No. 15-1112

IN THE
Supreme Court of the United States

WELLS FARGO & CO.
and WELLS FARGO BANK, N.A.,
Petitioners,
v.

CITY OF MIAMI,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the opening brief for petitioners remains accurate.

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INTRODUCTION

The City's brief refutes a straw man: the argument that cities may *never* bring Fair Housing Act lawsuits. Wells Fargo has not made that argument. Rather, throughout this litigation, Wells Fargo has explained that cities—no less than any other "aggrieved person" under the FHA—may seek relief for injuries that are (1) within the statute's zone of interests, and (2) proximately caused by the discriminatory conduct alleged.

In the typical FHA case, any number of "aggrieved persons" readily meet those two limitations. Say an apartment complex engages in racial steering by

denying housing to minorities. The discriminatory acts directly injure the prospective tenants, who are personally discriminated against; the residents, who are deprived of the benefits of living in an integrated neighborhood; and the city, which is denied an integrated community. The racial steering may also injure a nonprofit organization that has spent money combatting the specific defendant's discriminatory acts. Each of those potential plaintiffs has suffered an injury that depends on the discriminatory nature of the defendant's conduct, and is proximately caused by that conduct.

The City here is different. Its asserted injuries are unconnected to any interest in non-discrimination and are far removed from any FHA violations. So though the City compares itself to the village in *Gladstone* and the nonprofit organization in *Havens*, the City is actually akin to the shareholder in *Thompson* and the landlord in *Lexmark*, who suffered derivative financial injuries.

That the City may not bring *this* suit for *these* injuries does not mean that cities may never sue under the FHA. Nor does it mean that the FHA will go unenforced. The Department of Justice has already sued Wells Fargo under the FHA, challenging the *same* lending practices at issue here. *See* Compl., *United States* v. *Wells Fargo Bank, N.A.*, No. 1:12-cv-1150 (D.D.C. July 12, 2012), ECF No. 1. In fact, when the City filed its suit, it copied *almost verbatim* DOJ's main allegations. In 2012, the district court in DOJ's suit entered a consent order "enjoin[ing]" Wells Fargo "from violating the antidiscrimination provisions of the FHA * * * in connection with the origination of residential mortgage loans" anywhere in the country, and requiring Wells Fargo to create a

$125-million fund to compensate "aggrieved persons nationwide"—whom DOJ identified as the individual loan recipients. Consent Order 5, 13 (Sept. 21, 2012), ECF No. 10. Last month, DOJ agreed that "Wells Fargo has satisfied each term of the Consent Order" and moved to dissolve the order. Joint Mot. 1 (Sept. 14, 2016), ECF No. 24. The case is all but over.

In short, the City seeks compensation for injuries this Court has never held cognizable, based on alleged violations DOJ has already addressed. The Eleventh Circuit should be reversed.

ARGUMENT

I. THE CITY'S ALLEGED INJURIES FALL OUTSIDE THE FHA'S ZONE OF INTERESTS

A. The FHA Imposes A Zone-Of-Interests Limitation Narrower Than Article III

Two unanimous decisions of this Court compel the conclusion that the FHA imposes a zone-of-interests limitation narrower than Article III. In *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), this Court reaffirmed, 9-0, that the "zone-of-interests limitation * * * applies unless it is *expressly negated*." *Id.* at 1388 (emphasis added) (internal quotation marks omitted). And in *Thompson* v. *North American Stainless, LP*, 562 U.S. 170 (2011), this Court concluded, 8-0, that "the term 'aggrieved' must be construed more narrowly than the outer boundaries of Article III." *Id.* at 177.

The City and the Government ignore *Lexmark* and attempt to distinguish *Thompson*. Those efforts should be rejected.

1. The text of the FHA does not expressly negate the zone-of-interests limitation

The City (at 28) and the Government (at 15) contend that *Thompson*'s interpretation of "aggrieved" should not apply here because of the FHA's text. They point to the FHA's definition of "aggrieved person," which provides that an "aggrieved person" includes any person who "claims to have been," or "believes that such person will be," "injured by a discriminatory housing practice." 42 U.S.C. § 3602(i).

