Nos. 15-1111 & 15-1112

IN THE
Supreme Court of the United States

BANK OF AMERICA CORP., *et al.*,
Petitioners,
v.
CITY OF MIAMI, FLORIDA,
Respondent.

WELLS FARGO & CO. AND WELLS FARGO BANK, N.A.,
Petitioners,
v.
CITY OF MIAMI, FLORIDA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Housing Act (FHA) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race," 42 U.S.C. § 3604(b), and it further makes it unlawful "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race," *id.* § 3605(a). The FHA also provides that "[a]n aggrieved person may commence a civil action . . . to obtain appropriate relief with respect to

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

such discriminatory housing practice or breach," *id.* § 3613(a)(1)(A), defining "aggrieved person" broadly to include anyone who "claims to have been injured by a discriminatory housing practice," *id.* § 3602(i)(1).

Relying on these provisions, the City of Miami sued Bank of America and Wells Fargo for allegedly engaging in a decade-long practice of discriminatory and predatory lending. According to the city's complaints, the banks' targeting of minority borrowers for high-risk, costly loans—and their refusal to extend credit to minorities on equal terms with white borrowers—led to unnecessary and premature foreclosures, which in turn cost the city tax revenue and forced it to spend more on municipal services to address the blight in affected neighborhoods. *See* J.A. at 31-42, 88-95, 267-78, 334-41. The complaints offered extensive statistical data to support these allegations, along with "the statements of several confidential witnesses who claimed that the Bank[s] deliberately targeted black and Latino borrowers for predatory loans." BOA Pet'n at 9a.

Bank of America and Wells Fargo now claim that Miami may not sue under the FHA because it is not an "aggrieved" person within the meaning of the statute. *Amicus* submits this brief to demonstrate otherwise: in enacting and subsequently amending the FHA, Congress gave private actors, including cities like Miami, the authority to sue for injuries they suffer as a result of discrimination against others. Congress's decision to extend the ability to sue under the FHA so broadly is not only consistent with the ambitious goals of that legislation, it is consistent with the Constitution's promise that the federal courts would serve as a forum for the enforcement of federal law and the nation's long history of entrusting private actors to help make that promise a reality.

When the Framers adopted our enduring charter, they conferred broad power on the federal courts established by Article III of the Constitution. The decision to do so—which was a significant point of contention during ratification—was a direct response to the federal government's inability to enforce its decrees under the Articles of Confederation, leading Alexander Hamilton to lament "the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws." *The Federalist No. 21*, at 107 (Hamilton) (Clinton Rossiter ed., 1961).

Reflecting a "longstanding and deep American attachment to courts as a forum for vindicating rights," Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1354 (2012), Congress has long enlisted private parties in the enforcement of federal law. Indeed, since the very first Congress, lawmakers have enacted legislation giving persons a right to sue to redress violations of the nation's laws in the federal courts. Empowerment of these private litigants promotes robust enforcement of the law, securing "important social benefits" that include "deterrence of . . . violations in the future." *City of Riverside v. Rivera*, 477 U.S. 561, 574-75 (1986).

The FHA continued the tradition of enlisting private parties in the enforcement of federal law, recognizing that vigorous enforcement by private parties would be necessary to achieve the law's ambitious goals. Indeed, the FHA was enacted not merely to provide redress for discrete incidents of discrimination suffered by individual victims, but rather, as its proponents explained, to promote "an integrated society" and end "the explosive concentration of Negroes in the urban ghettos." 114 Cong. Rec. S3422 (Feb. 20,

1968) (statement of Sen. Mondale); 114 Cong. Rec. H9589 (Apr. 10, 1968) (statement of Rep. Ryan). The Act thus declared it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968); *see also* President Lyndon B. Johnson, Remarks on Signing the Civil Rights Act (Apr. 11, 1968), http://millercenter.org/president/speeches/speech-4036 (declaring that "fair housing for all . . . is now part of the American way of life"). As this Court has recognized, the FHA was designed to "play an important part in avoiding the . . . grim prophecy that 'our Nation is moving toward two societies, one black, one white—separate and unequal.'" *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (quoting Report of the National Advisory Commission on Civil Disorders 1 (1968)).

Enforcement of this ambitious new law was entrusted almost entirely to private lawsuits in which, as this Court later recognized, "the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quotation marks omitted). To facilitate this method of enforcement, Congress opened the courthouse doors to as wide a range of "aggrieved" plaintiffs as possible, extending the FHA's cause of action to "any person" claiming to have been "injured" by a discriminatory housing practice—not merely to individuals who were discriminated against. Pub. L. No. 90-284, § 810(a) ("Any person who claims to have been injured by a discriminatory housing practice or who be-

lieves that he will be irrevocably injured by a discriminatory housing practice that is about to occur").

