No. 15-1111

IN THE
Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
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 STATEMENT

The corporate disclosure statement included in the opening brief remains accurate.

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REPLY BRIEF FOR PETITIONERS

I. Miami's Claims For Lost Tax Revenue And Increased Municipal Costs Fall Outside The FHA's Zone Of Interests

Miami and the government contend that the FHA is a truly extraordinary statute: one that provides a private damages cause of action to *anyone* with Article III standing. This Court's precedents are clear: presumptively, every plaintiff must be within the relevant statute's zone of interests, so accepting Miami's view would require explicit statutory text to displace that presumption. Yet Miami fails to identify *anything* in the text of the "aggrieved person" limitation supporting its position. While the government gives the operative text a few halfhearted sentences, it fails to show that the perfectly ordinary language Congress chose to define who can sue—in this statute as in others—can be read to produce the extraordinary result the government desires.

With no support from the FHA's text or structure, Miami and the government defend their all-comers interpretation chiefly based on broad statements from this Court's trio of 1970s and 1980s FHA decisions, and the theory that Congress ratified those statements in the Fair Housing Amendments Act of 1988 (1988 Amendments), Pub. L. No. 100-430, 102 Stat. 1619. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). But this Court *rejected* that interpretation of those cases

in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011). The government recognizes as much, but argues (at 17) that *Thompson* "misread" this Court's prior decisions. *Thompson* was right: this Court's decisions have never *held* that everyone with Article III standing meets the statutory definition of "aggrieved."

Miami and the government quickly fall back to the position that, even if the FHA has a zone-of-interests limitation, Miami's claims for tax revenue and municipal services fall within that zone. But their divergent conceptions of the zone of interests are both overbroad and illogical. The government would allow anyone claiming damages somehow related to "urban blight" or "flow[ing]" from an FHA violation to bring suit—which could cover claims by crime victims, laid-off workers, and others far removed from housing discrimination. Miami would focus on whether a plaintiff is interested in fair housing, in the abstract, whether or not it asserts claims related to that interest. On that view, whether a suit is dismissed depends not on what it alleges, but on whether it is brought by a municipality or other favored plaintiff. That bears no resemblance to ordinary zone-of-interests analysis.

Miami and its public and private *amici* ultimately resort to the policy argument that localities *should* be able to sue. But while the whole community may have an interest in eradicating segregation, the set of private parties "aggrieved" by acts of housing discrimination is narrower. Neither in 1968 nor in 1988 did Congress seek to rely on cities to enforce the FHA on their citizens' behalf—which is why municipal suits like this one were unheard of until

recently, when enterprising contingency-fee counsel began pushing them.

Correctly understood, the zone of interests encompasses the claims historically used to enforce the FHA—claims by those targeted by housing discrimination, those combating discrimination, or those forced to live in a segregated community. Miami's claims, like all claims that seek merely "collateral damage" from discrimination against others, *Thompson*, 562 U.S. at 178, are outside the zone of interests—and have always been.

A. The FHA's Cause Of Action For "Aggrieved Persons" Extends Only To Plaintiffs Within The FHA's Zone Of Interests

1. The FHA Does Not Negate The Zone-of-Interests Presumption

Miami and the government do not dispute that Congress presumptively limits federal causes of action to claims within the statute's zone of interests unless that presumption is "expressly" negated. Opening Br. 18-19; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). But they make essentially no effort to find express negation in the FHA's text.

1. Miami complains (at 27[1]) that reading "aggrieved" to incorporate a zone-of-interests limitation would be "cramped." But that is simply

[1] References to briefs are to those filed in No. 15-1111, except as noted.

the "common usage" of "aggrieved," used in Title VII, the Administrative Procedure Act, and elsewhere. Opening Br. 20-22; *Thompson*, 562 U.S. at 177-78. The government acknowledges (at 15-16) that this is the "ordinary," "customary," "usual," "natural and popular" meaning. Moreover, structural aspects of the FHA, which neither Miami nor the government even discusses, support applying that common meaning here. *See* Opening Br. 24-25.