The Government contends (at 15-16) that this definition departs from the "customary meaning" of "aggrieved" because the "injury does not need to be associated with a particular legal interest." But the FHA defines a "discriminatory housing practice" as "an act that is *unlawful* under section 3604, 3605, 3606, or 3617 of this title." 42 U.S.C. § 3602(f) (emphasis added). Thus, "one is aggrieved only when 'suffering from an infringement or denial *of legal rights*' "—the very meaning the Government (at 15) considers "customary."

The Government also contends (at 17 n.4) that the FHA differs from other statutes because "it refers to any person *who claims to have been* injured." But Title VII likewise authorizes suit by "a person *claiming* to be aggrieved." 42 U.S.C. § 2000e-5(b) (emphasis added). And the Lanham Act similarly authorizes suit by "any person *who believes that he or she is likely* to be damaged." 15 U.S.C. § 1125(a) (emphasis added). The FHA cannot be distinguished from those statutes, which impose a zone-of-interests limitation. *See Thompson*, 562 U.S. at 177; *Lexmark*, 134 S. Ct. at 1388-1389.

The City cites two other purported differences between Title VII and the FHA. First, it asserts (at 28) that Title VII "hinges heavily" on discriminatory "motive[s]," while the FHA "focuses on results." But both statutes contain "results-oriented language," authorizing disparate-impact claims. *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516-2519 (2015). And in any event, that language concerns only *what* is prohibited, not *who* may sue.

Second, the City emphasizes the FHA's declared purpose "to provide, *within constitutional limitations*, for fair housing throughout the United States." 42 U.S.C. § 3601 (emphasis added). But Congress added those italicized words merely to acknowledge that, in regulating private transactions, it was legislating within its enumerated powers—*i.e.*, "within constitutional limitations *upon Congress*." 114 Cong. Rec. 4985 (1968) (statement of Sen. Miller) (emphasis added).

Thus, with respect to who may sue, Title VII and the FHA are virtually identical. And any textual differences certainly do not *expressly negate* the zone-of-interests limitation.

2. Thompson *properly disregarded the dicta in the older FHA cases*

The City (at 25) and the Government (at 12-13) also read *Trafficante*, *Gladstone*, and *Havens* as *holding* that anyone with Article III standing can sue under the FHA. *See Trafficante* v. *Metro. Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982). But just six Terms ago, a unanimous Court in *Thompson*

considered—and rejected—that reading of those older decisions. 562 U.S. at 176-177; *see* Pet. Br. 36-37, *Thompson*, *supra* (arguing that the statement in *Trafficante* was a holding); U.S. Br. 18, *Thompson*, *supra* (arguing that *Gladstone* "permit[ted] all plaintiffs with Article III standing to bring suit").

The Government insists (at 8-9) that all eight Justices in *Thompson* were simply "wrong." But it agrees (at 19) that the "results" of the older FHA cases are "compatible" with a zone-of-interests limitation narrower than Article III. And that fact makes each case's statements about the FHA extending to Article III "unnecessary to the decision"—the very definition of dicta. *McDaniel* v. *Sanchez*, 452 U.S. 130, 141 (1981).

In any event, the Government should not be permitted to relitigate *Thompson*. If, as the Government says (at 9), the "holding of a case includes its rationale," then the holding of *Thompson* includes its rejection of the statements in the older FHA cases as dicta. After all, *Thompson* presumed that Title VII and the FHA should be given the same meaning. 562 U.S. at 176-177. So if the older statements about the FHA were holdings, the Court would have felt bound to apply them to Title VII. *See id.* at 177 (rejecting an interpretation of Title VII that "contradict[ed] the very holding of *Trafficante*"). *Thompson*'s conclusion that those statements were dicta was thus central to its rationale. And under the Government's own definition, that itself is a holding, which should not be reopened for debate.

