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Still Standing, Barely: Bank of America Corp. v. City of Miami and the Impact on Fair Lending Litigation

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Comment

STILL STANDING, BARELY: *BANK OF AMERICA CORP. V. CITY OF MIAMI* AND THE IMPACT ON FAIR LENDING LITIGATION

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In the mid-1990s, changes in the mortgage lending market created new and harmful disparities for minorities in the United States.[1] While access to mortgages increased in the 1990s, both the secondary mortgage market and the use of automated credit scoring set the stage for discriminatory and unfavorable loan terms.[2] The development of the subprime mortgage market—involving higher costs and riskier terms for borrowers—enabled financial institutions to issue mortgages "without regard to the borrower's ability to afford them."[3] These practices disproportionately affected minority communities; black and Hispanic borrowers were more than twice as likely to obtain a subprime loan than were non-Hispanic white borrowers.[4] Consequently, these borrowers were significantly more likely to face mortgage foreclosure.[5] In late 2009, subprime loans were past due at three times the rate of the national average of all mortgages, and lenders commenced foreclosure at over double the rate.[6] Foreclosure rates in neighborhoods of major American cities skyrocketed, creating costs not only for the cities' residents, but for the cities themselves.[7]

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1. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 351–58 (3d ed. 2015).

2. *Id.* at 351–52.

3. *Id.* at 352.

4. *Id.* at 354. One study indicates that even when "controlling for income, credit score, loan to value and property locations, borrowers of color were about 30 percent more likely to receive higher cost loans than similarly risky White borrowers." *Id.* (quoting U.S. DEP'T OF HOUS. & URBAN DEV., FY 2010 BUDGET: ROAD MAP FOR TRANSFORMATION 5 (2009), https://archives.hud.gov/budget/fy10/fy10budget.pdf).

5. SCHWARTZ, *supra* note 1, at 357.

6. *Id.*

7. *See id.* ("To the extent that subprime mortgages are clustered in particular, often minority areas, disproportionately high rates of foreclosure can harm entire neighborhoods, contributing to property abandonment, diminished property values, and crime.").

In Baltimore City, unfair lending practices both capitalize on and exacerbate the effects of historical housing discrimination. Local and federal housing policy each have contributed to the racial and economic segregation of Baltimore's neighborhoods.[8] As early as 1911, Baltimore Mayor J. Barry Mahool imposed the nation's first segregation ordinance; it prevented citizens from living, attending school, or observing religion on the same block as a person of a different race.[9] When the United States Supreme Court declared such ordinances unconstitutional,[10] Baltimore officials formed a Committee on Segregation to cultivate and encourage racially restrictive covenants in white neighborhoods.[11] Meanwhile, national professional and government policies aggravated these discriminatory effects. The National Association of Real Estate's 1924 Code of Ethics required a realtor to "never be instrumental in introducing into a neighborhood character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in that neighborhood."[12] Baltimore neighborhoods also felt the effects of the Federal Housing Administration's "redlining" practices.[13] In an effort to promote homeownership by insuring private mortgages, the agency ranked neighborhoods on a map based on the risk of potential loans.[14] In doing so, however, the agency ranked predominantly black neighborhoods lowest and colored them red.[15] As a result, mortgage funds diverted away from black neighborhoods, significantly impeding homeownership.[16]

Subprime mortgage lending, furthermore, constitutes "reverse redlining" wherein financial institutions target minority neighborhoods when issuing predatory and unfair mortgage loans, perpetuating racial and econom-

8. *See generally* ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY (2010).

9. Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289, 289 (1983).

10. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (holding a similar Louisville ordinance unconstitutional).

11. Garrett Power, Meade v. Dennistone*: The NAACP's Test Case to ". . . Sue Jim Crowe out of Maryland with the Fourteenth Amendment,"* 63 MD. L. REV. 773, 792 (2004) ("The Committee on Segregation undertook to encourage neighbors, government officials, and real estate agents to use restrictive covenants, peer pressure, harassment, and suasion to promote *de facto* segregation.").

12. CODE OF ETHICS art. 34 (1924) (NAT'L ASS'N OF REAL ESTATE BDS., revised 1928).

13. *See* PIETILA, *supra* note 8, at 72.

14. *Id.*

15. *See id*. at 70–73 (describing redlining practices beginning with the Home Owners' Loan Corporation through the Federal Housing Administration).

16. *See id.* at 73 ("This encouraged further redlining by banks, insurance companies, and other businesses, thereby dooming older city neighborhoods to advancing decay, particularly if they were black or mixed race.").

ic divides.[17] In Baltimore, for example, Wells Fargo Bank issued high-cost loans to forty-three percent of its black customers in 2007, but only nine percent of white customers.[18] The bank's deceptive practices included steering minorities into subprime loans when they otherwise qualified for a prime loan.[19] Such practices led to disproportionate foreclosure rates in Baltimore's black neighborhoods, where foreclosures occurred at nearly three times the rate of white neighborhoods.[20] Due to these foreclosures, black neighborhoods saw a drastic increase in vacant properties.[21]

In areas where financial distress leaves properties vacant, municipal costs are particularly high.[22] Basic vacant property foreclosures might cost a city over $400 in foreclosure inspections and proceedings.[23] These costs, however, can multiply if the homeowner disappears before the foreclosure process is complete.[24] Uncollected bills and taxes, property maintenance, and legal processes can bring municipal expenses to over $19,000 per property.[25] In expenses connected directly to foreclosure proceedings, vacant properties can create additional expenses and headaches for local governments.[26] Vacant properties in Baltimore demand municipal expenses for inspection, blocking entrances, cutting grass, prosecuting code violations, and making structural repairs.[27] Vacant buildings can cause surrounding property to decline in value,[28] which means that the city collects decreased

17. Third Amended Complaint for Declaratory and Injunctive Relief and Damages at 2, Mayor of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62 (D. Md. Apr. 22, 2018).

18. *Id.* at 28. High-cost loans are "loans with an interest rate that was at least three percentage points above a federally-established benchmark." *Id.*

19. *Id.* at 23–26.

20. *Id.* at 18. The foreclosure rate in majority-white neighborhoods was 1.63% compared to 4.82% in majority-black neighborhoods. *Id.*

21. *Id.* at 44–45 ("In majority African-American neighborhoods, 270 of the Wells Fargo foreclosure properties became vacant after Wells Fargo made the loan.").

22. WILLIAM C. APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 12 (2005) ("In the simplest cases, the unit transfers smoothly from the borrower into the portfolio of the noteholder or to a foreclosure investor. . . . If the unit becomes vacant, however, the City's foreclosure costs mount rapidly.").

23. *Id.*

24. *Id.* at 14–15.

25. *Id.*

26. *Id.* at 15 (estimating that "abandoned properties damaged by fire" can cost a city nearly $35,000); NAT'L VACANT PROPERTIES CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES (2005).

27. *See* Third Amended Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 17, at 45.

28. *See* NAT'L VACANT PROPERTIES CAMPAIGN, *supra* note 26, at 9 (noting that in Philadelphia, "houses within 150 feet of a vacant or abandoned property experienced a net loss of $7,627").

tax revenue for nearby properties as well.[29] Lower property values can lead to a "spiral of blight" that includes population loss, arson, and crime.[30]

Given the limited capacity of individuals to hold lending institutions accountable for discriminatory practices, municipalities have attempted to take the wheel. The outcome in *Wal-Mart Stores, Inc. v. Dukes*,[31] though not a housing-related case, made it virtually impossible to bring a class action suit for disparate impact. In *Dukes*, 1.5 million female employees of Wal-Mart filed a class action suit, alleging that the corporation systematically discriminated against women while making wage and promotional decisions.[32] The Supreme Court held, however, that the class of plaintiffs failed to meet the "commonality" requirement of Rule 23(a)(2) of the Federal Rules of Civil Procedure; as a result, the class could not be certified and the merits of the case went unaddressed.[33] The Court explained that absent "proof of a companywide discriminatory pay and promotion policy," the class could not assert they had suffered a common injury.[34]

Because of individuals' limited capacity to challenge discriminatory lending practices through class action, cities have taken on a larger role in that battle. The first major breakthrough occurred when the Mayor and City Council of Baltimore was granted standing under the Fair Housing Act[35] ("FHA" or "the Act") against Wells Fargo.[36] This procedural victory and ensuing settlement led to a host of additional municipal claims against lenders. Memphis[37] and other cities followed Baltimore's lead, and eventual plaintiffs included Atlanta,[38] Los Angeles,[39] Miami Gardens,[40] and Cook County, Illinois.[41]

29. *Id.*

30. *Id.* at 12 (describing the "cumulative impact of vacant property"); APGAR & DUDA, *supra* note 22, at 9 ("Complicating matters is the fact that nonprime foreclosures tend to cluster in ways that generate significant spillover effects as vacant properties become magnets for crime and other social ills.").

31. 564 U.S. 338 (2011).

32. *Id.* at 343 ("[Plaintiffs] allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964.").

33. *Id.* at 359; FED. R. CIV. P. 23(a)(2) (2018) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if: . . . there are questions of law or fact common to the class.").

34. *Dukes*, 564 U.S. at 359.

35. 42 U.S.C. §§3601–3619 (2012).

36. Mayor of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759, at *1 (D. Md. Apr. 22, 2018); *see also infra* notes 115–117 (describing Baltimore's litigation and the district court's reasoning).

37. City of Memphis v. Wells Fargo, No. 09-2857-STA, 2011 WL 1706756, at *1 (W.D. Tenn. May 4, 2011) (holding that the City both had standing and had stated an adequate disparate impact claim under the FHA).

38. *E.g.*, DeKalb Cty. v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-ELR, 2015 WL 8699229, at *1 (N.D. Ga. Nov. 17, 2015).