Consistent with Congress's intent and the plain language of the statute it enacted, this Court has repeatedly declared that the term "aggrieved" in the FHA extends "as broadly as is permitted by Article III of the Constitution," *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 98 (1979), and has applied that principle to a range of plaintiffs who were not themselves discriminated against but who suffered indirect injuries. These plaintiffs include non-minority residents who alleged "economic damage in social, business, and professional activities" from being isolated from minorities, *Trafficante*, 409 U.S. at 208, homeowners who suffered a "diminution in value" of their properties, *Gladstone*, 441 U.S. at 115, and a nonprofit organization that experienced a "drain on [its] resources," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). Most relevant here, this Court has held that a municipality is a proper FHA plaintiff when racial steering "manipulates the housing market." *Gladstone*, 441 U.S. at 109. As the Court explained, "reduc[ing] the total number of buyers" can cause prices to "be deflected downward," and a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id.* at 110-11.

Despite the breadth of the FHA's private cause of action, the original Act proved inadequate to the enormous task of reversing generations of racial segregation. Although complaints by private persons were "the primary method of obtaining compliance with the Act," *Trafficante*, 409 U.S. at 209, various provisions had the effect of discouraging private ac-

tions, including "a short statute of limitations" and "disadvantageous limitations on punitive damages and attorney's fees." H.R. Rep. No. 100-711, at 16 (1988) (hereinafter "H.R. Report"). Two decades later, Congress "strengthen[ed] the private enforcement section" of the Act by correcting these defects and "eliminat[ing] certain restrictions" on the exercise of the private right of action. *Id.* at 23, 39. In doing so, lawmakers explained that their purpose was to remove "disincentive[s] for private persons to bring suits under existing law," in order to create "an effective deterrent on violators." *Id.* at 40.

At the same time, Congress ratified this Court's repeated pronouncements that the term "person aggrieved" extends "as broadly as is permitted by Article III of the Constitution," *Gladstone*, 441 U.S. at 98, putting its imprimatur on this Court's holdings permitting cities and others indirectly injured by housing discrimination to sue to enforce the Act's guarantee of equality. From the start of congressional efforts to improve the FHA, the leading bills took the law's broad cause-of-action language—the language that had been previously interpreted by this Court—and used it to formally define the term "aggrieved person" in the law's definitions section. Over nearly a decade of hearings and attempts to amend the FHA, both proponents and opponents of this "aggrieved person" definition understood—and told Congress—that including it in the amended Act would ratify this Court's precedent, under which proper plaintiffs "include not only direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates the statute." Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 Yale L. & Pol'y Rev. 375, 382 (1988).

Aware of these views, Congress not only retained the relevant language but affirmatively reinscribed it in the Act's standalone definitions section, to ensure that it would apply across the Act. *See* 42 U.S.C. § 3602(i). In the process, lawmakers made unmistakably clear their familiarity with this Court's "broad holdings" construing that definition. H.R. Report at 23. And Congress rejected an alternative bill that would have replaced the language previously interpreted by this Court with a narrower definition of "aggrieved person," restricted to individuals discriminated against while seeking housing.

Thus, by respecting the plain language of the FHA, which provides a cause of action to "any person" who "claims to have been injured by a discriminatory housing practice," 42 U.S.C. § 3602(i), this Court will give effect to Congress's clear intent—both in 1968 and in 1988. Doing so will also continue to "give vitality" to the Act's private enforcement mechanism, *Trafficante*, 409 U.S. at 212, ensuring that the law can help the nation continue to make strides toward eliminating housing discrimination. After all, despite progress made since 1988, discrimination and segregation are still rampant, and fair housing enforcement by direct victims of discrimination remains stymied by "the difficulties in incentivizing individuals to bring complaints." Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. Pa. J. Const. L. 1191, 1202-03 (2011). Cities, like Miami, that are injured by housing discrimination are well positioned to prosecute certain systemic housing abuses and supply a needed threat of deterrence, thus combating the racial segregation that has plagued our nation for far too long. The judgments of the court below, which

recognized Miami's right to sue under the FHA, should be affirmed.

ARGUMENT

I. THE FRAMERS OF ARTICLE III GAVE THE FEDERAL COURTS BROAD JUDICIAL POWER TO ENFORCE FEDERAL LAWS

Article III of the Constitution broadly extends the "judicial Power" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority[.]" U.S. Const. art. III, § 2, cl. 1. It empowers the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States," extending to the federal courts the obligation "of deciding every judicial question which grows out of the constitution and laws." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

The Constitution's sweeping grant of judicial power was viewed as critical to the enforcement of federal laws, and it created a federal judiciary with broad power to protect individual rights secured by federal law. James Madison explained that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential." 1 *The Records of the Federal Convention of 1787*, at 124 (Max Farrand ed., 1911).

The broad power conferred on the newly created federal courts was a direct response to the infirmities of the Articles of Confederation, which established a single branch of the federal government and no independent court system. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443

(1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power"). Under the dysfunctional government of the Articles, individuals could not go to court to enforce federal legal protections. Madison explained that because the federal government was "destitute" of any power of sanction or coercion, its laws were "nominally authoritative, [but] in fact recommendatory only." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 352 (Robert A. Rutland & William M. E. Rachal eds., 1975). Hamilton similarly observed that "[l]aws are a dead letter without courts to expound and define their true meaning and operation." *The Federalist No. 22*, *supra*, at 118 (Hamilton).

When the Framers gathered together in Philadelphia to create a new national charter, they took pains to ensure that the federal courts created by the new Constitution would have the power to enforce federal legal protections. The Framers understood that "[n]o government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws," and gave to the federal courts "the power of construing the constitution and laws of the Union . . . and of preserving them from all violation from every quarter[.]" *Cohens*, 19 U.S. at 387-88.