The City contends (at 30) that even if the older statements were dicta, the Court should give them "precedential" weight. But this Court is "not neces-

sarily bound by dicta should more complete argument demonstrate that the dicta is not correct." *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013). *Trafficante*'s analysis of whether "aggrieved" extends to Article III consisted entirely of a quotation from a lower court's decision regarding Title VII. 409 U.S. at 209. Later opinions simply "reiterate[d]" that passage, without recognizing that not even *Trafficante* had "adhere[d] to it" in expressing its "holding." *Thompson*, 562 U.S. at 176. It was not until *Thompson* that this Court "canvas[sed] the [relevant] considerations." *Kirtsaeng*, 133 S. Ct. at 1368. And because "more complete argument demonstrate[d] that the dicta is not correct," the dicta should be discarded. *Id.*

Even if the older statements were precedent, they should be overruled. Although this Court is "normally and properly reluctant to overturn [its] decisions construing statutes, [it has] done so to achieve a uniform interpretation of similar statutory language." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). It should do so here to achieve a uniform interpretation of the FHA, the APA, Title VII, and statutes that cross-reference Title VII, including the Americans with Disabilities Act. *See Thompson*, 562 U.S. at 177-178; 42 U.S.C. § 12117(a). Moreover, "the Court has not hesitated to overrule an earlier [statutory] decision" where there has been an "intervening development of the law," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989)—here, *Thompson*. And by overruling its earlier statements, this Court would not undermine the outcomes of those older cases or harm reliance interests. That is because those outcomes "are compatible with the 'zone of interests' limita-

tion," *Thompson*, 562 U.S. at 176, and because, as the City acknowledges (at 2), municipalities have "infrequently" brought suits like this anyway. Whether dicta or not, this Court's older statements should not stand in the way of the best interpretation of the FHA.

3. Congress did not ratify the dicta in the older FHA cases

The City (at 25-26) and the Government (at 14) contend that Congress in 1988 ratified this Court's older statements that "aggrieved" in the FHA extends as far as Article III. They do not dispute, however, that the ratification canon applies only to *holdings*. *See Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 351 & n.12 (2005). As *Thompson* explained, the Court's older statements were *dicta*. 562 U.S. at 176-177. Thus, Congress cannot be said to have ratified them.

But even if the Court's statements were holdings, or even if they were sometimes described as such, *see* U.S. Br. 19, the ratification argument would still fail, for two reasons.

First, the ratification canon is a canon about Congress's *subjective* intent, and aside from the statutory text itself, the best evidence of that intent is the contemporaneous House Report. The City (at 24) and the Government (at 14) quote the last sentence of the report's relevant paragraph, which states that the 1988 amendments "reaffirm the broad holdings" of *Gladstone* and *Havens*. H.R. Rep. No. 100-711, at 23 (1988). But they never acknowledge the two sentences that come before, which describe precisely which "holdings" the report has in mind: *Gladstone*'s holding that "standing requirements for judicial and

administrative review are identical under [the FHA]," and *Havens*'s holding that "'testers' have standing to sue." *Id.* The report thus tells us exactly what Congress meant to ratify. *See United States* v. *Am. Coll. of Physicians*, 475 U.S. 834, 845-846 (1986). And it never mentions anything about "aggrieved" extending to Article III.

The City (at 26) points to a bill introduced by Senator Hatch in 1987, which would have limited "aggrieved persons" under the FHA to persons discriminated against in "bona fide" housing transactions. Equal Access to Housing Act of 1987, S. 867, 100th Cong. § 5(b). Congress did not adopt that bill. But Senator Hatch's proposed definition of "aggrieved person" would have been far narrower than any zone-of-interests limitation, so the failure to adopt it cannot be understood as a rejection of such a limitation. *See Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." (internal quotation marks omitted)). Moreover, the fact that Senator Hatch himself later co-sponsored the 1988 amendments confirms that those amendments did not ratify the broadest possible definition of "aggrieved person." 134 Cong. Rec. 19,711 (1988).

Second, the ratification canon is a canon about what Congress "*impliedly* approved." *Jama*, 543 U.S. at 351 (emphasis added) (internal quotation marks omitted). The zone-of-interests limitation, however, applies unless "*expressly* negated"—a far higher bar. *Lexmark*, 134 S. Ct. at 1388 (emphasis added) (internal quotation marks omitted). The ratification canon cannot meet that bar, and the City

and the Government do not even attempt to explain how it could. The "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover" is simply too great for the ratification canon to overcome. *Id.* (internal quotation marks omitted).