2. Miami (at 27) and the government (at 15-17) emphasize that the FHA defines "aggrieved person," while Title VII does not. But Miami needs not just words that differ from Title VII, but words that negate the zone-of-interests presumption. And here, the FHA's definition of an "aggrieved person" as one "injured by a discriminatory housing practice," 42 U.S.C. § 3602(i), *supports* applying a zone-of-interests limitation. Opening Br. 22-24.

Miami does not even quote the FHA's definition of "aggrieved" as "injured by." The government tries to argue—citing no authority—that limiting plaintiffs to those "injured by" the violation simply (and superfluously) codifies Article III. That is incorrect: the set of those "injured by" a statutory violation is narrower than the set of those with Article III standing, which includes various plaintiffs who are not injured "by" the defendant's statutory violation. *See, e.g.*, *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 72-73 (1978) (plaintiffs sued over statutory limitation on liability for nuclear plants, alleging that they would be injured *as a result of* the statute, but not *by* the statute itself). In limiting suits to plaintiffs "injured by" a violation, the FHA—

like nearly every statute—demands a tighter connection than Article III.

The government also acknowledges (at 17 n.4) that "injured by" is standard language in federal causes of action. Understandably unwilling to adopt a position that would negate the zone-of-interests presumption in all of those statutes, too, the government tries (*id.*) to argue that the FHA is different because it is limited to plaintiffs who "*claim[] to have been* injured by" a violation. But that is no distinction: Title VII contains materially identical language ("claiming to be aggrieved"). 42 U.S.C. § 2000e-5(b), (f)(1)(A). And that language merely confirms that an eligible plaintiff claiming a qualifying injury must eventually prove it. It does nothing to liberalize what types of injuries qualify.

3. Miami also claims (at 27) that "aggrieved" has opposite meanings in the FHA and Title VII because the FHA allows disparate-impact claims while Title VII "hinges heavily on . . . motive." That is an odd claim indeed, considering that this Court construed the FHA to permit disparate-impact claims in large part because Title VII also does so. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2516-18 (2015). And even if that distinction had merit, Miami never explains why it sheds light on the class of plaintiffs that can bring suit.

4. Miami relies heavily on the FHA's preamble (at 20, 27), which states that the FHA "provide[s], within constitutional limitations, for fair housing

throughout the United States." 42 U.S.C. § 3601.[2] But Congress's statement that it was acting "*within* constitutional limitations"—which one hopes would be the norm—does not mean that courts must read every provision of the FHA as if Congress legislated *all the way to* constitutional limits. And indeed, the FHA unquestionably does not extend to the limits of Congress's authority; for instance, Congress did not prohibit rental discrimination in certain owner-occupied buildings. 42 U.S.C. § 3603(b)(2).

Further, Congress added the "within constitutional limitations" language not to address the civil-action provisions, or to emphasize the FHA's broad scope, but to address Senators' concern that the FHA's substantive restriction on the use of private property would exceed Congress's enumerated powers.[3] The amendment was merely "designed to state explicitly what [the sponsor was] sure we all intend by making it clear that the provision for fair housing must be within constitutional limitations upon Congress." 114 Cong. Rec. 4985 (Sen. Miller).

The preamble does not override any of the express limits in the text. It certainly does not rebut the presumption that the zone-of-interests limitation applies.

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[2] Miami implies (at 20) that *Trafficante* relied on the preamble, but *Trafficante* never even cited it.

[3] *See, e.g.*, Hearings on S. 1026 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 90th Cong., 1st Sess. 59 (1967); 114 Cong. Rec. 4965 (Sen. Robert Byrd).

2. This Court's Precedents And The 1988 Amendments Support Applying The Zone-Of-Interests Limitation

Having little to say about how the FHA's text or structure rebuts the zone-of-interests presumption, Miami and the government assert that Congress ratified certain broad statements in *Trafficante*, *Gladstone*, and *Havens*. Miami and the government misconstrue both this Court's decisions and the 1988 Amendments.