During the ensuing debates over ratification of the Constitution—in which Article III figured prominently—Federalists and Anti-Federalists alike agreed that the Constitution gave the federal courts extensive power to enforce federal legal commands. *See* Anthony J. Bellia Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 Duke L.J. 263, 313 (2007) (explaining that "[t]he first proffered reason" for

"arising under" jurisdiction "was that federal courts must be able to enforce federal laws"). In the state ratifying conventions, supporters repeatedly made the case that "[t]he federal government ought to possess the means of carrying the laws into execution." 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 158 (Jonathan Elliot ed., 1836) (Davie). James Iredell observed that "laws are useless unless they are executed," and resort to the courts "is the only natural and effectual method of enforcing laws." *Id.* at 145-46; *see id.* at 139 (Spaight) ("When any government is established, it ought to have power to enforce its laws, or else it might as well have no power. What but that is the use of a judiciary?").

The American people, rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, ratified the Constitution, giving the newly created federal courts broad judicial power to ensure, among other things, "that the laws should be executed" and "justice equally done to all the community." 4 *Elliot's Debates*, *supra*, at 160 (Davie).

II. SINCE THE FOUNDING, CONGRESS HAS HARNESSED THE INTERESTS OF PRIVATE PARTIES TO HELP ENFORCE FEDERAL LAWS

Beginning with the first Congress, lawmakers have enacted legislation that gives persons a right to sue to help enforce the nation's laws in the federal courts. This long tradition of enlisting citizens in the enforcement of federal law, which extends to the present day, is meant to harness the interests and initiative of these private actors in a manner that promotes robust enforcement of federal laws and deters their violation.

For example, "[t]he first Congresses feared that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 303 (1989). Accordingly, legislators in the early Republic enacted a host of provisions designed to enlist citizens in the enforcement of federal laws, "including those criminalizing the import of liquor without paying duties, prohibiting certain trade with Indian tribes, criminalizing failure to comply with certain postal requirements, and criminalizing slave trade with foreign nations." Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 175 (1992) (footnotes omitted).[2]

Many of these statutes provided financial incentives that encouraged citizens to act as "informers" or "relators," thus "authoriz[ing] private citizens to bring defendants to justice" and "don the mantle of a public prosecutor." Krent, *supra*, at 297, 300; *see Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*,

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[2] *See, e.g.*, Act of July 31, 1789, § 29, 1 Stat. 29, 44-45 (regarding duties and their rates and fees); Act of Sept. 1, 1789, § 21, 1 Stat. 55, 60 (following provisions of Act of July 31, 1789 regarding "penalties and forfeitures"); Act of Mar. 1, 1790, § 3, 1 Stat. 101, 102 (regarding filing of census forms); Act of July 20, 1790, § 1, 1 Stat. 131, 131 (regarding contracts with mariners and seamen); *id.* § 4, 1 Stat. at 133 (regarding harboring runaway seamen); Act of July 22, 1790, § 3, 1 Stat. 137, 138 (regarding trade with Indians); Act of Feb. 25, 1791, § 8, 1 Stat. 191, 196 (regarding the Bank Act); Act of Mar. 3, 1791, § 44, 1 Stat. 199, 209 (regarding the Distilled Spirits Act); Act of Feb. 20, 1792, § 25, 1 Stat. 232, 239 (regarding the Post Office Act); Act of Mar. 22, 1794, §§ 2, 4, 1 Stat. 347, 349 (regarding the foreign slave trade); Act of May 19, 1796, § 18, 1 Stat. 469, 474 (regarding trade with Indian tribes).

529 U.S. 765, 776-77 (2000). Chief Justice John Marshall later noted that "[a]lmost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information." *Adams v. Woods*, 6 U.S. 336, 341 (1805). A century later, this Court again acknowledged the important deterrent value of such suits. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905) (explaining, with regard to a law meant "to discourage and, if possible, prevent gambling," that the law offered informers a "right to recover the penalty or forfeiture" from a violation "for the purpose of suppressing the evil in the interest of the public morals and welfare").

Congress also enacted such laws to enlist the assistance of private parties who were in the best position to discover or prosecute illegal behavior. For instance, the 1863 False Claims Act had "the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War," *Vermont Agency of Nat. Res.*, 529 U.S. at 781 (quotation marks omitted), and "[t]he idea behind the provision was that individuals within the entity defrauding the government would have superior knowledge of fraud over that of the Department of Justice." Gretchen L. Forney, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 Minn. L. Rev. 1357, 1364 (1998).

Congress enlisted private parties to help deter illegal conduct throughout the twentieth century, making use of "those who enforce public policy by pursuing their own interests." William B. Rubenstein, *On What A "Private Attorney General" Is—and Why It Matters*, 57 Vand. L. Rev. 2129, 2145 (2004). For example, private lawsuits are "a significant means" of enforcing the securities and antitrust laws, where

plaintiffs seeking "compensation for economic damages to themselves" are "often encouraged by the promise of large damage awards (trebled in the case of antitrust damages)." Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. Ill. L. Rev. 185, 195-97 (2000). Indeed, the Securities and Exchange Commission has "repeatedly acknowledged . . . that private litigation enables a level of compliance that would be impossible to achieve if enforcement were limited to the government." Rubenstein, *supra*, at 2151.