B. The City Here Is Beyond The Zone Of Interests

The City (at 31-35) and the Government (at 21-28) contend that even if the FHA's zone of interests is narrower than Article III, the City's alleged injuries fall within it. They make three arguments: (1) any injury that results from discrimination is within the zone; (2) cities can always sue because, as governmental entities, they have an interest in fair housing; and (3) the City's interests here are analogous to interests recognized in this Court's precedent and the FHA's legislative history. None has merit.

1. The City contends (at 35) that it falls within the zone of interests because its complaint contains "allegations of discriminatory conduct." The Government agrees (at 27): "When [a plaintiff's] injuries result from discrimination, they are within the statute's zone of interests."

That cannot be the test. Every plaintiff must allege "injuries [that] result from discrimination" in order to plead a statutory violation and Article III standing. Were such allegations enough to bring a plaintiff within the FHA's zone of interests, the zone-of-interests limitation would be no limitation at all; "all factually injured plaintiffs [could] recover." *Lexmark*, 134 S. Ct. at 1388 (internal quotation marks omitted). The zone-of-interests limitation requires more—that "the injury [the plaintiff] complains of (*his* aggrievement, or the adverse effect

upon him) falls within the 'zone of interests' sought to be protected by the [statute]." *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

2. The City next contends (at 2, 31, 37) that cities are governmental entities with an "interest in fair housing"—which supposedly distinguishes them from shareholders, dry cleaners, bowling alleys, and other private persons. The City implies that because of their governmental status, cities can always sue to enforce FHA violations involving their residents.

But Congress did not assign cities any special *parens patriae* role in enforcing the FHA. The statute contains no "Enforcement by cities" provision. A city must sue as an "aggrieved person," under a provision entitled "Enforcement by *private* persons." 42 U.S.C. § 3613(a)(1)(A) (emphasis added). And that provision allows cities to sue only because the term "person" is defined to include "corporations," *id.* § 3602(d), which in turn has been construed to include *municipal* corporations. *See Gladstone*, 441 U.S. at 109 n.21; *cf.* 42 U.S.C. § 2000e (expressly including "governments, governmental agencies, [and] political subdivisions" in Title VII's definition of "person"). Congress thus did not accord cities, as distinguished from other "corporations" or "private persons," any special solicitude as FHA plaintiffs.

By contrast, when Congress meant to give a governmental entity a special role in enforcing the FHA, it did so explicitly—to HUD and DOJ. *See* 42 U.S.C. § 3610 ("Administrative enforcement"); *id.* § 3612 ("Enforcement by Secretary"); *id.* § 3614 ("Enforcement by Attorney General"). Notably, Congress also empowered HUD to refer complaints to state and local public agencies—thereby giving cities an oppor-

tunity to enforce *their own* fair housing laws. *Id.* § 3610(f). In that respect, Congress *did* recognize the importance of fair housing to cities. But Congress did not give cities a roving commission, unique among "persons," to enforce the FHA.

This does not mean that cities may never sue under the FHA. But it does mean that in order to sue, a city cannot simply invoke its status as a governmental entity. Rather, a city must meet the same requirements as any other "person." And that means, to fall within the statute's zone of interests, it must plead more than an "abstract" interest in fair housing. *Havens*, 455 U.S. at 379; *see also Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972) ("a mere 'interest in a problem' * * * is not sufficient by itself"). It must plead that *its own* interest in non-discrimination was "*actually* affected." *Nat'l Wildlife Fed'n*, 497 U.S. at 886 (emphasis added).

3. The City contends (at 19-21) that it has done so by pleading injuries akin to those in *Gladstone*, the legislative history, and *Havens*. That is incorrect.

a. In *Gladstone*, the realtors' practice of steering blacks toward a neighborhood while steering whites away "affect[ed] the village's racial composition," turning an "integrated neighborhood" into a "segregated one." 441 U.S. at 110. That was the village's *injury*—a decrease in racial integration that depended on the discriminatory nature of the realtors' conduct. And *Gladstone* suggested that the village's *damages*—its "harms flowing from the realities of a *racially segregated* community"—could be measured in terms of a "reduction in property values" and a "diminish[ed]" "tax base." *Id.* at 110-111 (emphasis added).