39. City of L.A. v. Wells Fargo & Co., 22 F. Supp. 3d 1047 (C.D. Cal. 2014).

In 2017, the City of Miami became the first of these cities to reach the United States Supreme Court in a fair lending dispute. *Bank of America Corp. v. City of Miami*[42] asked the Court to decide (1) whether the City had standing to sue under the FHA, and (2) whether the City's alleged injuries met proximate cause standards.[43] While the Court did grant standing to the City, it disagreed with the lower court's use of foreseeability alone when evaluating proximate cause.[44] Section I.A of this Comment will describe the history of the FHA and its applicability to discriminatory lending.[45] Sections I.B and I.C will detail statutory standing and proximate cause standards, respectively, with a particular focus on FHA contexts.[46] Section I.D will discuss the Court's reasoning in the *City of Miami*,[47] followed by analyses of each issue on remand in Sections II.A and II.B.[48] Finally, in Section II.C, the Comment will conclude with the options facing municipalities following the decision.[49]

I. BACKGROUND

The issues raised in *Bank of America Corp. v. City of Miami* rest at the intersection of political initiatives, social concerns, and legal precedent. The City brought a statutory claim under the FHA, federal legislation that Section I.A explains.[50] In order to have standing and advance to discovery, the City needed to adequately plead that the alleged violations—discriminatory mortgage lending practices—fell within protections granted by the FHA.[51] Section I.B provides historical perspective behind this issue, tracing the Supreme Court's decisions on constitutional, prudential, and statutory standing.[52] Furthermore, Section I.C outlines case law surrounding proximate cause.[53] While the Supreme Court has repeatedly used foreseeability and directness as benchmarks for pleading causation, lower courts

40. *E.g.*, City of Miami Gardens v. Wells Fargo, 328 F. Supp. 3d 1369 (S.D. Fla. 2018).

41. Cty. of Cook v. Bank of Am. Corp., 181 F. Supp. 3d 513 (N.D. Ill. 2015); Cty. of Cook v. HSBC N. Am. Holdings Inc., 136 F. Supp. 3d 952 (N.D. Ill. 2015); Cty. of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909 (N.D. Ill. 2015).

42. 137 S. Ct. 1296 (2017).

43. *Id.* at 1301.

44. *Id.*

45. *See infra* Section I.A.

46. *See infra* Sections I.B (statutory standing), I.C (proximate cause).

47. *See infra* Section I.D.

48. *See infra* Sections II.A (analyzing the Court's ruling on standing), II.B (analyzing the Court's ruling on proximate cause).

49. *See infra* Section II.C.

50. *See infra* Section I.A.

51. *See infra* Section I.B.

52. *See infra* Sections I.B.1 (Article III standing), I.B.2 (prudential requirements), I.B.3 (statutory standing).

53. *See infra* Section I.C.

have not been clear on how these standards apply to fair housing disputes.[54] Finally, Section I.D summarizes the Court's majority and dissenting opinions in *City of Miami*.[55]

A. FHA and Discriminatory Mortgage Lending

In 1968, Congress passed the FHA, codified as Title VIII of the Civil Rights Act of 1968.[56] While Congress failed to agree on the bill's language for two years, President Lyndon B. Johnson was able to move the FHA through Congress following the assassination of Dr. Martin Luther King, Jr. in April 1968.[57] In addition to Dr. King's influence on fair housing legislation prior to his death,[58] the FHA was motivated by the ongoing housing discrimination against minority infantrymen returning from Vietnam.[59] The Act's legislative purpose was to "provide, within constitutional limitations, for fair housing throughout the United States."[60] Additionally, the legislative hearings for the FHA indicate that Congress intended to protect not only the direct victims of racial discrimination, but also "those who were not the direct objects of discrimination [who] had an interest in ensuring fair housing, as they too suffered."[61]

The FHA prohibits housing discrimination on the basis of "race, color, religion, sex, familial status, or national origin."[62] Protections under the FHA extend to the sale, rental, and advertising of homes; the Act also prohibits inducing a buyer or renter based on the prospective entry of a particular group to a neighborhood.[63] Regarding mortgage lending, the FHA has provided a basis for claims against unfair lending practices through its prohibitions against discriminatory real estate transactions.[64] The Act defines

54. *See infra* Sections I.C.1 (Supreme Court on proximate cause), I.C.2 (lower court applications).

55. *See infra* Section I.D.

56. 42 U.S.C § 3601–3619 (2012).

57. *See History of Fair Housing*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Sept. 15, 2018).

58. *Id.* ("Since the 1966 open housing marches in Chicago, Dr. King's name had been closely associated with the fair housing legislation. President Johnson viewed the Act as a fitting memorial to the man's life work, and wished to have the Act passed prior to Dr. King's funeral in Atlanta.").

59. *Id.*

60. 42 U.S.C. § 3601.

61. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (citing *Hearings Before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong., 1st Sess. (1967)).

62. 42 U.S.C. § 3604(b).

63. *Id.* § 3604(e).

64. *Id.* § 3605(a) ("It shall be unlawful for any person or other entity . . . to discriminate against any person in making available [a residential real estate] transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or

transactions as "[t]he making or purchasing of loans or providing other financial assistance" for the purchase or security of residential real estate.[65] Accordingly, courts have permitted municipal and county governments to submit claims against financial institutions for unfair mortgage lending practices.[66]

B. Courts Typically Grant Standing Broadly Under the FHA

A plaintiff's claim under the FHA must meet the requirements set by both Article III of the Constitution and those set by the judiciary's prudential considerations.[67] While Article III limits the Court's jurisdiction to "cases" or "controversies,"[68] the Court imposes additional, prudential requirements to "avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim."[69] This Section examines the Supreme Court's approach to standing in housing contexts.

1. Injuries from FHA Violations Meet Article III Standing Requirements

Constitutional standing under Article III limits claims to actual "cases" or "controversies."[70] A case or controversy requires that (1) the plaintiff suffered an injury in fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) the injury will likely be redressed by the requested relief.[71] Furthermore, while "it does not suffice if the injury complained of is 'th[e] result [of] the *independent* action of some third party not before the court,'

national origin."); *see also File a Complaint*, U.S. DEP'T OF HOUS. & URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint (last visited Sept. 15, 2018).

65. 42 U.S.C. § 3605(b).

66. *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (holding that a city has standing to sue a bank for discriminatory mortgage lending under the FHA); City of L.A. v. Wells Fargo & Co., 22 F. Supp. 3d 1047 (C.D. Cal. 2014) (permitting the municipality to recover under the FHA for discriminatory lending practices); Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975 (N.D. Ill. 2018) (holding that the County was entitled to redress for certain damages resulting from the bank's discriminatory mortgage lending); Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950 (N.D. Ill. 2018) (same); Mayor of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759, at *1 (D. Md. Apr. 22, 2018) (denying the financial institution's motion to dismiss the City's FHA claim for discriminatory lending).

67. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99 (1979) ("This [standing] inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise . . . .").

68. U.S. CONST. art. III, § 2.

69. *Gladstone*, 441 U.S. at 99–100.

70. U.S. CONST. art. III, § 2.

71. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

that does not exclude injury produced by determinative or coercive effect upon the action of someone else."[72]

In *Gladstone, Realtors v. Village of Bellwood*,[73] the Supreme Court was asked to determine whether a group of plaintiffs—a village, four white residents, a black resident, and a black resident of a neighboring municipality—had Article III standing. The plaintiffs sued a group of realtors under the FHA for "racial steering" practices.[74] Namely, the realtors allegedly steered potential black buyers to an integrated neighborhood and potential white buyers away from the same area.[75] The plaintiffs' claimed injuries consisted of detrimental economic manipulations of their neighborhoods and the lost "benefits of living in an integrated society."[76] The Supreme Court held that the Village of Bellwood satisfied Article III standing because it may have endured both a "significant reduction in property values" and racial stability as a result of the defendants' practices.[77]

2. The Court Typically Interprets Prudential Standing Broadly Under the FHA

In addition to constitutional standing, a plaintiff alleging a FHA violation must also meet prudential standing requirements.[78] Prudential standing requirements ensure that courts are not burdened with adjudicating a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens."[79] Where the Court is particularly concerned with a plaintiff's ability to sue under a statute, however, it asks whether the plaintiff's asserted rights fall within the "zone of interests" that the statute intends to protect.[80] As early as 1970, the Supreme Court in *Ass'n of Data Processing Service Organizations v. Camp*[81] referenced a "trend toward the enlargement of the class of people" who fall within the zone of interests of a given statute.[82]

72. Bennett v. Spear, 520 U.S. 154, 169 (1997) (alterations in original) (citations omitted) (quoting *Defenders of Wildlife*, 504 U.S. at 560–61).

73. 441 U.S. 91 (1979).

74. *Id.* at 97.

75. *Id.* at 95.

76. *Id.*

77. *Id.* at 110.

78. *Id.* at 99–100 ("Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual would be vindicated . . . .").

79. Warth v. Seldin, 422 U.S. 490, 499 (1975) (quoting United States v. Richardson, 418 U.S. 166, 176 (1974)).

80. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

81. 397 U.S. 150 (1970).

82. *Id.* at 154.