Most pertinent here, private litigation is also one of the "primary mechanisms" that Congress has used to enforce civil rights legislation. Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 186 (2003); *see* Johnson, *Equality Directives*, *supra*, at 1346 ("Congress enacts civil rights statutes to promote antidiscrimination and equity goals, and to empower private individuals to enforce those goals through private litigation."). Enabling private litigation offers an essential supplement to the federal government's enforcement efforts. *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401-02 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II."); *Allen v. State Bd. of Elections*, 393 U.S. 544, 556-57 (1969) ("The achievement of the [Voting Rights] Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney Gen-

eral. . . . It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Section] 5 approval requirements.").

In numerous statutes, therefore, "Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large." Karlan, *supra*, at 186. This approach "supplements what even an ideally constituted, well-funded, and vigorous public enforcement agency could do," by "engag[ing] the resources of a multitude of private actors in rooting out discrimination." Johnson, *Equality Directives*, *supra*, at 1347; *see City of Riverside*, 477 U.S. at 574-75 ("[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. . . . [A] successful civil rights plaintiff often secures important social benefits . . . . In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.").

As this history demonstrates, Congress's decision to authorize private suits is often motivated as much by the need for deterrence and robust enforcement of federal law as by a desire to ameliorate harms suffered by individual victims of illegality. In other words, "Congress can vindicate important public policy goals by empowering private individuals to bring suit." Karlan, *supra*, at 186. Indeed, that is exactly what Congress did in enacting, and subsequently amending, the FHA, as the next Section discusses.

III. TO HELP ENFORCE THE PROMISE OF FAIR HOUSING, THE FHA HARNESSES THE INTERESTS OF ALL PARTIES INJURED BY ILLEGAL DISCRIMINATION

A. To Accomplish Its Goal of Ending Racial Housing Segregation, the Original FHA Relied on Private Litigants Injured by Discrimination Against Others

The debate over a fair housing law began in 1967 amidst a series of "devastating urban riots that left vast areas of major cities in flames." Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 70 (1993). "[N]ews coverage of the riots and the underlying disparities in income, jobs, housing, and education, between White and Black Americans helped educate citizens and Congress about the stark reality of an enormous social problem." Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation: Not an Easy Row To Hoe*, 4 Cityscape: A Journal of Policy Development and Research 21, 26 (1999); *see, e.g.*, 114 Cong. Rec. H9589 (Apr. 10, 1968) (statement of Rep. Ryan) ("A national fair housing act . . . is required unless the explosive concentration of Negroes in the urban ghettos is to continue. The hour is late. If Congress delays, it may be writing the death warrant of racial reconciliation.").

After the assassination of Martin Luther King, Jr., and "jolted by the repeated civil disturbances virtually outside its door," Mathias & Morris, *supra*, at 26, Congress responded with legislation remarkably broad in ambition, declaring it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." Pub. L. No. 90-284, § 801; *see* Mathias &

Morris, *supra*, at 26 ("The Fair Housing Act was to provide not only greater housing choice but also to promote racial integration for the benefit of all Americans."); 114 Cong. Rec. S3422 (Feb. 20, 1968) (statement of Sen. Mondale) ("America's goal must be that of an integrated society, a stable society free of the conditions which spawn riots . . . . [T]he best way for this Congress to start on the true road to integration is by enacting fair housing legislation."); 114 Cong. Rec. H9959 (Apr. 10, 1968) (statement of Rep. Celler) (referring to the aim of "eliminat[ing] the blight of segregated housing"). As this Court has recognized, the Act plays a "continuing role in moving the Nation towards a more integrated society." *Inclusive Cmtys.*, 135 S. Ct. at 2526.

Despite the FHA's ambitious goal—nothing less than ending housing segregation in America—legislative concessions eliminated any meaningful federal enforcement powers, and thus enforcement of the Act would be "primarily dependent on private litigation." Schwemm, *supra*, at 378. Compensating for this near exclusive reliance on private litigation, however, the Act opened the courthouse doors to as wide a range of "aggrieved" plaintiffs as possible—"Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur." Pub. L. No. 90-284, § 810(a).[3]

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[3] The banks wrongly assert that "[t]he FHA contains the same text" as Title VII of the 1964 Civil Rights Act. *See* Wells Fargo Br. at 14. To the contrary, Title VII has never included this definition of an "aggrieved" person, or indeed any definition at all. That is significant because the word "aggrieved," standing in isolation, has a "common usage," *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177 (2011), that connotes being denied a legal right or subjected to treatment that departs from an

This Court quickly recognized both the ambitious goal of the FHA and the means it made available to realize that goal. *See Trafficante*, 409 U.S. at 209, 211 (stating that "the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns," but that "complaints by private persons are the primary method of obtaining compliance with the Act" (quotation marks omitted)). Given the Department of Housing and Urban Development's lack of enforcement power and the "minimal" role of the Attorney General, this Court concluded that "the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." *Trafficante*, 409 U.S. at 211 (quotation marks omitted); *see Newman*, 390 U.S. at 402.