1. The ratification argument fails from the start because it misstates history. Only *Trafficante* actually construed a statute limited to "person[s] aggrieved" (former § 3610). And *Trafficante* never stated *even in dicta* that "anyone" with Article III standing was a "person aggrieved" under § 3610. All Miami (at 18) and the government (at 12, 17-18) can point to is *Trafficante*'s favorable citation of a Third Circuit decision, which interpreted *Title VII* to allow suit under that statute by anyone with Article III standing (and which was wrongly decided, as *Thompson* later held). But when it came to analyzing the FHA, *Trafficante* only recognized standing for "all in the same housing unit who are injured by racial discrimination in the management of those facilities." 409 U.S. at 212; *accord id.* at 209 (agreeing with the Third Circuit only "insofar as tenants of the same housing unit that is charged with discrimination are concerned"); *Thompson*, 562 U.S. at 176.

The government claims (at 17-18) that the limiting language in *Trafficante* addressed who had Article III

standing, not the statutory "aggrieved" limitation.[4] But as the government recognizes, this Court *rejected* that interpretation of *Trafficante* in *Thompson*; the government therefore insists (at 17) that this Court "misread" its own decision. It is the government, not this Court, that "misread[s]" *Trafficante*. The Court in *Trafficante* held that it can "give vitality to § [36]10(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities." 409 U.S. at 212; *see also id.* at 209. That is the language of statutory construction, not constitutional interpretation.

As for *Gladstone* and *Havens*, neither actually applied the "aggrieved" limitation. Rather, both involved the broader cause of action in former § 3612, which was not limited to those "aggrieved" and included "no particular statutory restrictions on potential plaintiffs." *Gladstone*, 441 U.S. at 103; Opening Br. 29-33. Contrary to the government's submission (at 18), *Gladstone* did not hold that anyone with Article III standing was "aggrieved." The *Gladstone* defendants posited that § 3610 "provides standing to the fullest extent permitted by Art. III," but argued that § 3612 "contemplates a more restricted class of plaintiffs." 441 U.S. at 100, 102-03. This Court disagreed because § 3612 was on its face broader than § 3610; it lacked the "restriction[]" to "person[s] aggrieved." *Id.* at 103. As

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[4] Miami makes no such argument, acknowledging the "qualifying language" in *Trafficante* but arguing that it was undone by subsequent decisions (in cases that did not involve an "aggrieved person" limitation). 15-1112 Miami Br. 17-18.

a result, given the *Gladstone* defendants' position that anyone with Article III standing is "aggrieved" under § 3610, the Court analyzed plaintiffs' standing under Article III too. *Gladstone* never discussed whether a non-constitutional limit might also apply under § 3610. *Id.* at 100 n.6, 109-116. *Havens* then relied entirely on *Gladstone* for its statement that § 3612 allows anyone with Article III standing to bring suit; the Court never suggested that any party argued otherwise. 455 U.S. at 372.

Thus, as *Thompson* made clear, statements that anyone with Article III standing is "aggrieved" were dicta. The "*holdings* of those cases are compatible with the 'zone of interests' limitation." 562 U.S. at 176 (emphasis added).

2. Because the 1988 Amendments consolidated the private-right-of-action provisions into a new § 3613, limited to "aggrieved person[s]," Miami's argument that those amendments ratified *Havens* and *Gladstone* fails. Miami admits that ratification is possible only when Congress "amends an Act *without altering the text of the relevant provision*." Miami Br. 25 (quoting *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009)) (emphasis added; internal quotation marks and alterations deleted). Here, Congress *did* alter the text of the provision at issue in *Gladstone* and *Havens* and abandoned the limitless formulation interpreted in those cases. 42 U.S.C. § 3613(a)(1)(A); Opening Br. 34-36. Thus, the 1988 Amendments did not ratify *Havens* and *Gladstone*'s statements that anyone with Article III standing could sue under former § 3612.