The City contends (at 19) that it has suffered a reduction in property values and a diminished tax base, too. But in *Gladstone*, those things were the "consequences" of an injury to "the village's racial composition"—an injury squarely within the FHA's zone of interests. 441 U.S. at 110; *see* WF Br. 32. The City here has not alleged any such injury. There is no allegation that the racial composition of the City, or even one of its neighborhoods, has been affected at all. Whether the alleged discrimination caused the City to become more segregated, become more integrated, or stay the same, the complaints never say. *See* WF Br. 34-35. Unlike in *Gladstone*, the loss of property-tax revenues is not just a measure of damages; it is the City's injury itself. J.A. 334, 417. And that injury is purely financial, affecting only the City's interest in protecting its coffers.

If the City is analogous to anyone, it is not the village in *Gladstone*, but the hypothetical shareholder in *Thompson*, who suffers a drop in stock price when the company fires a valuable employee. *Thompson*, 562 U.S. at 177. To the shareholder, the race of that employee does not matter; the shareholder would suffer the same financial injury regardless of whether the employee was black, white, or Latino. Thus, the shareholder falls outside the zone of interests; his injury does not depend on the discriminatory nature of the company's conduct. That is equally true of the City here: If the same homes had been foreclosed upon but their owners had been white, the City would have suffered the same injuries.

b. The City (at 14-15) and the Government (at 21-22) also argue that the City's injuries are similar to those discussed in the Kerner Commission Report and the legislative history. But the Commission

identified a broad social problem—racial segregation—and proposed a variety of reforms. *Report of the National Advisory Commission on Civil Disorders* 11-13 (Mar. 1, 1968) (Kerner Report). As just one of those reforms, the FHA was not meant to tackle every problem the Commission identified.

Moreover, as in *Gladstone*, the harms identified by the Commission and various legislators all "flow[ed] from the realities of a *racially segregated* community." 441 U.S. at 110-111 (emphasis added); *see* 114 Cong. Rec. 2274 (1968) (statement of Sen. Mondale) (discussing the "failure to put an end to segregated housing"); *id.* at 2988 (statement of Sen. Brooke) (suggesting that "[a]s segregation continues to grow," cities might "find themselves less and less able to cope with their problems"); *id.* at 2993 (statement of Sen. Mondale) (describing "the problem of segregated housing"); Kerner Report, *supra*, at 5 (attributing "deteriorating facilities and services" to "[*b*]*lack in-migration and white exodus*"); *id.* at 10 (warning of "further deterioration of already inadequate municipal tax bases" if the Nation fails "to achieve an integrated society"); *id.* at 13 (denouncing "prevailing patterns of racial segregation"). And there is no dispute that if housing discrimination affected a city's racial composition—causing it to become racially segregated—a city could seek damages for that injury. As explained, however, the City has alleged no such injury here.

c. Finally, the City maintains (at 36) that it is "no differen[t]" from the nonprofit organization in *Havens*. But though both the City and the organization assert an interest in fair housing, only the organization alleged that its interest was "*actually* affected." *Nat'l Wildlife Fed'n*, 497 U.S. at 886 (emphasis

added). As *Havens* explained, the organization alleged that it had "devote[d] significant resources to identify and counteract *the defendant's* racially discriminatory steering practices." 455 U.S. at 379 (emphasis added) (internal quotation marks and alteration omitted). And it sued to recover those precise resources spent on "testing and monitoring defendants' practices." App. 20, *Havens*, *supra*.[1]

The City has not alleged that it devoted any resources to combatting *Wells Fargo's* alleged conduct; it alleges only the existence of a Department of Community and Economic Development, which deals with fair housing in general. J.A. 417. And the millions of dollars the City seeks in damages, J.A. 429, have nothing to do with the "expenses of testing and monitoring." App. 20, *Havens*, *supra*. Regardless of whether a city *could* plead injuries like the organization in *Havens*, the City has not done so here.

* * *

Because the City here has not pleaded any injury protected by the FHA, it has no cause of action—whether for declaratory, injunctive, or monetary relief.