Specific to the FHA, a plaintiff must qualify as an "aggrieved person" who the statute intended to protect.[83] The Act defines an aggrieved person as a person who either "claims to have been injured by a discriminatory housing practice" or believes that an injury "is about to occur."[84] The Supreme Court, furthermore, has interpreted the term "person" broadly in standing contexts; the term has previously encompassed localities,[85] nonprofit agencies,[86] and spouses of discriminated people.[87]

In the 1972 case *Trafficante v. Metropolitan Life Insurance Co.*,[88] the Court recognized that the FHA afforded protections not only to direct recipients of discrimination, but also to those who lost tangential benefits due to the violation. In *Trafficante*, two tenants of an apartment complex—one white tenant and one black tenant—sued their landlord for racially discriminatory practices against nonwhite renters.[89] The plaintiffs' injuries included the lost benefits of living in an integrated community, lost business prospects of having diverse neighbors, and social and economic damages of being stigmatized as living in a "white ghetto."[90] The Supreme Court first looked at the legislative history of the FHA, noting Senator Walter Mondale's hope that indirect victims would also be protected.[91] Given this intent to promote integrated communities, the Court construed the language broadly in order to "give[] standing to sue to all in the same housing unit who are injured by racial discrimination."[92] As a result, tenants of both races were granted statutory standing to sue under the FHA.[93]

In 1982, the Court was asked to determine whether a nonprofit organization and two individually discriminated "testers" had standing to sue un-

83. 42 U.S.C. § 3610(a) (2012) ("An aggrieved person may . . . file a complaint with the Secretary alleging [a] discriminatory housing practice.").

84. *Id.* § 3602(i).

85. *See* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 94–95 (1979) (permitting standing to a village, white residents, and a black resident in a "racial 'steering'" claim that resulted in lost opportunity to in an integrated society); Bennett v. Spear, 520 U.S. 154, 165–66 (1997) (granting standing to an irrigation district as "any person" under the Endangered Species Act).

86. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (allowing a nonprofit housing organization to state an FHA claim for decreased ability to provide services to prospective homebuyers and increased expenses of combatting segregation).

87. Thompson v. N. Am. Stainless, LP 562 U.S. 170 (2011) (permitting a husband's Title VII retaliation claim against his employer after he was fired following his wife's gender discrimination complaint).

88. 409 U.S. 205 (1972).

89. *Id.* at 207–08 ("The complaint alleged that the owner had discriminated against nonwhite rental applicants in numerous ways, e.g., making it known to them that they would not be welcome at Parkmerced, manipulating the waiting list for apartments, delaying action on their applications, [and] using discriminatory acceptance standards.").

90. *Id.* at 208.

91. *See supra* note 61 and accompanying text.

92. *Trafficante*, 409 U.S. at 212.

93. *Id.*

der the FHA in *Havens Realty Corp. v. Coleman*.[94] In this case, the nonprofit hired two "tester plaintiffs"—one white individual and one black individual—to pose as interested renters of apartment units.[95] After the testers were given different information regarding the availability of apartment units, the parties sued for discriminatory housing practices.[96] The nonprofit's alleged injuries included a decreased ability to provide counseling and referral services to its members "with a consequent drain on resources."[97] The Court looked to the similar facts in *Gladstone*,[98] where standing had been granted "to the full limits of Art[icle] III."[99] The nonprofit in *Havens* was forced to devote significant resources to counteracting FHA violations, which in turn decreased its capacity to provide its typical client services.[100] As a result, the Supreme Court gave the plaintiffs standing under the Act.[101]

3. Statutory Standing Analyses Outside of the Housing Context Help Inform the Reach of the FHA

In addition to FHA claims, the Supreme Court has been asked to assess statutory standing for persons aggrieved under other federal statutes.[102] While these cases do not address fair lending violations, they inform the extent to which certain "persons" may fall within a statute's zone of interests.[103] In *Bennett v. Spear*,[104] for example, irrigation districts and ranch operators sued the Fish and Wildlife Service under the Endangered Species Act ("ESA").[105] The plaintiffs claimed that the agency's mandate for minimum water levels failed to consider the economic interests of the affected region, in violation of the statute.[106] While the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit dismissed the case for lack of standing, the Supreme Court

94. 455 U.S. 363 (1982).

95. *Id.* at 368.

96. *Id.*

97. *Id.* at 369. The organization also asserted association standing on behalf of its members who "had been deprived of the benefits of interracial association arising from living in an integrated community free of housing discrimination." *Id.*

98. *See supra* notes 73–77 and accompanying text.

99. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9 (1979).

100. *Havens*, 455 U.S. at 379 ("Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."). The "tester" plaintiffs were asked to amend their complaint in order to plead injuries with more particularity. *Id*. at 377–78.

101. *Id.* at 382.

102. Bennett v. Spear, 520 U.S. 154 (1997); Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011).

103. *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1303 (2017) (citing *Bennett* and *Thompson* as precedent for statutory standing analyses).

104. 520 U.S. 154 (1997).

105. *Id.* at 159–60.

106. *Id.* at 160.

reversed. Applying the zone of interests test,[107] the Court unanimously held that the irrigation district and ranchers qualified as "any person" under the ESA due to the purpose of the legislation (environmental protection for all) and the purpose of the particular provision (enforcement by private attorneys general).[108]

Finally, in *Thompson v. North American Stainless, LP*,[109] the Court assessed whether a husband's retaliation claim fell within Title VII's zone of interests when he had been fired after his wife filed a discrimination complaint with the Equal Employment Opportunity Commission.[110] Although the plaintiff in this case was not alleging retaliation against the person who had complained—his wife—the Supreme Court granted standing for his Title VII claim. The Court looked to the statutory language, specifically that an action for retaliation may be brought by "a person claiming to be aggrieved."[111] Recalling its previous broad interpretation of "person aggrieved" in *Trafficante*,[112] the Court in *Thompson* held that the husband's injury fell within the zone of interests protected by Title VII because the employer intended to hurt the plaintiff's wife by firing him.[113]

4. Lower Courts Have Attempted to Apply Standing Requirements to Fair Lending Cases

Specific to discriminatory lending suits under the FHA, lower courts have attempted to incorporate Supreme Court precedent with both constitutional and statutory standing. In one of the first of such cases, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*,[114] the City of Baltimore's third amended complaint survived a motion to dismiss for lack of standing. The United States District Court for the District of Maryland held that the City's alleged injuries—increased municipal expenses and decreased tax revenue—were "fairly traceable" to the banks' alleged misconduct and, there-

107. *See supra* text accompanying note 80 (explaining that the zone of interests tests asks whether the relevant statute intends to protect against the type of injury alleged).

108. *Bennett*, 520 U.S. at 165.

109. 562 U.S. 170 (2011).

110. *Id.* at 172–73.

111. *Id.* at 173 (citing 42 U.S.C. § 2000e-5(f)(1)).

112. *Id.* at 176. It is worth noting that the Court considered the broadest interpretation of "person" under *Trafficante* to be "ill-considered" dictum. *Id.* at 176. The Court warned that expanding standing to any person with Article III standing could lead to absurd results, such as a shareholder suing an employer for employment decisions that negatively impacted the company's stock price. *Id.* at 177.

113. *Id.* at 178 ("Thompson is not an accidental victim of retaliation . . . . Hurting him was the unlawful act by which the employer punished [his wife]. In those circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII.").

114. Mayor of Balt. v. Wells Fargo Bank, N.A., No. JFM-08-62, 2011 WL 1557759, at *1 (D. Md. Apr. 22, 2018).

fore, met the causation requirement of Article III standing.[115] The court specified two allegations that "provide[d] the missing causal link" for standing: (1) the bank steered borrowers who would have qualified for prime loans into subprime loans, and (2) the bank approved minority borrowers for refinance when they knew, or should have known, that such borrowers would not be able to meet financial obligations.[116] Many properties became vacant because the bank's conduct forced borrowers to default.[117] Based on the causal connection between the City's injuries and the defendant's actions, the court granted standing under Article III.[118]

As the Supreme Court clarified its understanding of statutory standing,[119] district courts needed to adjust accordingly. In the Los Angeles case and in two of the three Cook County cases, the cities were granted both Article III and statutory standing, for their injuries fell within the protected zone of the FHA.[120] In these cases, both the United States District Court for the Central District of California and the United States District Court for the Northern District of Illinois relied on the *Havens* proposition that "standing under the FHA [is] as broad as Article III standing."[121] Therefore, upon finding that the plaintiffs' claims met constitutional standing requirements, these courts did not undergo a separate analysis for statutory standing.[122]

115. The court pointed to *Gladstone* for justification that, at the time of the opinion, standing under the FHA was "as broad as is permitted by Article III of the Constitution." *Id.* at *2 (quoting Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 108 (1979)); *see also supra* note 71 and accompanying text (defining Article III standing requirements).

116. *Mayor of Balt.*, 2011 WL 1557759, at *3. The causation analysis in *Mayor of Baltimore* is in the context of Article III standing; the court did not expressly mention proximate cause. As stated in *Lexmark International, Inc. v. Static Control Components, Inc.*, "Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct." 572 U.S. 118, 134 n.6 (2014).

117. *Mayor of Balt.*, 2011 WL 1557759, at *3.

118. *Id.* at *6.

119. *See supra* notes 80–113 and accompanying text (describing the development and application of the zone of interests test).

120. *See* City of L.A. v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1057 (C.D. Cal. 2014) ("Since the Court has already found that the City has adequately alleged Article III standing, the City's alleged injuries fall within the FHA's zone of interests."); Cty. of Cook v. Bank of Am. Corp., 181 F. Supp. 3d 513, 520 (N.D. Ill 2015) ("In short, the County's claims fall within the FHA's zone of interests . . . ."); Cty. of Cook v. HSBC N. Am. Holdings Inc., 136 F. Supp. 3d 952, 959–64 (N.D. Ill. 2015) (holding that the County's injuries of increased blight and decreased tax revenue fell within the FHA's protected zone).

121. *City of L.A.*, 22 F. Supp. 3d at 1056; *see also Cty. of Cook*, 181 F. Supp. 3d at 519 ("Congress intended to confer standing to the full extent permitted under Article III of the Constitution."); *Cty. of Cook*, 136 F. Supp. 3d at 963 (similar).