3. The ratification argument also fails because this Court's statements that anyone with Article III

standing can bring an FHA suit were dicta. Miami and the government do not dispute that Congress presumptively ratifies only this Court's *holdings*, not its dicta. *Jama v. ICE*, 543 U.S. 335, 351 n.12 (2005). While a holding is not just the result, Miami Br. 28; U.S. Br. 18-19, *Thompson* already explained, correctly, that the "holdings" of *Trafficante*, *Gladstone*, and *Havens*, not just their results, are "compatible with the 'zone of interests' limitation." 562 U.S. at 176. Those "holdings" must therefore *exclude* their statements that anyone with Article III standing could sue, as those statements are *not* compatible with applying the zone-of-interests limitation. Miami ignores that aspect of *Thompson* altogether. The government acknowledges it, but then pretends that *Thompson* discussed "results" instead of "holdings." U.S. Br. 18-19.[5]

B. Miami's Claims Fall Outside The FHA's Zone Of Interests

Abandoning the court of appeals' decision, Miami and the government argue at length that Miami is within the FHA's zone of interests. Most of that discussion attacks various straw men, arguing that cities should not be "enjoined" or "barred" from bringing *any* FHA suits and that FHA plaintiffs are

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[5] The government claims (at 19) that the 1988 Congress would have *thought* this Court held that anyone with Article III standing was "aggrieved," even if the Court had not actually done so. But when the 1988 Congress described the "broad holdings" it meant to "reaffirm," it described them consistent with the more limited way this Court accurately summarized them in *Thompson*. *See* Opening Br. 35-36; H.R. Rep. No. 100-711, at 23 (1988).

not limited to "direct victims." *E.g.*, Miami Br. 12, 16, 25, 30-31. But *no one* advocates such limits. The opening brief made clear that the FHA's zone of interests includes claimed damages not only from being targeted by housing discrimination but also from combating discrimination or being forced to live in a segregated community. Bank of America agrees that nonprofits, and even cities, can sue to recover specific funds used to combat discrimination, and that a housing developer can sue a city if it is the target of municipal action barring its construction for discriminatory reasons. What the FHA's zone of interests does *not* include are suits, like Miami's, seeking to recover purely monetary damages for the wholly collateral effects of alleged discrimination directed against others.

1. Miami (at 20-21) and the government (at 23-25) incorrectly interpret *Gladstone* to authorize cities' tax-loss claims. Far from being "indistinguishable" from Miami's claim, Miami Br. 20, the Village of Bellwood's complaint did not even *mention* lost taxes, let alone seek to recover them. Bellwood's only allegation of harm was that its "housing market" was "wrongfully and illegally manipulated to the economic and social detriment *of [its] citizens*." Joint Appendix at 4, *Gladstone, supra* (No. 77-1493) (emphasis added). The Court construed this "conclusory and abbreviated" averment to allege that defendants' practices "affect[ed] the village's racial composition"—a valid claim under *Trafficante*. 441 U.S. at 110. The Court then hypothesized various unalleged "adverse consequences" from a "'changing' neighborhood," including the possibility of tax losses. *Id.* at 110-11. But far from concluding that Bellwood could recover such losses, the Court concluded only

that Bellwood had Article III standing to "*challenge the legality*" of defendants' conduct. *Id.* at 111 (emphasis added). The Court never even considered whether a city could bring an FHA claim to recover collateral tax losses.

2. The government's proposed zone of interests—including anyone suffering damages related to "urban blight"—would be effectively limitless. *See* U.S. Br. 21-23. The government concedes as much, describing "the whole community" as the "victim of discriminatory housing practices." U.S. Br. 22. That theory would allow not only tax-loss claims by cities, but claims for decreased property value by neighbors, claims for lost jobs by employees of businesses that move to the suburbs, claims for lost educational opportunities by students whose schools decrease in quality (*see* Miami Br. 16), and even claims by victims of crime that can allegedly be traced back to urban blight.

Even if Congress outlawed housing discrimination because its effects can be felt by "the whole community," that does not mean Congress intended to provide a damages remedy to anyone injured by urban blight. Federal statutes routinely benefit a broad class of citizens but provide a private civil action only to a narrower class. For instance, this Court held in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), that consumers cannot not sue to challenge milk marketing orders even though Congress was concerned with "consumer interests" in adopting the relevant statute. The question, this Court emphasized, was not "whether the interests of a particular class like consumers are implicated," but instead whether "Congress intended for that class to

be relied upon" in enforcing the statute. *Id.* at 347; *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (describing *Block* as a "useful reference point for understanding the 'zone of interests' test"). Nothing in the FHA's text, structure, or history suggests that Congress intended "the whole community" to have standing to sue.