Indeed, this Court's first FHA decision recognized that the need to "give vitality" to the Act required no more than heeding its literal language—its "broad" definition of "person aggrieved," *Trafficante*, 409 U.S. at 212—thus allowing *all* injured parties to help enforce the FHA's promise of fair housing. "In light of the clear congressional purpose in enacting the 1968 Act, and the broad definition of 'person aggrieved,'" the Court determined that Congress had provided the plaintiffs with "an actionable right to be free from the adverse consequences *to them* of racially discrimina-

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accepted standard. *See, e.g.*, *Webster's New World Dictionary* (3d College ed. 1988) (defining "aggrieved" as "offended," "wronged," and "injured in one's legal rights"). Yet the more elaborate and precise definition of "person aggrieved" in the FHA—covering "any person" who was "injured" by the proscribed conduct—allowed those who "themselves are not granted substantive rights" under the Act to "sue to enforce the . . . rights of others," *Gladstone*, 441 U.S. at 103 n.9.

tory practices directed at and immediately harmful *to others*." *Warth v. Seldin*, 422 U.S. 490, 512-13 (1975) (emphasis added).

The Court has repeatedly adhered to that principle, holding that an array of plaintiffs with diverse indirect injuries could sue to enforce the FHA. These plaintiffs included white tenants of an apartment complex who, as a result of the owner's discrimination against non-whites, lost "the social benefits of living in an integrated community" and "business and professional advantages which would have accrued if they had lived with members of minority groups," and who "suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto.'" *Trafficante*, 409 U.S. at 208. They similarly included residents of a neighborhood who lost "social and professional benefits" due to racial steering committed against others, while also suffering the "economic injury" of a "diminution of value" of their homes. *Gladstone*, 441 U.S. at 115. And they included a nonprofit fair housing organization that experienced a "drain on [its] resources" and impairment of its "ability to provide counseling and referral services" because of the need to counteract racial steering practices of a realty company. *Havens*, 455 U.S. at 378-79.

Most relevant here, this Court held that a municipality was a proper FHA plaintiff where racial steering had "manipulate[d] the housing market" and affected its racial composition, "replacing what [was] an integrated neighborhood with a segregated one." *Gladstone*, 441 U.S. at 109-10. In describing the potentially "profound" and "adverse" consequences to a municipality of such discrimination, the Court explained that "reduc[ing] the total number of buyers" could cause prices to "be deflected downward," espe-

cially "if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents." *Id.* at 110. "A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id.* at 110-11. A municipality may therefore sue under the FHA if discriminatory practices "rob [it] of its racial balance and stability." *Id.* at 111.

By the early 1980s, therefore, this Court had allowed a variety of plaintiffs who were not themselves discriminated against to seek relief under the FHA, making clear each time that "the only requirement for standing to sue" under the Act was "the Art. III requirement of injury in fact." *Havens*, 455 U.S. at 375-76; *accord Gladstone*, 441 U.S. at 109; *Trafficante*, 409 U.S. at 209. As this Court recognized, Congress empowered all parties injured by housing discrimination to bring suit under the FHA in order to better enforce the important civil rights guaranteed by the Act. *See Gladstone*, 441 U.S. at 103 n.9 ("That respondents themselves are not granted substantive rights by § 804, however, hardly determines whether they may sue to enforce the § 804 rights of others. . . . The central issue [is] whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm[.]"); *see id.* at 126 (Rehnquist, J., dissenting) ("[B]ecause discrimination in housing can injure persons other than the direct objects of the discrimination, Congress believed that the statute's fair-housing goals would be served by extending standing under § 810 as broadly as constitutionally permissible." (citation omitted)).

B. The 1988 Amendments Confirmed that All Parties Injured by Illegal Housing Discrimination Have a Cause of Action, While Further Encouraging Private Enforcement

This Court's prediction that private litigation would be the primary force behind prosecution of the FHA proved accurate, *see* Schwemm, *supra*, at 378, but success combatting discrimination was hindered "by the inadequate remedies provided in the original Act," which made it "unlikely that a fair housing suit would fully compensate the victim of discrimination." Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 Temp. L. Rev. 909, 922 (1991). Given these "severe limitations on the relief available to prevailing plaintiffs," Ware, *supra*, at 79, "strengthening the FHA's enforcement capacity became the central occupation of fair housing reformers over the next two decades." Johnson, *Last Plank*, *supra*, at 1207.

"After nearly a decade of abortive efforts," Congress responded in 1988 with "a comprehensive overhaul of the [FHA's] enforcement mechanism," Ware, *supra*, at 62, acknowledging that "[t]wenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive." H.R. Report at 15. Experience had shown that the FHA "fail[ed] to provide an effective enforcement system," and Congress sought "to fill that void" not only by "creating an administrative enforcement system," but also "by removing barriers to the use of court enforcement by private litigants" and thus establishing "an improved system for civil action by private parties." *Id.* at 13, 33.

In amending the FHA to encourage more robust private enforcement, Congress deliberately preserved the language on which this Court relied in concluding that the Act's private cause of action extends to all parties injured by illegal housing practices—including municipalities and others indirectly injured by discrimination. Thus, any doubt that might have existed about the scope of the FHA's cause of action in the Act's original form was eliminated by this 1988 amendment.

