neighborhood is transparently false. "Or dwellings" was inserted to cover the cases such as where a mortgage loan is sought to finance an apartment building or multi-unit where a loan is sought to finance more than one house or in situations

a blanket mortgage is involved. Had the Legislature intended the result plaintiffs seek, the latter part of 42 USC Sec. 3605 would at the very least read

> ". . . because of the race . . . of such person . . . or occupants of the dwelling or dwellings in relation to which such loan is to be made or given or of the occupants of dwellings in proximity to such dwelling or dwellings." (Redraftmanship ours)

> "It is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." United States v. Great Northern Ry. Co., 343 US 562, 72 S Ct. 985, 96 L Ed 1142 (US Supreme Court, 1952)

Had the Legislature intended to enact such a revolutionary change in the law it would not have couched the prohibition in such obscure and ambiguous phraseology.

> "It has long been settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it." United States v. Cores-Sanchez, 404 US 293, 92 S Ct. 471, 30 L Ed2d 457 (US Supreme Court, 1971)

Penal statutes are construed narrowly to insure that no person is convicted unless

> ". . . a fair warning (has first been) given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 US 25, 51 S Ct. 340, 75 L Ed 816 (U.S. Supreme Court, 1931)

The Congress affirmatively demonstrated its intention to make redlining unlawful by omitting the "catch-all phraseology" of 42 USC (a) the "or otherwise" of which plaintiffs make so much. If the Legislature intended to make all forms of discrimination in lending unlawful, it did not voice that intent by including the "or otherwise" phrase in 42 USC Sec. 3605?

> ". . . where a particular [illegible] statute, the [illegible] [illegible] that in [illegible] [illegible] [illegible] Statutory [illegible] [illegible] 362 F Supp. [illegible]"

> "Where a [illegible] takes a given [illegible] vision [illegible] such a [illegible]" [illegible] [illegible] F2d [illegible] 390 US 955, [illegible]

As plaintiffs [illegible] at p. 5 of their [illegible] practice (of redlining) [illegible] Congress enacted Title VIII the U.S. [illegible] Commission on Civil [illegible] the prevalence of redlining [illegible] practice. Yet, as plaintiffs [illegible] is a [illegible] the period of over six years [illegible] Sec. 3605 [illegible] or redlining has been [illegible]. This in itself [illegible] on the reasonableness of plaintiffs' interpretation. [illegible] Congress' intent was to [illegible] unlawful and [illegible] action to ensure [illegible] was enforced. [illegible] opportunity presented [illegible] 1974. Yet, Congress did not [illegible] in the statute [illegible] wanted to make redlining unlawful. [illegible] was, for example, [illegible] "or otherwise" found in 42 USC [illegible] 04 (a). This Court [illegible] manifest congressional [illegible] redlining is not [illegible] Sec. 3605.

> "The legisla[illegible] controlling [illegible] vital part, [illegible] law." Kansas [illegible] 310 F2d [illegible] 373 US [illegible]

The Legislature chose to enumerate those practices it deemed advisable to prohibit in connection with home mortgage lending practices. chose not to list redlining. The maxim of 'expressio unius est exclusio alterius' indicates that it was by this method that Congress made its intent not to make redlining unlawful.

Plaintiffs suggest that in order for redlining not to be unlawful it must be specifically 'exempted' from the statute. Quite the contrary, conduct is deemed lawful until the law clearly and affirmatively makes it unlawful.

> "A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from United States v. Wiltberger, 5 Wheat 76, 5 L Ed 37, down to this day. Chief Justice Marshall said in that case:
>
> "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department."
> Id., p. 95.
>
> "The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition."
> U.S. v. Boston & Maine Railroad, 380 US 157, 85 S Ct. 808, 13 L Ed2d 728 (U.S. Supreme Court, 1965)

Plaintiffs are, in effect, seeking to extend and then enforce a federal penal statute. They have cast their net wide. Defendants in this suit include not only Oakley Building and Loan Company but nine private individuals as well. These individuals have already suffered distress and damage to their reputations merely by being charged in this suit. That 42 USC Sec. 3605 may not be denominated a criminal statute, it is being sought to be used to penalize these defendants. The rationale for giving criminal statutes a strict construction is equally applicable in this instance. Moreover, plaintiffs assert that their claim is based on 42 USC Sec. 3617 which clearly is a criminal statute.