122. *See City of L.A.*, 22 F. Supp. 3d at 1057 ("Since the Court has already found that the City has adequately alleged Article III standing, the City's alleged injuries fall within the FHA's zone of interests."); *Cty. of Cook*, 181 F. Supp. 3d at 519 ("I have already determined that the County's complaint satisfies Article III's standing requirements, so there is no need to undertake a separate zone of interests analysis."); *Cty. of Cook*, 136 F. Supp. 3d at 964 ("[T]he County satisfies the requirements of Article III standing as discussed above, and, consequently, falls within the zone of interests of the FHA.").

Conversely, the Northern District of Illinois dismissed the third Cook County case for lack of statutory standing, holding that urban blight and decreased tax revenue do not fall within the FHA's zone of interests.[123] The United States District Court for the Southern District of Florida reached a similar conclusion in Miami's trial court decision.[124] In these latter cases, the district courts applied separate, more narrow analyses of statutory standing than for Article III standing.[125] For example in *County of Cook v. Wells Fargo & Co.*, the court relied on the assertion from *Thompson* that broad statutory standing in previous cases was "ill-considered" dictum.[126] According the court, the FHA protects persons from facing discrimination while renting, buying, or mortgaging a home; Cook County took none of these actions.[127] Under this narrow zone of interests analysis, Cook County's claims were dismissed.[128]

C. The Supreme Court's Proximate Cause Limits Have Led to Inconsistent Lower Court Decisions

In addition to standing, municipalities must also demonstrate that their claimed damages were proximately caused by the financial institutions' lending practices.[129] Statutory claims such as those through the FHA must meet the same standard of proximate cause as common law tort claims.[130] At issue in discriminatory lending cases is the range of damages for which a

123. Cty. of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909, 920 (N.D. Ill. 2015) ("Cook County's own injuries—urban blight and a reduced property tax base—while perhaps consequences of reverse redlining or equity stripping writ at large, do not bring it within [the FHA's] zone of interests."). The discrepancy between this outcome and those in Cook County's Bank of America and HSBC cases can likely be explained by differing views of the presiding judges. For example, the HSBC decision acknowledges a "different view [within the district] . . . that *Thompson* effectively overruled *Gladstone* in substance." *Cty. of Cook*, 136 F. Supp. 3d at 964.

124. City of Miami v. Bank of Am. Corp., No. 13-24506-CIV, 2014 WL 3342348, at *2 (S.D. Fla., July 9, 2014). On appeal, the United States Court of Appeals for the Eleventh Circuit found that the City's injuries fell within both Article III and statutory standing parameters. City of Miami v. Bank of Am. Corp., 800 F.3d 1262 (11th Cir. 2015), *vacated*, 137 U.S. 1296 (2017). The bank appealed, and the ultimate Supreme Court decision is discussed in depth in Section I.D. of this Comment.

125. *See Cty. of Cook*, 115 F. Supp. 3d at 915–20 (holding that the County was not an "aggrieved" person under the FHA); *City of Miami*, 2014 WL 3342348, at *3–4 (determining that Miami's injuries fell outside the scope of the FHA).

126. *Cty. of Cook*, 115 F. Supp. 3d at 915 (citing Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011)); *see also supra* note 112.

127. *See Cty. of Cook*, 115 F. Supp. 3d at 919 ("Cook County . . . alleges neither that it was denied a loan nor offered unfavorable terms—setting aside the obvious point that Cook County is not alleged to have a race or other protected trait.").

128. *Id.* at 921.

129. *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017) ("The remaining question is one of causation: Did the Banks' allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services?").

130. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014).

municipality might try to recover. Municipalities may attempt to recover for, *inter alia*, municipal expenses related to foreclosure, decreased tax revenue resulting from urban blight and decreased property values, and adverse impacts on racial integration.[131]

1. Proximate Cause in Both Statutory and Fair Housing Contexts Typically Require Foreseeability and Directness

As stated by the Supreme Court in *Holmes v. Securities Investor Protection Corp.*,[132] directness is a significant element, albeit not the sole factor, in determining proximate cause.[133] While the Supreme Court has not defined which damages resulting from discriminatory lending meet the proximate cause requirement under the FHA, three cases may lend insight to the standard that municipalities must meet[134]: *Anza v. Ideal Steel Supply Corp.*;[135] *Hemi Group, LLC v. City of New York*;[136] and *Lexmark International, Inc. v. Static Control Components, Inc.*[137]

First, in *Anza*, Ideal Steel Supply Corporation ("Ideal") sued a competitor under the Racketeer Influenced and Corrupt Organizations Act[138] ("RICO") for failing to charge customers sales tax and subsequently filing fraudulent tax returns to the State of New York.[139] Ideal alleged that the defendant's failure to pay taxes allowed them to offer lower prices, which injured the plaintiff in the form of decreased sales.[140] The Supreme Court rejected this claim, noting that the plaintiff failed to meet the proximate cause requirement under the statute.[141] According to the Court, (1) the injury requires some direct relation to the conduct; (2) Ideal's lost sales could have been caused by a multitude of other factors; and (3) another party—the State of New York—could better "vindicate the laws by pursuing their own claims."[142]

131. S*ee, e.g.*, Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 982 (N.D. Ill. 2018) (claiming costs incurred administering and processing foreclosures, lost property tax revenue, increased demand for county services, urban crime and blight, and racial imbalance).

132. 503 U.S. 258 (1992).

133. *Id.* at 269.

134. *See City of Miami*, 137 S. Ct. at 1306 (invoking common law principles of proximate cause as stated in *Anza*, *Hemi*, and *Lexmark*).

135. 547 U.S. 451 (2006).

136. 559 U.S. 1 (2010).

137. 572 U.S. 118 (2014).

138. 18 U.S.C. §§ 1961–1968 (2012). The statute makes it illegal for people or entities associated with interstate commerce "to conduct or participate, directly or indirectly, in the conduct of [their] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* § 1692(c).

139. *Anza*, 547 U.S. at 454.

140. *Id.*

141. *Id.* at 457–60.

142. *Id.*

Second, *Hemi* illustrated the Court's reliance on "directness" as a factor in proximate cause.[143] New York City sued out-of-state cigarette sellers under RICO for failing to provide the State with required customer information, which in turn prevented the State from sending such information to the City; as a result, the City was unable to track down certain customers for unpaid sales tax.[144] The Court held that this claimed injury—lost sales tax revenue—was too remote to meet the proximate cause requirement of RICO.[145] The defendant's fraud was in fact committed against the State; furthermore, the City's injury was more a product of the customers' actions than those of the defendants.[146] While noting that "[t]he concepts of direct relationship and foreseeability" contribute to common law proximate cause, the Court's decision in *Hemi* illustrates that, at least as far as RICO claims are concerned, directness reigns supreme.[147]

The third case that helps formulate the concept of statutory proximate cause is *Lexmark*.[148] Lexmark, a manufacturer of printers and toner cartridges, used shrinkwrap language[149] to encourage customers to return used cartridges to Lexmark in order to be refilled.[150] Lexmark sued Static Control, a business that supplied "remanufacturers" with toner cartridge supplies, including those originally sold by Lexmark; the remanufacturers would then refurbish and resell the cartridges.[151] While the original suit involved a copyright dispute, Static Control issued a cross-claim alleging that Lexmark violated the Lanham Act[152] by (1) misleading customers to think that they were required to return the cartridges to Lexmark and (2) informing remanufacturers "that it was illegal to sell refurbished [Lexmark] cartridges."[153] When Lexmark attempted to dismiss Static Control's cross-claim on proximate cause grounds, the Supreme Court denied the motion.[154] In its decision, the Court noted that "the plaintiff's injury flows directly

143. *Hemi Group, LLC*, 559 U.S. at 12.

144. *Id.* at 5–6.

145. *Id.* at 11 ("The City's claim suffers from the same defect as the claim in *Anza*.").

146. *Id.* Put in another way, "the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* (emphasis in original).

147. *Id.* at 12.

148. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

149. Shrinkwrap language in this context refers to "terms . . . communicated to consumers through notices printed on the toner-cartridge boxes, which advised the consumers that opening the box would indicate consent to the terms." *Id.* at 121.

150. *Id.*

151. *Id.*

152. 15 U.S.C. § 1125 (2012). Static Control sued under § 1125(a)(1)(B), which provides a private right of action for any person who is "likely to be damaged" by false advertising. *Lexmark*, 572 U.S. at 122 (quoting § 1125(a)(1)(B)).

153. *Lexmark*, 572 U.S. at 122–23.

154. *Id.* at 140.

from the [remanufacturer's] belief in the disparaging statements."[155] Additionally, since Static Control sold microchips that were only compatible with Lexmark's cartridges, there was direct correlation between the remanufacturer's sales and Static Control's sales.[156] The extra step between the unlawful act and the alleged injury did not imply that the injury was too remote, for the Static Control's injuries were just as immediate and predictable as those of the remanufacturers.[157]

The Supreme Court has considered proximate cause as it relates to the FHA, albeit unrelated to mortgage lending practices. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[158] the Inclusive Communities Project, a nonprofit affordable housing corporation, filed a disparate impact suit against the Texas Department of Housing and Community Affairs for its unfair distribution of low income housing tax credits.[159] The nonprofit alleged that the state agency granted "too many [tax] credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods."[160] As a result of these practices, racial and income segregation increased throughout the state.[161] The Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit's decision that the plaintiffs had a valid claim under disparate impact theory.[162] Importantly, the Court clarified that disparate impact claims under the FHA must meet a "robust causality requirement" such that racial imbalance alone cannot establish a prima facie case.[163] Rather than relying on a statistical disparity alone, the Court required that the plaintiff must point to a specific policy or practice which caused the inequitable outcomes.[164]

2. Lower Courts Have Varied in Determining Which Effects of Discriminatory Lending Meet Proximate Cause Requirements

Because the Supreme Court has not set concrete standards for proximate cause in discriminatory lending suits, lower courts have applied varied

155. *Id.* at 138.