As early as 1979, the leading bills to amend the FHA added a formal definition of "aggrieved person" identical to the one that ultimately prevailed in 1988, and which replicated the language on which this Court relied in *Trafficante*. *Compare* 42 U.S.C. § 3602(i), *with* H.R. 5200, 96th Cong. § 4(b) (1979) ("'Aggrieved person' includes any person who claims to have been injured by a discriminatory housing practice or who believes that such person will be irrevocably injured by a discriminatory housing practice that is about to occur."). From the start, fair housing advocates supported this definition precisely because—as they explained to Congress—they understood it to preserve and ratify this Court's interpretation of the term. *See, e.g.*, *Fair Housing Amendments Act of 1979: Hearings before the Subcomm. on the Constitution of the Comm. on the Judiciary, on S. 506*, 96th Cong. 107 (1979) (National Committee Against Discrimination in Housing Memorandum) ("The amendments propose a definition of 'aggrieved person' which essentially tracks the current language of section 810. This definition, which includes 'any person' who has been, or will be, adversely affected by a discriminatory housing practice, adopts the Supreme Court's formulation in *Trafficante*[.]").

Opponents of this definition shared the same understanding of its meaning and significance, and opposed it for precisely that reason. *See, e.g.*, *id.* at 433 (Prepared Statement of the National Association of Realtors) ("[T]he National Association vigorously opposes the concept that a person who neither seeks nor has been denied access to housing or the means of acquiring housing should be deemed an 'aggrieved person' under Title VIII. The extension of 'standing' contemplated by the definition of 'aggrieved person' is an invitation for abuse[.]"); *id.* ("The Supreme Court has presented the Congress with an ideal opportunity to aid it in defining the limits of 'standing to sue' under Title VIII . . . . The National Association submits that Congress should amend Section 4(b) of S. 506 to provide that an 'aggrieved person' shall be defined as 'any person who is directly and adversely affected by a discriminatory housing practice.'").

By the time the Act was amended in 1988, there was no question what this Court's FHA decisions meant or what Congress's ratification of those decisions would signify. As one commentator had noted earlier that year, "the Court . . . has made clear that proper plaintiffs under the Act include not only direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates the statute." Schwemm, *supra*, at 382.

When lawmakers debated the bill that ultimately was passed in 1988, opponents once again implored Congress not to ratify this Court's interpretation of "aggrieved" persons by reinscribing the statutory language on which it was based. As they warned, "the definition found in the Kennedy/Specter bill, which adopts existing Supreme Court precedent, effectively eliminates any limits on who can sue a real estate broker for an alleged discriminatory housing prac-

tice." *Fair Housing Amendments Act of 1987: Hearings before the Subcomm. on the Constitution of the Comm. on the Judiciary, on S. 558*, 100th Cong. 124-25 (1987) (hereinafter "1987 Hearings") (Prepared Statement of Robert Butters, on Behalf of the National Association of Realtors).

Legislators rejected those entreaties. Congress not only preserved the language that this Court had repeatedly interpreted as permitting suit by any injured party, but also signaled its attention to this matter by formalizing this language in a new standalone definition. *See* Pub. L. No. 100-430, § 5(b), 102 Stat. 1619, 1619-20 (1988).

To be sure, one purpose of adding "aggrieved person" to the FHA's overarching definitions section was to make explicit what this Court in *Gladstone* found to be implicit—that "precisely the same class of plaintiffs" may choose to pursue either administrative or judicial remedies, which the Act addresses in separate places. *Gladstone*, 441 U.S. at 100-01; *see* H.R. Report at 23 (noting that in *Gladstone* "the Supreme Court affirmed that standing requirements for judicial and administrative review are identical" and explaining that the bill's new definition was intended "to reaffirm the broad holdings" of *Gladstone* and *Havens*). It defies reason, however, to suppose that when Congress made sure that a single set of "standing requirements" would apply across the entire Act, it was oblivious to—or agnostic about—what this Court had explained those "standing requirements" were.[4]

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[4] The banks emphasize the absence of any recitation of those requirements in the Committee Report, but this is immaterial: this Court's pronouncements on who could sue under the Act were clear, repeated, and unequivocal, which is why everyone—

Because lawmakers clearly were aware of how this Court had construed the term "person aggrieved" under the FHA, "Congress' decision in 1988 to amend the [Act] while still adhering to the operative language . . . is convincing support for the conclusion that Congress accepted and ratified" that interpretation. *Inclusive Cmtys.*, 135 S. Ct. at 2520.

Indeed, such legislative "ratification" has been inferred even where a prior judicial construction was found only in the lower courts of appeals, *see id.* at 2519-20, where there was no direct evidence that Congress knew about the prior judicial construction, *see Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992), where Congress merely retained existing language without taking any other steps signaling its intent, *see id.*, and where accepting an inference of ratification meant eschewing a "literal interpretation" of statutory text, *id.* Here, by contrast, "*this Court* had . . . addressed that question," *Inclusive Cmtys.*, 135 S. Ct. at 2538 (Alito, J., dissenting), and there is no doubt that Congress was aware of "the broad holdings of these cases," H.R. Report at 23. Moreover, Congress did not merely fail to disturb existing language but formalized the definition interpreted by this Court and made it applicable across the Act. *See id.* Perhaps most important, acknowledging Congress's intent to ratify this Court's interpretation means affirming, rather than departing from, the plain language of the statute, which provides a cause of action to "any person" who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1).