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[1]Since *Havens*, nonprofit organizations have similarly sought damages incurred in combatting the defendant's specific discriminatory acts. *See, e.g.*, *Fair Hous. of Marin* v. *Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (affirming $24,377 award for resources "diverted to investigating and other efforts to counteract [defendant's] discrimination"); *United States* v. *Balistrieri*, 981 F.2d 916, 933 (7th Cir. 1992) (affirming $5,000 award for "time and money [that] was deflected to legal efforts" fighting defendant's discrimination).

That is not to say that no one could sue to challenge the alleged discrimination in this case. Individual loan recipients could sue, and even seek to band together in a class action. The FHA's fee-shifting provision, 42 U.S.C. § 3613(c)(2), encourages them to act as private attorneys general. Nonprofit organizations could also sue, just as in *Havens*. And governmental entities could pursue claims, too. HUD could file an administrative complaint. *Id.* § 3610(a), (f). Or DOJ could sue in court, *id.* § 3614, which it has already done, *see supra* pp. 2-3.

II. THE ASSERTED FHA VIOLATIONS DID NOT PROXIMATELY CAUSE THE CITY'S ALLEGED INJURIES

Proximate cause is a separate limitation that independently dooms the City's complaint. *See Lexmark*, 134 S. Ct. at 1388. The City concedes that the FHA incorporates a proximate-cause requirement. City Br. 38; U.S. Br. 29. And rightly so: This Court has made clear that proximate cause is the default rule, absent contrary instructions from Congress. *Lexmark*, 134 S. Ct. at 1390.

The remaining questions, then, are *what* proximate cause requires and *whether* the City has pleaded a sufficiently tight causal relationship. On the first question, the City reduces proximate cause to a blinkered version of foreseeability, whereby each link in the causal chain must simply predict the next. But that test ignores this Court's guidance on proximate cause and does next to nothing to limit the class of potential FHA plaintiffs. On the second question, the City asserts that it is a direct victim. But the injuries it actually claims are several steps away from any discrimination; they violate the

"general" rule that proximate cause cuts off liability after the "first step." *Id.* at 1394 (internal quotation marks omitted).

1. In federal statutes, proximate cause serves a dual function, precluding recovery for both bizarre and remote injuries. WF Br. 38-41. The City appears to embrace the "bizarre" limit only. It suggests (at 47-48) that proximate cause is satisfied so long as (1) discrimination foreseeably caused foreclosures, and (2) the plaintiff was foreseeably harmed by the foreclosures. That watered-down test contravenes this Court's precedents, which assess the directness of the claimed injuries and explain that plaintiffs generally may not recover for derivative ones. *See* WF Br. 39, 42-43.

The City has no answer to those precedents. Start with *Lexmark*. *Lexmark* explained that proximate cause "bars suit for alleged harm that is too remote," and that anything after the "first step" is typically too remote. 134 S. Ct. at 1390, 1394 (internal quotation marks omitted). Still, in "relatively unique circumstances"—like a near-perfect "1:1 relationship" between the injury and the violation—a derivative injury might be viable. *Id.* at 1394. Contrary to the City's assertion (at 53), its derivative injuries are not a perfect 1-to-1 match with the FHA violations, or an "integral * * * aspect of the violation alleged." *Lexmark*, 134 S. Ct. at 1394 (internal quotation marks and brackets omitted). Under *Lexmark*'s own terms, they cannot be: The City stands in the same position as the landlord that *Lexmark* offered as a prototypical plaintiff who *cannot* satisfy proximate cause. *Id.* at 1391; *see* WF Br. 48.

Nor does the City explain why it is any different from the city in *Hemi Group, LLC* v. *City of New York*, 559 U.S. 1 (2010). *See* WF Br. 49. It instead tries (at 51-52), without success, to distinguish RICO from the FHA. To start, the City argues that RICO's language borrows from the Sherman Act, which accounts for directness. But the Sherman Act itself contains broad language, which courts have read "to incorporate common-law principles of proximate causation." *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267 (1992). The City next argues that RICO requires directness because remote harms may be difficult to attribute to a RICO violation. Yet that same problem applies in the FHA context. The City's rejoinder that its experts can bridge the gap in this *particular* case, even if true, does not eliminate the difficulties inherent in parsing long causal chains. Finally, the City asserts that, in contrast with RICO victims, directly injured FHA victims have fewer incentives to enforce the statute. The City ignores, though, the FHA's fee-shifting provision. 42 U.S.C. § 3613(c)(2). It also ignores class-action attorneys, nonprofit organizations, and federal enforcers—all of whom can be "counted on to vindicate the law * * * without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes*, 503 U.S. at 269-270. And it ignores that DOJ has already brought a suit challenging the very lending practices alleged here.[2]