156. *Id.* at 139 ("[T]here is likely to be something very close to a 1:1 relationship between the number of refurbished [Lexmark] cartridges sold (or not sold) by the remanufacturers and the number of [Lexmark] microchips sold (or not sold) by Static Control.").

157. *Id.* at 140.

158. 135 S. Ct. 2507 (2015).

159. *Id.* at 2514.

160. *Id.*

161. *Id.* ("The ICP alleged the Department has caused continued segregated housing patterns by its disproportionate allocation of the tax credits . . . .").

162. *Id.* at 2525–26. The Court asserted that disparate impact claims are cognizable under the FHA because "the FHA aims to ensure that [fair housing] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation." *Id.* at 2522.

163. *Id.* at 2523.

164. *Id.*

approaches to the topic. The United States District Court for the Central District of California assessed proximate cause in a discriminatory lending context in 2014, when the City of Los Angeles sued Wells Fargo for FHA violations.[165] The City alleged that the unlawful practice resulted in lost property tax revenue and increased municipal services.[166] The court applied a three-pronged test for proximate cause, examining (1) if there are more direct victims who might vindicate the law; (2) the difficulty in calculating the damages; and (3) if "the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries."[167] Applying this test, the court in *City of Los Angeles v. Wells Fargo & Co.*[168] held that the City's damages met proximate cause requirement because they were distinct from those of the homebuyers, they could be calculated using a Hedonic regression analysis, and there was no danger of multiple recoveries.[169]

The United States District Court for the Eastern District of Pennsylvania recently held that both economic and non-economic consequences of discriminatory lending violations meet the pleading requirements for proximate cause.[170] The City of Philadelphia filed suit against Wells Fargo in 2017 for "reverse redlining" practices under which the bank offered less favorable and more risky loan terms to minority borrowers.[171] The City alleged two types of damages: (1) economic injuries, such as increased municipal expenses and decreased property tax revenue, and (2) non-economic injuries, including decreased capacity for minority homeownership and frustrated goals of integration.[172] Denying the bank's motion to dismiss, the court held that the non-economic injuries could plausibly have "some direct relation" to the banks' alleged misconduct.[173] The discriminatory practices both negatively impacted minorities' ability to purchase homes and reduced overall minority homeownership. While the court had "serious concerns" regarding the City's ability to prove proximate cause for the economic injuries, it permitted the claim to advance past the pleading stage.[174]

Later in 2018, the United States District Court for the Northern District of Illinois decided three cases brought by Cook County, Illinois against fi-

165. City of L.A. v. Wells Fargo & Co., 22 F. Supp. 3d 1047 (C.D. Cal. 2014).

166. *Id.* at 1057.

167. *Id.* (quoting Or. Laborers–Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc., 185 F.3d 957, 963 (9th Cir. 1999)).

168. 22 F. Supp. 3d 1047 (C.D. Cal. 2014).

169. *Id.* at 1058.

170. City of Phila. v. Wells Fargo & Co., No. 17-2203, 2018 WL 424451, at *1 (E.D. Pa. Jan. 16, 2018).

171. *Id.*

172. *Id.*

173. *Id.* at *6.

174. *Id.*

nancial institutions under the FHA.[175] The court evaluated proximate cause under a "directness" standard derived from *Anza*, *Hemi*, and *Lexmark*,[176] meaning that damages that went beyond the "first step of the causal chain" would not qualify for redress.[177] As a result, the district court permitted the County to claim "direct" costs related to foreclosures, such as serving eviction notices, conducting foreclosure proceedings, and inspecting foreclosed homes.[178] In denying the defendant's motion to dismiss, the court noted that (1) these costs flowed directly to the County, (2) no "better" plaintiff could sue for the costs, and (3) the exact amount of damages required a relatively simple calculation.[179] On the other hand, the court granted the defendant's motion to dismiss a number of other damages.[180] For example, the County was not permitted to recover for the costs of social services to foreclosed homeowners, loss of property tax revenue from foreclosed and vacant properties, diminution of property values, diminished racial imbalance, or urban blight.[181] These types of costs could only be calculated speculatively and ran through too many links in the chain of causation.[182]

D. In Bank of America Corp. v. City of Miami, *the Court Granted the City Standing Under the FHA but Dismissed the Claim on Proximate Cause Grounds*

In *Bank of America Corp. v. City of Miami*,[183] the City of Miami attempted to recover from two banks—Wells Fargo and Bank of America—for discriminatory lending practices under the FHA. The City had sued the

175. Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950 (N.D. Ill. 2018); Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975 (N.D. Ill. 2018); Cty. of Cook v. Bank of Am. Corp., No. 14 C 2280, 2018 WL 1561725 (N.D. Ill Mar. 30, 2018).

176. *See supra* notes 138–157 and accompanying text.

177. Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 984 (N.D. Ill. 2018). The same court noted that this standard "obviates the difficulty in assessing damages from indirect injuries; avoids complicated rules for appropriating damages among several injured parties with greater or lesser injuries; and provides the requisite level of deterrence for . . . tortfeasors." Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950, 960 (N.D. Ill. 2018) (alteration in original) (quoting RWB Servs., LLC v. Hartford Computer Grp., Inc., 539 F.3d 681, 688 (7th Cir. 2008)).

178. *See, e.g.*, Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950, 962 (N.D. Ill. 2018). The County was also permitted to recover for lost recording and transfer fees due to the lender's use of an electronic database in lieu of public reporting systems. *Id.* at 965.

179. *Id.* at 962; *see also* Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 984 (N.D. Ill. 2018) ("Those alleged harms, despite running through an 'intervening link of injury' to borrowers, are 'so integral an aspect of the violation alleged, there can be no question that proximate cause is satisfied.'" (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139 (2014))).

180. *See, e.g.*, Cty. of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950, 962–65 (N.D. Ill. 2018) (rejecting the County's claims for damages related to social services, decreased property tax revenue, racial imbalance, and urban blight).

181. *Id.*

182. Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 988 (N.D. Ill. 2018).

183. 137 S. Ct. 1296 (2017).

banks for "intentionally issu[ing] riskier mortgages on less favorable terms to African-American and Latino customers."[184] As a result, a disproportionate number of homes were foreclosed upon in nonwhite neighborhoods, resulting in widespread vacancies and increased segregation.[185] This had an adverse impact on property values, which caused the City's property tax revenue to decrease.[186] Moreover, urban blight increased in those neighborhoods, forcing the City to spend extra funds on municipal services.[187] The Court addressed two issues: (1) whether a municipality has standing under the FHA as an "aggrieved person"; and (2) whether the banks' conduct proximately caused the injuries alleged by the City.[188]

First, the Court held that the City was an "aggrieved person" under the FHA and had standing to sue the banks for the alleged conduct. In addition to constitutional standing requirements of Article III, Section 2, Miami needed to show that it met the "'statutory' standing requirements" from *Lexmark*.[189] The Court described how the term "aggrieved person" had been interpreted broadly in past cases; standing was typically defined "as broadly as is permitted by Article III."[190] Previous cases have allowed plaintiffs to sue under the FHA for being denied interracial relationships,[191] decreased tax revenues and impaired integration,[192] and expenses related to combatting racial steering practices.[193] Based on stare decisis, the Court held that the City's injuries fell within the "zone of interests" protected by the FHA.[194]

Second, the Court addressed whether the City's alleged injuries were proximately caused by the banks' conduct.[195] The United States Court of Appeals for the Eleventh Circuit held that the City met proximate cause because the injuries were "foreseeable results of the banks' misconduct," regardless of the number of links in the causal chain.[196] The Supreme Court

184. *Id.* at 1301.

185. *Id.*

186. *See* Third Amended Complaint for Violations of the Fair Housing Act at 28, City of Miami v. Wells Fargo & Co., No. 13-cv-24508-DIMITROULEAS (S.D. Fla. Apr. 29, 2016) (relying on NAT'L VACANT PROPERTIES CAMPAIGN, *supra* note 26).

187. *City of Miami*, 137 S. Ct. at 1301.

188. *Id.*

189. *Id.* at 1302 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014)).

190. *Id.* at 1303 (citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972)).

191. *See supra* text accompanying note 76.

192. *See supra* note 85.

193. *See supra* note 86. In *Havens*, the plaintiff's complaint alleged "[the plaintiff organization] had to devote significant resources to identify and counteract the defendant's *[sic]* racially discriminatory steering practices." Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) (alteration in original).

194. *City of Miami*, 137 S. Ct. at 1305.

195. *Id* at 1305–06.

196. *Id*. at 1305.

disagreed, noting that the "directness" requirement of tort principles should control.[197] As a result, the Court held that "foreseeability alone does not ensure the close connection that proximate cause requires."[198] The Supreme Court declined to set precise boundaries for proximate cause under the FHA, encouraging lower courts to create their own definitions.[199] Based on the above analysis, the Court vacated the Eleventh Circuit's ruling and remanded for further proceedings based on the proximate cause discussion.[200]

Justice Thomas dissented in part and concurred in part; he agreed that the Eleventh Circuit erred in their proximate cause evaluation but argued that the City of Miami should not have had standing under the FHA to begin with.[201] After reiterating the majority's statutory standing requirements, Justice Thomas immediately diverged from the majority's analysis.[202] He wrote that the broad interpretation of "aggrieved person" under older cases such as *Trafficante* and *Gladstone* had since been denounced by *Thompson*, in which the Court referred to the expanded interpretations as "ill-considered" dictum with "absurd consequences."[203] Furthermore, typical plaintiffs under the FHA include prospective homebuyers or neighbors who are negatively impacted by segregation; the FHA is silent on the issues on which Miami raised its complaint.[204] Finally, the dissent raised concerns that expanded reading of FHA standing could lead to absurd results.