3. Miami's proposed zone of interests is more limited, but illogical. It claims that any plaintiff with an interest in fair housing can bring an FHA suit, regardless whether the plaintiff's claimed injury relates to that interest. *See* Miami Br. 10, 31.

The zone-of-interests inquiry, however, focuses not on the plaintiff generally, but on the lawsuit's specific allegations. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1390 (focusing on what "injury" the plaintiff "allege[s]" to its "commercial interest"). A zone-of-interests analysis that required no connection between a fair-housing interest and the alleged injury that the suit seeks to remedy would lead to absurd results. While Miami could claim its lost taxes, a neighboring city without a similar fair-housing interest—for instance, a city that itself engages in housing discrimination, *see* U.S. Br. 26-27—could not recover lost taxes. Similarly, a fair-housing nonprofit could recover losses in property value, while a neighboring environmental nonprofit could not. Organizational mission can be relevant when an association seeks to invoke the rights of members who are proper plaintiffs. *See, e.g.*, *United Food & Commercial Workers Union 751 v. Brown Group, Inc.*, 517 U.S. 544, 552-53 (1996). It is *not* relevant to whether a plaintiff's own claims are within the zone of interests. If the plaintiff's asserted *claims* do not seek to

vindicate a fair housing interest, it does not matter whether the *plaintiff* has such an interest in the abstract.

4. Bank of America's proposed zone of interests would not eliminate suits that have traditionally been brought under the FHA, including those by developers and others alleging that cities have denied their right to buy, sell, or build for discriminatory reasons. *See* U.S. Br. 25-27; Trafficante Br. 21-28. These entities, though not denied access to housing, are direct targets of discriminatory government action. As in *Thompson*, those entities are not "accidental victims" of discrimination against others; the action against them was the "intended means" of the discriminatory municipal conduct. 562 U.S. at 178.

But this is not a traditional FHA suit at all. For four decades, municipal suits like this one were completely unknown; they certainly were not an enforcement mechanism Congress endorsed. Rather, Miami's claims, like any other claim that asserts merely "collateral damage" from discrimination against others (*id.*), are and have always been outside the FHA's zone of interests.

II. Miami Has Failed To Allege That Its Losses Were Proximately Caused By Bank Of America's Conduct

A. The FHA's Proximate-Cause Requirement Bars Plaintiffs From Recovering Damages That Do Not Flow Directly From The Defendant's Alleged Discrimination

As the opening brief explained (at 47-48), every time this Court has interpreted a federal statute to incorporate the common-law proximate-cause inquiry, it has held that plaintiffs can only recover damages flowing directly from the defendant's conduct. This Court applies a directness requirement even where Congress "admonish[ed]" that a statute should be "liberally construed." *Holmes v. SIPC*, 503 U.S. 258, 274 (1992); *see also Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519 (1983). The FHA is no exception; as Miami acknowledges (at 34), "tort principles derived from the common law control" the FHA's causation inquiry. *See also Lexmark*, 134 S. Ct. at 1391; U.S. Br. 29. That should resolve this question.

Miami and the government seek to avoid proximate-cause principles this Court has applied for decades. Miami tries to resurrect a foreseeability-only approach that this Court has rejected as inadequate to fulfill the purposes of the proximate-cause requirement. And the United States proposes an even more radical departure, arguing (at 30) that no matter how long the causal chain, proximate cause is satisfied if the injury is generally of the type Congress was trying to prevent.