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[2]The Government (at 32) tries its hand, too, claiming that FHA suits by indirect victims would not lead to overlapping damages. It is easy to think of contrary examples: Take a city that loses $50,000 in property-tax revenues and thus fires an

Instead, the City cites (at 43) a few cases discussing foreseeability. Wells Fargo has never argued that foreseeability is irrelevant to the proximate-cause inquiry. To the contrary, its opening brief explained why cases like *Paroline* v. *United States*, 134 S. Ct. 1710 (2014), where an immediate victim suffers a variety of harms, gravitate toward foreseeability language. WF Br. 38-39. In cases like this one, where a distant victim sues for derivative injuries, directness is the more relevant construct. *Id.* at 39-40. Several of the City's cases in fact employ the latter framework. *See, e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004) (assessing whether actors were "close enough to the harm"); *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 479 (1982) (assessing whether injury was too "remote").

2. The City tries to buttress its flawed legal analysis by pointing to various statistical tools. It emphasizes its experts' "rigorous" regression analyses, arguing (at 38-40) that they demonstrate a disparity in loan terms. Wells Fargo certainly disputes the "rigor[]" of this evidence. But more to the point, such evidence is irrelevant: It goes to the question of *actual* (or *but-for*) cause, not *proximate* (or *legal*) cause. *See Paroline*, 134 S. Ct. at 1719. Put differently, even if the regression analyses could prove that the alleged FHA violations were "one of the causes of the plaintiff's injury," "there remains the question whether the defendant should be legally responsible for the injury." W. Page Keeton et al.,

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employee who makes $50,000; both the city and the employee might sue for the same $50,000 of damages.

Prosser and Keeton on the Law of Torts § 42, at 272-273 (5th ed. 1984). That is the question here.

The City (at 45-49) also relies on various risk-management tools, which it claims could have been combined with a few publicly available studies to predict the loan defaults and their effects. But even if predictability were enough to satisfy foreseeability, *but see* WF Br. 41 n.7, that would not make the City's financial injuries any less attenuated—just as its preferred study's discussion of how foreclosures hurt "nearby property owners, businesses, and others with financial interests" cannot make those persons' injuries any less attenuated. William C. Apgar et al., *The Municipal Costs of Foreclosures: A Chicago Case Study* 10 (2005). These tools and studies cannot solve the City's *directness* problem.

3. The Government takes a different tack. It agrees that *Lexmark* requires a "sufficiently close connection" to the statutory violation—that is, directness. 134 S. Ct. at 1390. It argues instead that injuries are never too attenuated if they are "of the kind that the 'statute intended to protect' against." U.S. Br. 30. True enough, effectuating legislative purpose is one function of the directness component of proximate cause. WF Br. 43. But that general principle does not help the Government here.

Lexmark instructed how to discern whether a statute protects a specific class of plaintiffs: by reading the statute. Because "the Lanham Act authorizes suit only for commercial injuries," a commercial plaintiff could satisfy proximate cause where the defendant's "deception of consumers causes them to withhold trade from the plaintiff." 134 S. Ct. at 1391; *see* WF Br. 33-34. The Government offers no

comparable evidence that the FHA authorizes suit by cities that suffer the financial injuries asserted here. It points (at 30) to two snippets of legislative history—a few words about deteriorating urban conditions in the Kerner Report, and a similar comment by one legislator. Even assuming that such legislative history could inform the proximate-cause inquiry, neither snippet suggests that a city's downstream injuries are recoverable in litigation.