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proponents and opponents alike—knew what it would mean for Congress to retain the language on which this Court relied in construing those standards. *See supra* at 21-23.

As if that were not enough, Congress enacted the FHA amendments after rejecting an alternative bill that would have eliminated the definition of an "aggrieved" person previously interpreted by this Court, replacing it with a narrower definition restricted to persons who were discriminated against while seeking housing. *See* 1987 Hearings at 110 (referring to "the provision contained in Senator Hatch's bill that defines an aggrieved person under the act as one whose bona fide attempt to purchase, sell or lease real estate has been frustrated by a discriminatory housing practice"). The rejection of this alternative bill and its narrow definition of "aggrieved person," notwithstanding testimony advocating for the adoption of that definition, *see id.*, further demonstrates that Congress "made a considered judgment to retain the relevant statutory text," *Inclusive Cmtys.*, 135 S. Ct. at 2519, along with the unambiguous construction this Court had given it. *Cf. id.* at 2520 (relying on the fact that "Congress rejected a proposed amendment that would have eliminated disparate-impact liability for certain zoning decisions").

In sum, after this Court repeatedly stated that the FHA reaches "as broadly as is permitted by Article III of the Constitution," *Gladstone*, 441 U.S. at 98, Congress reinscribed the statutory language on which those pronouncements were based, in the course of amending the Act specifically to boost private enforcement. This Court would therefore be pulling the rug out from under Congress if it decided that now, upon second consideration (actually, upon fourth consideration), the supposed "best interpretation of the FHA" requires something different. Wells Fargo Br. at 19. Such a maneuver would not "give effect to the will of Congress," *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993), but

would instead "undo what it has done," *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

Ratifying this Court's broad interpretation of who could sue under the FHA was integral to Congress's purpose in 1988, because "the primary weakness" that Congress sought to fix by amending the Act was the "limited means for enforcing the law." H.R. Report at 15. The impact of private enforcement, lawmakers observed, was "restricted by the lack of private resources" and "hampered by a short statute of limitations, and disadvantageous limitations on punitive damages and attorney's fees." *Id.* at 16.

Indeed, commentators had identified the $1,000 cap on punitive damages awards and the limited availability of attorney's fees "as the primary reasons that [the FHA] was not effective in eradicating housing discrimination." Armstrong, *supra*, at 910-11. "Unlike employment discrimination cases, the out-of-pocket damages in most housing cases [were] *de minimus*," and the limit on punitive damages "serve[d] to protect the most egregious violators from feeling the full force of an appropriate judgment." Schwemm, *supra*, at 380-81. As a result, "relatively few fair housing cases [were] filed," with "[t]he number of reported employment discrimination decisions run[ning] five to ten times th[e] amount" of housing discrimination cases. *Id.* at 381.

As amended, the new FHA "continue[d] the private right of action under existing law, but eliminate[d] certain restrictions on the exercise of that right." H.R. Report at 39. Specifically, Congress explained that the new legislation "strengthen[ed] the private enforcement section by expanding the statute of limitations, removing the limitation on punitive damages, and bring[ing] attorney's fee language in [the FHA] closer to the model used in other civil

rights laws." *Id.* at 17; *see* 42 U.S.C. § 3613(a)(1)(A), (c)(1), (c)(2).

Congress left no doubt that it made these changes to increase, not decrease, private enforcement of the FHA—explaining, for instance, that "the limit on punitive damages served as a major impediment to imposing an effective deterrent on violators and a disincentive for private persons to bring suits under existing law." H.R. Report at 40. In short, legislators took an all-hands-on-deck approach to the FHA amendments, improving private *and* governmental enforcement, in response to the still-dire state of housing integration and the pressing need for major reform.

C. Cities Pursuing Redress for Their Injuries Are Well Positioned To Enforce Fair Housing Guarantees and Overcome Barriers that Thwart Enforcement by Individual Victims

Despite advancements that followed the strengthening of the FHA in 1988, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation." *Inclusive Cmtys.*, 135 S. Ct. at 2525. While "some White neighborhoods have become less homogenous, Black neighborhoods remain largely unchanged." Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. Rev. 2182, 2193 (2013) (citing statistics).

Much of this stagnation is attributable to the persistence of racial discrimination in "the sale, rental, and occupancy of housing[.]" Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 Ind. L. Rev. 507, 508 (2008); *see* Johnson, *Last Plank*, *supra*, at

1196-97 ("The most comprehensive tests of U.S. metropolitan markets reveal that blacks and Latinos seeking housing encounter discrimination nearly a quarter of the time. . . . [T]he FHA has proven to be a less successful mechanism for remedying housing discrimination than Title VII of the Civil Rights Act of 1964 has in addressing employment discrimination.").