Justice Thomas then agreed with the majority on the issue of proximate cause, specifically that it requires some direct relation rather than foreseeability alone.[205] Justice Thomas went a step further, stating that he would have reversed the Eleventh Circuit's decision rather than remand the

197. *Id.* at 1306. The Court relied on the language from *Holmes*, requiring "some direct relationship between the injury asserted and the injurious conduct alleged." *Id.* (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1306–12 (Thomas, J., dissenting).

202. *Id.* at 1307.

203. *Id.* at 1308 (quoting Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 176 (2011)).

204. *Id.* at 1309 ("But nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow."). Nor do the pleadings allege racial steering, which has been found to be within the FHA's zone of interests. *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972) (granting standing to a white tenant and a black tenant who alleged that a landlord's discriminatory practices denied them the benefits of social integration); Gladstone, Realtors v. Vill. Of Bellwood, 441 U.S. 91, 111 (1979) (permitting standing to plaintiffs alleging that racial steering practices prevented them from living in an integrated society). Justice Thomas admitted that while *Gladstone* does address a "budget-related injury," it must be considered "*in addition to* its racial- steering injury." *City of Miami*, 137 S. Ct. at 1310 (Thomas, J., dissenting).

205. *City of Miami*, 137 S. Ct. at 1311.

case.[206] He wrote that the circuit court would be in no better position than the Supreme Court in evaluating proximate cause, given that the case was brought up on a motion to dismiss, leaving only the complaint to evaluate.[207] Justice Thomas underscored that the complaint would not meet a reasonable proximate cause standard, re-stating the six step chain of events between the banks' conduct and the alleged injuries.[208]

II. ANALYSIS

The two holdings in *Bank of America Corp. v. City of Miami* create conflicting outcomes for cities in fair lending disputes. On one hand, the Court reaffirmed its broad interpretation of standing under the FHA, providing an avenue for cities to litigate fair lending violations.[209] Simultaneously, however, local governments may be discouraged to bring a claim in light of the Court's "direct" proximate cause requirement.[210] In demanding that cities show more than mere foreseeability of municipal damages, *City of Miami* aligns with Supreme Court precedent in curbing unwieldly litigation.[211] Given the newly stated standard, subsequent lower court decisions have favored lending institutions.[212] As a result, cities should explore alternative strategies in litigation, such as advanced data analytics, or policy, such as vacant property registration, in order to hold financial institutions accountable for discriminatory lending practices.[213]

206. *Id.* ("But these cases come to the Court on a motion to dismiss, and the Court of Appeals has no advantage over us in evaluating the complaint's proximate-cause theory.").

207. *Id.*

208. *Id.* Justice Thomas wrote:

> As a result of the lenders' discriminatory loan practices, borrowers from predominantly minority neighborhoods were likely to default on their home loans, leading to foreclosures. The foreclosures led to vacant houses. The vacant houses, in turn, led to decreased property values for the surrounding homes. Finally, those decreased property values resulted in homeowners paying lower property taxes to the city government. Also, . . . the foreclosed upon, vacant homes eventually led to "vagrancy, criminal activity, and threats to public health and safety," which the city had to address through expenditures of municipal resources.

Id. (internal citations omitted) (quoting Brief for Respondent City of Miami at 6, *City of Miami*, 137 S. Ct. 1296 (No. 15-1111)).

209. *See infra* Section II.A.

210. *See infra* Section II.B.

211. *See infra* Section II.B.

212. *See infra* Section II.C.

213. *See infra* Section II.C.

A. The Court's Decision Reaffirms Its Broad Interpretation of Standing Under the FHA, Providing an Incentive for Municipalities to Use the Court Systems for Related Litigation

The Supreme Court has made clear through a line of decisions that standing under the FHA should be granted liberally.[214] While the Court had not yet heard a municipal plaintiff challenge an institution's lending practices under the FHA, its decision properly aligns with the holdings in *Trafficante v. Metropolitan Life Insurance Co.*, *Gladstone v. Village of Bellwood*, and *Havens Realty Corp. v. Coleman*.[215] In both *Gladstone* and *Trafficante*, the plaintiffs included individuals who were not directly harmed but had nonetheless suffered an injury-in-fact under Article III of the Constitution.[216] The plaintiffs lost the benefits of living an integrated society, and they suffered economic harm as a result of racial steering practices in their neighborhood.[217] Moreover, one of the plaintiffs in *Gladstone* included a village, supporting the notion that a municipality's injuries that derive from certain FHA violations fall within the zone of interests protected by the Act.[218] In *Havens*, the Court granted standing to a housing nonprofit which was unable to serve its clients and, consequently, suffered financially.[219] These cases illustrate that the Court's understanding of "aggrieved person" under the FHA has expanded to the fullest extent of Article III of the Constitution.[220]

The Supreme Court's interpretation of FHA standing, furthermore, is consistent with statutory standing holdings in recent decades.[221] After the Court in *Ass'n of Data Processing Service Organizations, Inc. v. Camp* authorized an "enlargement" of the class of plaintiffs receiving under the zone of interests test, numerous cases reflected this thinking.[222] For example, *Bennett v. Spear* illustrates how an entire district could have standing for a claim that a regulation, which was intended to affect ranchers, unfairly af-

214. 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 3:17 (3d ed. 2014) ("In combination, *Trafficante*, *Gladstone*, and *Havens* create a generous standing doctrine under the [FHA], a doctrine that requires a finding of standing to the full extent permitted by Article III of the Constitution.").

215. *See supra* notes 73–77, 88–101 and accompanying text.

216. *See supra* notes 73–77, 88–93 and accompanying text.

217. *Trafficante*, 409 U.S. 205 (considering business prospects of having diverse neighbors as economic harm); *Gladstone*, 441 U.S. 91 (permitting economic manipulation of the neighborhood and reduced property values as economic harm).

218. *See Gladstone*, 441 U.S. at 110–11 (granting standing to the village based on economic manipulation of its neighborhoods).

219. *See Havens*, 455 U.S. at 379.

220. *See supra* note 83.

221. *See supra* Section I.B.3.

222. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970); *see supra* notes 80–82 and accompanying text.

fected that region's economy.[223] The Court took a more nuanced approach in 2011 in *Thompson v. North American Stainless, LP*.[224] Despite saying that it would not allow every party with Article III standing to sue under Title VII, the Court granted standing to a husband claiming that his employer retaliated after his wife had filed a separate grievance.[225] Writing for the majority, Justice Scalia explained that although the employer did not retaliate directly against the wife, her husband's injury was still one which the Title VII legislation was intended to prevent.[226]

The Court's trend toward expanding standing in FHA cases support the majority's ruling in *City of Miami*. First, the holdings from *Trafficante*, *Gladstone*, and *Havens* indicate that an FHA plaintiff need not be the immediate recipient of misconduct.[227] Similarly, the City of Miami alleged injuries that resulted from misconduct directed at other individuals.[228] Just as groups and regions were granted standing for injuries related to individual statutory violations in *Gladstone*, *Havens*, and *Bennett v. Spear*, the City of Miami's claim properly fell within the Court's expanded reading of "aggrieved persons."[229] Furthermore, even if the Court decided to restrict its holding to signal a shift in statutory standing after *Thompson*, Miami's claim would likely still pass muster. When the *Thompson* Court referred to the expanded standing in previous cases as "ill-considered" dictum, it intended to limit statutory standing to plaintiffs whose interests fell within the purposes of the legislation.[230] Looking at the purposes of the FHA, the City of Miami's injuries are likely the type which Congress intended to prevent.[231] The FHA was created to protect "those . . . [who] had an interest in ensuring fair housing,"[232] and a municipality can demonstrate such an interest.[233]

223. Bennett v. Spear, 520 U.S. 154 (1997); *see supra* notes 102–108 and accompanying text.

224. *See supra* text accompanying notes 109–113.

225. *Id.* at 178.

226. *Id.*

227. *See supra* text accompanying notes 214–220.

228. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1301–02 (2017). The premise of the claim was that the bank's predatory lending practice adversely impacted certain neighborhoods, which placed both an economic and social burden on the City to address the damages. *Id.*

229. *See supra* text accompanying notes 73–77 (*Gladstone*), 94–100 (*Havens*), 102–108 (*Bennett*).

230. *Thompson*, 562 U.S. at 176–77 (2011). It should be noted that the holding in *Thompson*, which sought to restrict statutory standing, addressed a Title VII claim. *Id.* Additionally, the *Thompson* Court's concerns about Article III standing are reflected in Justice Thomas's dissent in *City of Miami*. *See supra* text accompanying notes 201–204.

231. *See supra* notes 60–61.

232. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (citing *Hearings Before the Subcomm. on Hous. and Urban Affairs of the S. Comm. on Banking and Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong., 1st Sess. (1967)).

233. *See* Veronica Nicholson, Note, Bank of America Corporation v. City of Miami, 44 OHIO N.U. L. REV. 147, 169–70 (2018) (citing testimonies from *City of Miami* that illustrate a munici-

In his *City of Miami* dissent, Justice Thomas echoed the concerns about expanded statutory standing originally raised in *Thompson*; however, these concerns are misplaced. Both Justices Thomas and Scalia worried that broad grants of standing under statutes such as the FHA would lead to a litany of unnecessary and unfair litigation.[234] Two factors suggest that municipal standing will not lead to absurd results. First, the "zone of interests" test limits the Court's ability to adjudicate in statutory causes of action. This test, first created in *Ass'n of Data Processing*, ensures that the Court does not hear "generalized grievances"[235] in statutory contexts.[236] While Justice Thomas warns of local merchants and service providers bringing similar FHA claims on account of lost business,[237] their interests do not fall within the zone of the FHA's purpose because they do not have a clear interest in fair housing.[238] Second, the Court simultaneously set rigid requirements for proximate cause.[239] By stating that foreseeability alone is not sufficient to recover for injuries under the FHA, the Court effectively discouraged "foreseeable" yet indirect victims of foreclosures, such as local businesses, from bringing claims because their injuries were not proximately caused by the lenders' misconduct.[240]

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pality's interest in fair housing); *see also* Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2525–26 (2015) ("The Court acknowledges the [FHA's] continuing role in moving the Nation toward a more integrated society.").