The Government's sweeping argument would thus strip *Lexmark*'s "first step" inquiry of any real force: Locate a bit of legislative history mentioning a certain type of entity, and proximate cause can be dispensed with altogether. To illustrate, the Kerner Report says that the same segregated conditions that harmed cities also harmed "[s]tores of all kinds," and resulted in "lost revenue" to "[h]undreds of businesses" and "lost wages" to "thousands of citizens." Kerner Report, *supra*, at 197. If a bare appearance in the legislative history suffices, local businesses and their employees could sue—which the City and the Government do not dispute would be absurd.

4. In the end, the City is left with *Gladstone* and *Havens*. City Br. 41-42; U.S. Br. 30-31. Yet neither *Gladstone* nor *Havens* addressed proximate cause at all. Although *Havens* mentioned "direct" and "indirect" injuries, it did so only in the context of describing the types of victims with Article III standing. 455 U.S. at 375. It did not analyze which victims stood at the "first step" from an FHA violation for proximate-cause purposes.

Even if relevant to the proximate-cause inquiry, *Gladstone* and *Havens* do not support the City here. In *Gladstone*, the village alleged that the defendants

had "manipulate[d] the housing market" by "replacing" "an integrated neighborhood with a segregated one." 441 U.S. at 109-110. Because "the village's racial composition" was under attack, *id.* at 110, the village was injured at the first step. Only then did *Gladstone* propose diminished property-tax revenues as a measure of *damages* to compensate the village for its direct *injury*. *See id.* at 110-111. The loss of property-tax revenues, in other words, was one possible way of quantifying the injury; it was not the underlying injury itself. *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562-563 (1931) (embracing the "clear distinction" between the fact of an injury and the quantity of damages, and requiring only a "just and reasonable inference" of "the extent of the damages").

Here, conversely, the loss of property-tax revenues (or increase in municipal spending) *is* the City's asserted injury. And that injury occurs well after the first step. Just compare the Government's description of the causal chain in *Gladstone* with its description of the causal chain in this case. In *Gladstone*, the village appears in the *very first* link: "The discriminatory conduct allegedly affected the *village's* racial composition," and so on. U.S. Br. 30 (emphasis added). Here, the City does not appear until the *sixth and final* link. The alleged discrimination affects (1) "loan terms," then (2) "defaults," then (3) "foreclosures," then (4) "vacancies," then (5) "property values"—all before finally affecting (6) "the *municipality's* tax base" and "ability to provide services." *Id.* at 30-31 (emphasis added). For proximate-cause purposes, the City's injury occurs many leaps beyond the first step.

Havens does not add much to the analysis. As explained, a nonprofit organization—or indeed, a *city*—that seeks damages for specific outlays combatting a defendant's discrimination will typically demonstrate the unique 1-to-1 correlation sufficient to establish proximate cause. WF Br. 45-46; *see Lexmark*, 134 S. Ct. at 1394. Although the City claims (at 45) that it "stands in similar shoes to a non-profit," it has not alleged that it spent any specific resources combatting the asserted discrimination, or that it must devote specific resources in the future to counteract the effects of that discrimination. *See supra* p. 15. In fact, it has not identified *any* relationship—let alone a proximate one—between Wells Fargo's actions and the City's fair-housing efforts.

Taking a step back, this Court's precedents illustrate that a city might stand at three different distances from FHA violations. *First*, it might be *immediately* injured by racial steering, as in *Gladstone*. *Second*, it might suffer an *integrally related* injury from allocating specific resources to combat the defendant's discrimination, as in *Havens*. Or *third*, it might be *indirectly* injured when discrimination against individuals has financial effects that reverberate outward, as alleged here. The first two satisfy proximate cause; the third does not.

5. Finally, the City's stripped-down version of proximate cause would "hardly [be] a condition at all." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 553 (1994). Both the City and the Government appear to acknowledge the absurdity of allowing other indirect victims to recover: flower shops, dry cleaners, city employees, and so forth. Yet they address the absurdity only by pointing to *other* statutory limitations. The City, for example, relies

(at 44) on the zone of interests—though, of course, it believes there is none. And the Government (at 33) mentions other ubiquitous requirements, like complying with the statute of limitations and presenting evidence. No doubt those are constraints on successful lawsuits. They are unresponsive, though, to the fundamental problem: that the City's theory would render the proximate-cause requirement a virtual nullity.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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