Cities like Miami are acutely harmed by this persistence of racial housing discrimination. "The person on the landlord's blacklist is not the only victim of discriminatory housing practices," of course, and as this Court has more than once observed, "'[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.'" *Gladstone*, 441 U.S. at 111 (quoting *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 94 (1977)); *cf. Trafficante*, 409 U.S. at 210-11 (noting that the FHA's proponents had "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered"). Residential segregation and racially biased predatory lending exert a palpable effect on the cities in which they occur, not only by decreasing tax revenues and requiring additional municipal services but also by increasing crime, fostering urban blight, encouraging the flight of business and residents to the suburbs, discouraging entrepreneurship and private investment, harming the public education system, frustrating inhabitants' ability to find employment, and entrenching poverty. *See generally Amici* Br. of City and County of San Francisco, *et al.*

Thus, continued aggressive enforcement of the FHA remains as necessary today as it was when the law was enacted. And because the amended FHA "retained the individual cause of action as the prima-

ry means of correcting the evils caused by [FHA] violations," Armstrong, *supra*, at 915, the Act still "depends heavily on requiring private individuals to self-identify as victims of discrimination and bring complaints." Johnson, *Last Plank*, *supra*, at 1204. Indeed, private enforcement remains particularly critical because the "enhanced public enforcement capacity" that was one goal of the 1988 amendments "has not produced greater results," as HUD's "administrative complaint system has historically been plagued by staffing problems and delays," *id.* at 1207, while the robustness of Department of Justice enforcement has varied over time.

Yet despite the law's reliance on private enforcement, it is difficult to "incentiviz[e] individuals to bring complaints." *Id.* at 1202-03; *see id.* at 1202 ("By all estimates, only a small number of potential victims of housing discrimination make use of the enforcement system."). One problem is that "victims of housing discrimination often do not even realize that they have been treated unfairly." Schwemm, *supra*, at 379-80. Today, "persons who engage in housing discrimination are increasingly unlikely to do so in an overt manner," and "victims generally [are] not trained to detect violations." Armstrong, *supra*, at 919. Even when individuals believe they were victimized, "the prospect of hiring a lawyer and filing a lawsuit is not appealing to many people, and this problem is especially acute in the housing field," because the "very fact that an individual or a family is in the market for new housing often means that their lives are in a state of flux that makes pausing to file a federal lawsuit a practical impossibility." Schwemm, *supra*, at 380. To ensure effective enforcement of the FHA's guarantee of equality, Congress wrote the Act to allow all injured persons, including municipalities

and others indirectly injured by housing discrimination, to supplement the enforcement efforts of direct victims by seeking redress for their own injuries.

Furthermore, "as several studies reveal, damages in housing cases are on average too inconsistent and generally too low to alter the behavior of potential discriminators." Johnson, *Last Plank*, *supra*, at 1203. In many cases, moreover, "the relief that would actually achieve the goal of integration—provision of the denied housing—is of no use to the plaintiff," who "has already found a substitute unit because the need for housing cannot await the litigation's final outcome." Armstrong, *supra*, at 918-19.

Given these challenges, it is essential that indirectly injured parties like the City of Miami be able to sue over "the adverse consequences to them" of "racially discriminatory practices directed at and immediately harmful to others," who may not be able to vindicate effectively their own rights. *Warth*, 422 U.S. at 512-13. Where large institutions like banks engage in widespread but difficult-to-detect discrimination, such as steering minorities toward predatory loans, cities, with their institutional resources, can be effective prosecutors of systemic abuses, capable of surmounting the hurdles described above, which too often prevent individual victims of housing discrimination from adequately enforcing the law. After all, "thwarting discrimination requires a significant threat of complaints and substantial penalties for discrimination," Johnson, *Last Plank*, *supra*, at 1203, and cities are well positioned to supply that needed threat—as well as to obtain injunctions protecting individual victims from future harm. *Cf. Inclusive Cmtys.*, 135 S. Ct. at 2522 (noting that disparate-impact liability "has allowed private developers to vindicate the FHA's objectives and to protect their

property rights" by challenging discriminatory measures).

Vigorous enforcement of the FHA is critical because where the prospect of enforcement is weak, chances increase that violators will flout the fair housing laws and perpetuate the racial segregation that has plagued the nation for too long. Promoting the certainty and adequacy of fair housing enforcement is precisely why Congress in 1968 opened the courthouse doors to "[a]ny person who claims to have been injured by a discriminatory housing practice." Pub. L. No. 90-284, § 810(a). It is also why Congress in 1988 ramped up the inducements to private enforcement, while reinscribing statutory language that this Court had repeatedly described as extending the right to sue "as broadly as is permitted by Article III of the Constitution." *Gladstone*, 441 U.S. at 98. In taking these actions, Congress was simply continuing a legislative tradition as old as the nation itself—harnessing the interests of private parties to help enforce federal laws, *see* Section II, *supra*, and making the federal courts a forum for those efforts, *see* Section I, *supra*.

The Fair Housing Act, protecting "a more-than-usually 'expan[sive]' range of interests," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014), confers a right of action on "any person" who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i). That clear language is consistent with the Act's broader structure, its purpose, and its history. This Court should once again read it literally and hold that Miami may sue under the FHA.

CONCLUSION

For the foregoing reasons, the judgments of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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