234. *Thompson*, 562 U.S. at 176–77 ("If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow."); Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1310–11 (2017) (Thomas, J., dissenting) ("Petitioners similarly argue that, if Miami can sue for lost tax revenues under the FHA, then 'plumbers, utility companies, or any other participant in the local economy could sue the Banks . . . .'" (quoting *City of Miami*, 137 S. Ct. at 1304 (majority opinion))).

235. Warth v. Seldin, 422 U.S. 490, 499 (1975).

236. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).

237. *City of Miami*, 137 S. Ct. at 1304 (raising the defendant's concerns that "restaurants, plumbers, utility companies, or any other participant in the local economy could sue the Banks to recover business they lost when people had to give up their homes").

238. *See supra* text accompanying notes 56–61. Miami raised this argument when arguing that municipal standing would not lead to absurd results. *See* Jesse D.H. Snyder, *No Need for Cities to Despair After* Bank of America Corporation v. City of Miami: *How Patent Law Can Assist in Proving Predatory Loans Directly Cause Municipal Blight Under the Fair Housing Act*, 70 ME. L. REV. 63, 74 (2017) ("Only parties with an interest in fair housing—like cities—can sue under the FHA." (alterations omitted) (quoting Amy Howe, *Argument Preview: Justices to Consider Scope of Fair Housing Act*, SCOTUSBLOG (Nov. 3, 2016, 10:03 AM), http://www.scotusblog.com/2016/11/argument-preview-justices-to-consider-scope-of-fair-housing-act/)).

239. *See supra* text accompanying notes 196–200.

240. *See* Nicholson, *supra* note 233, at 168 ("[B]y reeling in the standard for proximate cause under the FHA, the majority made sure that not just anyone who foreseeably experienced financial loss as a result of the banks' alleged misconduct could sue under the FHA.").

In addition, the Court's decision reaffirms the role of cities in protecting the rights of their citizenry, particularly in disparate impact contexts.[241] In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that, absent a discriminatory policy, plaintiff classes cannot meet the "commonality" requirement of Rule 23(a)(2) of the Federal Rules of Civil Procedure.[242] Thus, the Court "effectively eliminated private class actions against mortgage lenders based on alleged violations of the FHA."[243] Following that decision, municipalities increasingly attempted to use the court system to litigate fair lending disputes.[244] While Cleveland attempted to sue on nuisance theory, Baltimore's case was the first in which a city alleged detrimental harm as a result of banking practices.[245] Baltimore, in addition to Memphis and Chicago—who had brought fair lending claims on similar bases[246]—survived a significant motion to dismiss for lack of standing.[247] As a result, these cities were able to reach "massive settlements negotiated by the U.S. Department of Justice" against major lending institutions.[248] Lower courts subsequently favored municipalities bringing unfair lending cases in banks. In a total of twelve cases brought by Atlanta, Los Angeles, Miami, and Cook County, ten plaintiffs were eventually granted standing.[249] As one legal expert has noted, the decision to grant standing to Miami in the Supreme Court "affirmed progressive cities' role in combatting housing segregation in the United States."[250]

241. *See* John L. Ropiequet et al., *Fair Lending Developments: Standing to Sue Takes the Floor*, 72 BUS. L. 549, 549–54 (2017) (chronicling the rise in municipal plaintiffs following *Wal-Mart Stores, Inc. v. Dukes*).

242. Wal-Mart Stores v. Dukes, 564 U.S. 338, 359 (2011); *see supra* notes 31–34 and accompanying text (describing the Court's analysis in *Dukes*); FED. R. CIV. P. 23(a)(2) ("[T]here are questions of law or fact common to the class.").

243. *See* Ropiequet et al., *supra* note 241, at 550.

244. *Id.*

245. John L. Ropiequet, *Has the US Supreme Court Sounded the Death Knell for Fair Lending Cases?*, BANKING & FIN. SERVS. POL'Y REP., July 2017, at 6.

246. *See supra* text accompanying notes 37–41.

247. *See supra* text accompanying notes 114–117.

248. Ropiequet, *supra* note 245, at 6.

249. *See* Ropiequet, *supra* note 241, at 551. Three of the four Miami cases were given standing on appeal in the Eleventh Circuit, and two of the three Cook County cases were granted standing in the district court. *Id.*

250. Mark Joseph Stern, *Will Fair Housing Stay Fair?: The Supreme Court's Ruling in* Bank of America v. City of Miami *Strengthened the Fair Housing Act—for Now*, SLATE (May 1, 2017), https://slate.com/news-and-politics/2017/05/in-bank-of-america-v-miami-the-supreme-court-strengthens-the-fair-housing-act.html.

B. The City of Miami *Ruling that Proximate Cause Requires More than "Foreseeability" May Discourage Unfair Lending Litigation, but It Aligns with FHA Precedent*

The Court's second holding in *City of Miami*—that proximate cause for damages in fair lending cases requires more than foreseeability alone[251]—is consistent with precedent in both the Supreme Court and district courts. The Supreme Court held that the Eleventh Circuit erred by using foreseeability to evaluate proximate cause; it instead required that the lower court use the "directness" standard from tort principles.[252] The Court declined to provide further guidance on the issue for lower courts, intending for those courts to set the limits of proximate cause in light of both foreseeability and directness.[253]

This more stringent proximate cause standard, in contrast with the aforementioned standing holding, may discourage cities from using court systems to recover for the municipal costs of discriminatory lending. Many legal analysts have noted that the decision makes the standing win a "Pyrrhic victory" due to the more rigid causation requirements.[254] While the path to standing might be more direct, "uncertainty in proving causation may lead cities to forego suing under the [FHA]."[255] The decision, difficult as it may appear to cities, does align with causation precedent.

First, the Supreme Court has held that in statutory causes of action, and particularly in FHA claims, causation requires more than foreseeability. The Court in both *Anza v. Ideal Steel Supply Corp.* and *Hemi Group, LLC v. City of New York* indicated that, at least as far as statutory fraud cases are concerned, some direct relationship is required between the alleged misconduct and ensuring harm.[256] This standard both ensures that no intervening cause accounts for the harm and that the defendant's harm is best remedied by the particular plaintiff.[257] Furthermore, the *Lexmark International, Inc. v. Static Control Components, Inc.* decision indicates that if there are multiple steps in the chain of causation, those steps should carry predictable and proportional harms.[258] In a FHA context, the Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* held

251. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305–06 (2017).

252. *See supra* notes 195–200 (describing the Court's analysis of proximate cause).

253. *City of Miami*, 137 S. Ct. at 1306.

254. Ropiequet, *supra* note 245, at 9; *see also* Snyder, *supra* note 238, at 78 (citing commentary by legal experts who felt that the proximate cause holding gives cities a difficult standard to meet).

255. Snyder, *supra* note 238, at 78 (citing Stern, *supra* note 250).

256. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006); Hemi Group, LLC v. City of New York, 559 U.S. 1, 11 (2010); *see also supra* text accompanying notes 138–147.

257. *See supra* text accompanying notes 138–147.

258. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 140 (2014); *see also supra* text accompanying notes 156–157.

that while the FHA may be used to litigate disparate impact claims, plaintiffs must meet a "robust causality requirement."[259] Similar to the *Wal-Mart* decision, this outcome indicates that plaintiffs must be able to trace damages directly to a particular policy or decision.[260] The stringent causality standard would, therefore, ward off unnecessary litigation.[261]

Similarly, by limiting fair lending claims to those with at least some direct relationship with the alleged misconduct, the Court signifies an intent to permit recovery only when an injury can be traced to the harm.[262] The ruling in *City of Miami* both limits judicial abuse and simplifies damage calculations. Additionally, the rule aligns with the precedent set through *Anza*, *Hemi*, and *Lexmark*, since the Court has clearly required that proximate cause for statutory causes of action requires at least some direct connection.[263] The Eleventh Circuit—the only court of appeals to rule on this issue—used a foreseeability standard when evaluating proximate cause.[264] In developing this standard, the Eleventh Circuit cited to *Gladstone* and *Havens* to show that direct harm need not be pleaded in order to bring an FHA claim.[265] These cases, however, serve to determine *standing* under the FHA[266] and should not be used to establish limits for proximate cause as it relates to disparate impact and fair lending.

C. After City of Miami, *the Trends in Lower Courts' Interpretation of Proximate Cause Favor the Lenders, Meaning Cities Might Explore Alternative Options to Hold Banks Accountable*

The *City of Miami* Court's standing and proximate cause rulings arguably "[give] ammunition to both sides in litigation between cities and banks under the [FHA] over the impact of predatory lending practices on local

259. Tex. Dep't of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2523 (2015).

260. *See* John L. Ropiequet, *The Supreme Court Doubles Down on the Causation Requirement for Fair Lending Cases*, 71 CONSUMER FIN. L.Q. REP. 219, 219–20 (2017) (describing *Dukes* and *Inclusive Communities* as precursors to the *City of Miami* outcome).

261. *Inclusive Communities*, 135 S. Ct. at 2512 ("These limitations are also necessary to protect defendants against abusive disparate-impact claims.").