In Schild v. Busch, 293 F. Supp. 1353 (D.C. Tex., 1968) the Agricultural Department sought to assess a penalty against a peanut farmer exceeding his acreage allotment and producing too many peanuts. The case hinged on proper interpretation of the Agricultural Adjustment Act. The Court said:

> "An administrative body's interpretation of its own regulations may be considered by a reviewing court, but is not conclusive . . . For two reasons the interpretation urged in the instant case need not be given great weight. In the first place, as will be shown, the interpretation here is an attempt to supply a missing definition rather than a construction of an ambiguous provision. Secondly, for all that appears, the interpretation asserted in this action is no more than a conclusion unsupported by reasoning. In these circumstances a court's decision must be de novo.
>
> *** . . . three of the most useful maxims (of statutory construction) indicate clearly that the Department's construction . . . is erroneous: (1) A specific provision should be construed in the context of the entire regulatory scheme; (2) A specific provision should not be construed to make other provisions mere redundancies; and (3) "A criminal statute is to be construed strictly, not loosely." (Underscoring ours)
>
> *** Although the Act is not denominated a criminal statute, the purpose and the effect of its penalty provisions are to punish the farmer who has failed to abide by the law and the regulations. The marketing penalty may be compared to a fine, and in an action to recover a penalty a court should construe the provisions establishing the violation as if they were criminal statutes."

Defendants in this case may be subjected to injunctive relief, actual damages, punitive damages, court costs and plaintiffs' attorneys' fees if they be found guilty of violating 42 USC Sec. 3603. If they be found guilty of all that plaintiffs allege in their memorandum contra, these defendants could each be fined not more than $10,000.00 or imprisoned not more than 10 years, or both. This being the case, this Court should not be asked to construe the subject statutes the loose and expansive construction plaintiffs urge:

> "Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests . . . this being a criminal statute, it must be strictly con-

strued, and any ambiguity must be resolved in favor of lenity."
United States v. Evans, 410 US 306, 93 S Ct. 1007, 35 L Ed2d 379 (U.S. Supreme Court, 1973)

In U.S. v. Bass, 92 S. Ct. 515, 404 US 336, 30 L Ed2d 488 (U.S. Supreme Court, 1971) the Court discussed "a wise principle this Court has followed."

". . . "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (citations omitted) In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (citation omitted) This principle is founded on two principles that have long been part of our tradition. First "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." (citations omitted) Second, because of the criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."

"In the last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in United States v. Wiltberger, 5 Wheat 76, 96, 5 L Ed. 37;

> "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. * * *"

Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697 12 L Ed2d 894 (U.S. Supreme Court 1964)

Huntington v. Attrill, [illegible] U.S. 657, 13 S. Ct. 224, (U.S. Supreme Court, 1892) holds that a statute which [illegible] tortious liability on one who does a wrongful act and [illegible] vides a civil remedy to the individual wronged by that act,

> "should be strictly construed."

> "Statutes creating a new liability must be strictly construed in favor of persons sought to be subjected to the applicability of the statute."
> United States v. York, 281 F. Supp 713,714 (W.D. Tex 1968) reversed on other grounds 396 F2d 382

> "The courts have also [illegible] disfavored statutes imposing liability based on failure to comply with a duty imposed by statute where the amount of the [illegible] is fixed on a somewhat liquidated measure without regard to injury suffered. Such statutes are strictly construed."
> Wood, Walker & Co. v. [illegible], 461 F2d 852, 855 (10th Cir., 1972)

At page 6 of their memorandum contra, plaintiffs state:

> "Further, the Supreme Court of the United States in Trafficante v. [illegible] Life Insurance Co., 409 U.S. 205, 211, (1972) . . . directed that the Act be given "a generous construction." Id at 212."

What plaintiffs construe as a "directive" of our Supreme Court that the whole of the Federal Fair Housing Act be given "a generous construction" was really something quite different. The court, in considering the provision of one section of the Act, said:

> "We can give vitality to [illegible]ction 810 (a) only by a generous construction."