262. *See* Ropiequet, *supra* note 260, at 236 ("*Dukes*, *Inclusive Communities*, and *City of Miami* . . . stressed the importance of evidence of a strong causal connection between the lenders' acts and discriminatory effects on borrowers.").

263. *See supra* text accompanying notes 256–259.

264. Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017) ("The Eleventh Circuit grounded its decision on the theory that proximate cause under the FHA is 'based on foreseeability' alone. . . . [No] other court of appeals weighed in on this issue." (quoting City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015), *vacated*, 137 U.S. 1296)).

265. *City of Miami*, 800 F.3d at 1281.

266. *See supra* Section II.B.

communities."[267] While the Court's broad standing requirements might encourage a city to use litigation to settle disputes with financial institutions, the stringent causation standard might serve as a deterrent.[268] Furthermore, municipalities will keep an eye on both settlement discussions and litigation in lower courts around the country. While many cases prior to *City of Miami* focused on standing, lower courts will now be tasked to determine which sorts of injuries can be directly linked to the alleged misconduct.[269]

Following the *City of Miami* decision, few courts have ruled on which municipal injuries might be proximately caused by discriminatory lending.[270] The outcomes have favored financial institutions. In all three Cook County cases, the district court concluded that most of the County's alleged injuries did not meet the directness standard.[271] In the suits against HSBC and Wells Fargo, for example, the court denied the motions to dismiss claims for expenses related to foreclosure proceedings, but dismissed claims related to lost tax revenue, increased blight, increased social services, and the like.[272] While the costs related to foreclosure proceedings were "within the first step of injury," the vast majority of other claims "depended on a multitude of factors"[273] and required "difficulty in measuring and apportioning."[274]

Meanwhile, *City of Philadelphia v. Wells Fargo & Co.* might represent a beacon of hope for cities at the pleading stage, although lending institutions might find comfort in the likely merits of the case.[275] The Eastern District of Pennsylvania held that non-economic injuries, such as frustrated integration goals, could have a direct relationship to the bank's lending practices because they may have impaired minorities' ability to purchase

267. Tony Mauro, *SCOTUS Decision May Fuel Suits Against Banks*, LAW.COM, (May 21, 2017) https://www.law.com/sites/almstaff/2017/05/01/scotus-decision-may-fuel-suits-against-banks/.

268. *Id.*

269. *See* Ropiequet, *supra* note 245, at 9.

270. Cty. of Cook v. Bank of Am. Corp., No 14 C 2280, 2018 WL 1561725, at *1 (N.D. Ill. Mar. 30, 2018); Cty. of Cook v. HSBC N. Am. Holdings, Inc., 314 F. Supp. 3d 950 (N.D. Ill. 2018); Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975 (N.D. Ill. 2018).

271. *See supra* notes 178–182 and accompanying text.

272. *See supra* notes 178–182 and accompanying text.

273. Cty. of Cook v. HSBC N. Am. Holdings, Inc., 314 F. Supp. 3d 950, 962 (N.D. Ill. 2018).

274. *Id.*; *see also Cty. of Cook*, 2018 WL 1561725, at *5 (holding that "both the contingent nature of the county's injuries . . . as well as their temporal and causal remoteness" justify dismissal); Cty. of Cook v. Wells Fargo & Co., 314 F. Supp. 3d 975, 990 (N.D. Ill. 2018) (noting that damage calculation would require "the very kind of 'massive and complex damages litigation' against which the Supreme Court has strongly cautioned" (quoting Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017))).

275. City of Phila. v. Wells Fargo & Co., No. 17-2203, 2018 WL 424451, at *1 (E.D. Pa. Jan. 16, 2018); *see supra* text accompanying notes 170–174 (describing Philadelphia's claim and the court's holding).

homes.[276] In reaching this decision, the district court opted not to rule on proximate cause for economic injuries such decreased tax revenue.[277] The court did, however, caution that it had "serious concerns" regarding proximate cause for these injuries on the merits, which might further deter the use of litigation to resolve these disputes.[278] Proximate cause for the ripple effects of discriminatory lending will likely be difficult to prove on the merits in other pending cases around the nation.[279]

Municipalities attempting to recover for foreclosure—and blight-related damages from unfair lending—may need to examine alternative litigation or policy-based solutions. First, cities might explore innovative litigation strategies to more closely connect their injuries to the discriminatory banking practices. Data and expert analysis may be used to demonstrate a more predictable and close connection between lending practices and urban blight.[280] As early as Baltimore City's case against Wells Fargo, the City used Hedonic regression analyses to plead "precise quantification of the injury to the City caused by Defendants' discriminatory lending practices."[281] While Baltimore only needed to show a fairly traceable relationship between the bank's conduct and the City's alleged injuries,[282] similar calculations might be used for proximate cause pleadings.

As the Supreme Court held, the presence of a one to one relationship between cause and result can mitigate concerns about extra "steps" in the causal chain.[283] Techniques that eliminate intervening and contributing causes of blight, therefore, can benefit cities in meeting proximate cause standards. As seen in *City of Los Angeles v. Wells Fargo & Co.*, where the district court used a proximate cause standard rooted in both directness and foreseeability, advanced data can illustrate a connection between actions and results.[284] Specifically, the court noted how "the City alleges that Defendants' contribution can be parceled out from the losses attributable to non-Wells Fargo foreclosures and other causes through Hedonic regression

276. *City of Phila.*, 2018 WL 424451, at *6.

277. *Id.* ("Because the City plausibly pleads proximate cause for its non-economic injuries, the question of whether it also adequately pleads proximate cause for its economic injuries need not be reached at this juncture.").

278. *Id.*

279. *See* Ropiequet, *supra* note 260, at 232 ("Similarly, when the Atlanta, Miami Gardens, Cook County, and Philadelphia cases reach that stage . . . it is unlikely that the cases will survive summary judgment.").

280. *See* Snyder, *supra* note 238, at 83–85.

281. Third Amended Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 17, at 107.

282. *See supra* notes 114–118 and accompanying text.

283. *See supra* notes 156–157 and accompanying text (referring to the direct correlation between the sales of the remanufacturing company and the plaintiff).

284. *See supra* notes 166–169.

analysis."[285] Courts have increasingly permitted regression analyses to show damages, but they are subject to strict *Daubert* standards and can be excluded for even slightly unsupported assumptions.[286] The combination of advanced economic statistics and expert witnesses might nevertheless get the issue of proximate cause to a jury.[287]

If litigation ultimately proves fruitless in this regard, cities will need to explore policy options to hold lenders accountable for unfair lending practices. For example, cities could force lenders to be accountable for vacant property upkeep through vacant property registration ("VPR").[288] This process can require lenders to register a property at the time of foreclosure or after a property has been vacant for a term.[289] Chula Vista, California, became one of the first localities to enforce VPR on lending institutions.[290] Mandated by ordinance, lenders must inspect a home ten days after initial notice of foreclosure; and if the property is vacant, the lender "must then register with the city and is required to maintain the property to a specified community standard."[291] The city is subsequently able to collect taxes, impose fines, and place priority liens on the property.[292] Such a process, while not a comprehensive method to recover all foreclosure-related damages, might at least keep institutions accountable for blighted and nonpaying properties.

III. CONCLUSION

Ever since Baltimore City survived a motion to dismiss for lack of standing in its fair lending litigation against Wells Fargo and Bank of America, lower courts have authored inconsistent decisions regarding mu-

285. City of L.A. v. Wells Fargo & Co., 22 F. Supp. 3d 1047, 1055 (C.D. Cal. 2014) ("[T]he City alleges that Defendants' contribution can be parceled out from the losses attributable to non-Wells Fargo foreclosures and other causes through Hedonic regression analysis."); *cf.* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015), *vacated*, 137 U.S. 1296 (2017) ("[T]he City has provided the results of regression analyses that purport to draw the connection between the Bank's conduct toward minority borrowers, foreclosure, and tax revenue."); *see also* Snyder, *supra* note 238, at 84 ("If economic statistics show that one act drove economic downturn, then a jury should be able to hear that testimony.").

286. *See generally* Jeff Todd & R. Todd Jewell, *Dubious Assumptions, Economic Models, and Expert Testimony*, 42 DEL. J. CORP. L. 279 (2018). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court clarified the "gatekeeping role of the [trial] judge" in admitting reliable and relevant expert testimony. *Id.* at 597. According to this principle, judges should admit "[p]ertinent evidence based on scientifically valid principles." *Id.*

287. Snyder, *supra* note 238, at 84–86.

288. FRANK S. ALEXANDER, CTR. FOR CMTY. PROGRESS, LAND BANKS AND LAND BANKING 38 (2d ed. 2015).

289. *Id.*

290. *Id.* at 39; CHULA VISTA, CAL. MUNICIPAL CODE § 15.60.040 (2018).

291. ALEXANDER, *supra* note 288, at 39.

292. *Id.*

nicipal standing and proximate cause under the FHA.[293] In *Bank of America Corp. v. City of Miami*, the Supreme Court stated that while municipalities have standing to sue banks for unfair lending practices under the FHA, mere foreseeability is insufficient to establish proximate cause.[294] The Court properly stated that the historically broad reading of statutory standing under the FHA should include municipalities.[295] Additionally, its mandate that proximate cause include some element of directness aligns with precedent in both fair housing and similar statutory contexts.[296] This decision may appear to benefit both sides in discriminatory lending litigation, but the stringent proximate cause standards might discourage cities from using the courts to settle similar disputes.[297] Moving forward, municipalities may need to explore alternative litigation strategies or policy solutions to hold banks accountable for discriminatory lending practices.[298]

293. *See* Ropiequet, *supra* note 245, at 6–7.
294. *See supra* Section I.D.
295. *See supra* Section II.A.
296. *See supra* Section II.B.
297. *See supra* Section II.B.
298. *See supra* Section II.C.