The court was merely stating that rule of statutory construction that a statute be construed as having some effect and not as a nullity or mere surplusage. As indicated earlier, plaintiffs choose not to comply with the rule.

Plaintiffs' memorandum contra sets up several straw men. Pages 6 and 7 of their memorandum contra plaintiffs improperly attribute to defendants the argument that the Federal Home Loan Bank Board is powerless to deal with the problem of redlining. Such is not defendants' position.

> "No one questions the authority of respondent . . . to enact rules and regulations relative to administration . . .; what is disputed is his power to enact the section in question with the language employed and the connotations expressed therein." Hudson v. Greenhill, 347 NYS 2d 913 (New York Supreme Court, 1974)

Defendants well recognize that there are ways in which Home Loan Bank Board may deal with redlining. What defendants do the FHLBB does not have the authority to make redlining illegal therefore 12 CFR 528.2 and 551.8(a), the particular regulations are of no force or effect. As plaintiffs note at page 27 of their contra, the critical question in determining the validity of a whether it goes beyond the authority of the law pursuant to which Thus, unless these regulations are within the authority of 42 they are invalid and of no force or effect.

Neither do defendants claim that Congress is ignoring practice of redlining. Though it has not seen fit to make it 42 USC Sec. 3601 et seq they are taking steps to end the practice this year the Senate Committee on Banking, Housing and Urban A conducted extensive hearings in connection with a bill proposed by Proxmire, committee chairman, to require all federally relat stitutions to make public disclosure of their loans and depo the House subcommittee on Financial Institution Supervision, Insurance is conducting hearings on the practice of redlining ment." These hearings have evidenced a Congressional intent to disclosure of lending institutions' loans and deposits on a g to allow the American public to determine for itself whether a tution engages in redlining. It would then be the public's choice they would patronize those institutions which practiced redlining

As indicated by the court in U.S. v. General Douglas Senior Village, Inc., supra p. 2, it is essential that the law

remain vested in the Legislature which is subject to the popular will of citizenry through the elective process, and not be usurped by agencies not subject to such check. We should adhere as closely as possible to the principles of our founding fathers that ours is a government by the rule of laws and not of men. This Congressional determination that the American citizenry, acting through its free market economy and elected officials, as opposed to the bureaucracy acting through regulatory fiat to deal with this national problem should not be thwarted.

Plaintiffs' contention, at page 14 of their memorandum, that "defendants' refusal to make a loan to the plaintiffs for the purpose of (purchasing)a home in a racially integrated neighborhood made housing unavailable to them as surely as through any other discriminatory method" is apparently false. As plaintiffs' complaint alleges, they bought a home for which defendants denied them financing. Plaintiffs were not prevented moving into their house so much as a single day by defendants' denial of loan application. This is but one example of how discrimination in the provision of home financing differs from discrimination in other areas and why Congress dealt specifically and differently with it.

At page 15 of their memorandum contra plaintiffs set up one of their straw men. They attribute to defendants the argument "that plaintiffs do not state a claim for relief because they are white." This is not defendants' position.

Defendants' argument, concisely stated, is that neither plaintiffs' complaint nor their deposed testimony allege that they were discriminated against because of their race or because of the race of anyone in their statutorily conferred privity.

We respectfully urge this Court, in keeping with its constitutional powers, to exercise the perogative of judicial interpretation and construction by holding that 42 USC Sec. 3605 means just what it says,no more or less.

Congress legislated and that its provisions require the sustaining of defendants' motion for a summary judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of July, served the foregoing Defendants' Brief in Reply to Plaintiffs' Amicus Curiae's Memoranda Contra Defendants' Motion for Summary Judgment by United States mail addressed to the offices of counsel for plaintiff Donald F. Colegrove, Esq., 1831 Carew Tower, Cincinnati, Ohio 45202; Sloane, Esq., 1425 H. Street, N.W., Ste. 410, Washington, D.C. 20005; Daniel J. Goldberg, Esq., Associate General Counsel, Federal Labor Relations Board, 320 First Street, N.W., Room 732, Washington, D.C. 20552.

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