1. Despite conceding that the FHA incorporates background common-law principles, Miami (at 46-50) and the government (at 31-33) argue that the FHA does *not* adopt the common-law proximate-cause principles explained in *Associated General Contractors*, *Holmes*, and *Lexmark*. But as the opening brief explained (at 47-48), those cases were not statute-specific, but instead described general common-law causation principles that apply whenever a federal statute incorporates background common-law rules. For instance, it was the Clayton Act's "common-law background," not anything specific about the statute, that required a proximate-cause inquiry focusing on "the directness or indirectness of the asserted injury." *Associated General Contractors*, 459 U.S. at 531, 540. The Court relied on Sutherland's "leading treatise on damages," which explained that a plaintiff cannot recover economic "injury from the defendant's conduct to a third person." *Id.* at 532 n.25 (quoting 1 J. Sutherland, *A Treatise on the Law of Damages* 55-56 (1882)); *see also Holmes*, 503 U.S. at 269. Miami and the government recognize, and this Court has expressly held, that the FHA incorporates this same common-law background. Opening Br. 49.[6]

Miami (at 48) misconstrues *Holmes* as resting on the principle that RICO "should not get [] an expansive reading." (quoting 503 U.S. at 266; alteration in Miami's brief). That omits a key word: *Holmes* concluded that RICO "should not get *such* an

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[6] By contrast, in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011), the statute at issue "parted from traditional common-law formulations of causation." *Id.* at 696, 691.

expansive reading" as to *eliminate* the proximate-cause requirement. 503 U.S. at 265-66 (emphasis added). *Holmes* recognized that RICO should be "liberally construed to effectuate its remedial purposes"; there is "nothing illiberal," however, about applying ordinary proximate-cause limitations to prevent recovery by "secondary victims." *Id.* at 274 (quoting 84 Stat. 947). Liberal construction does not defeat proximate cause.

Miami also misreads *Lexmark* (at 48-49), which also supports a directness requirement. Relying on the same common-law sources as *Associated General Contractors* and *Holmes*, *Lexmark* explained that under "background principles" of proximate cause, plaintiffs cannot recover economic damages that do not "flow[] directly" from defendant's conduct. 134 S. Ct. at 1388, 1390-91; Opening Br. 47-48. *Lexmark* recognized that in certain statutes, damages may "flow[] directly" even where there is one intervening step between the damages and the statutory violation, 134 S. Ct. at 1391, but the directness inquiry still bars more attenuated damages claims. Thus, in the FHA context, while money a nonprofit (or a city) spends combating housing discrimination (such as operating a tester program) "flow[s] directly" from that discrimination, *see Havens*, 455 U.S. at 379, the same is not true of a nonprofit's lost property value (or a city's associated lost property taxes) allegedly traceable, through an extended causal chain, to a third party's discriminatory loan terms.

2. *Gladstone* and *Havens* say nothing about whether an FHA plaintiff can recover damages that

do not flow directly from a statutory violation. *See* Miami Br. 35-36; U.S. Br. 30.[7] As discussed above, pp. 11-12, *supra*, the village in *Gladstone* did not seek to recover lost tax revenue, and the Court did not conclude that the defendants' conduct proximately caused (never-alleged) tax losses. The Court held only that the village could "challenge the legality of [defendants'] conduct." 441 U.S. at 111. *Havens* is even less relevant. The Court held that some indirect *victims* "ha[ve] standing to sue" under the FHA, but it never held that those victims can recover *damages* that do not "flow[] directly" from a statutory violation. 455 U.S. at 375.

In ordinary statutes like the FHA, the directness requirement plays an important role. *See* Miami Br. 46-50 & n.13. As the opening brief explained (at 49-50), the directness requirement avoids complex problems "ascertain[ing] the amount of a plaintiff's [indirect] damages attributable to the violation, as distinct from other, independent factors." *Holmes*, 503 U.S. at 269. Miami's claim highlights these problems, as even Miami admits (at 47 n.13; J.A. 90-91) that to recover, it would have to prove damages attributable to petitioners' alleged discrimination, not to one of the numerous other borrower-specific and macro-economic factors that lead to foreclosures and decreased property values. *See* Opening Br. 55-56.

Miami (at 47 n.13) and the government (at 31) claim that the proposed lawsuit will use regression

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[7] *Inclusive Communities* did not involve *damages* causation at all, but only the causal connection required to prove disparate impact *liability*. *See* 135 S. Ct. at 2523. Each is a distinct burden Miami must plead and prove.

analysis to alleviate these concerns by isolating damages attributable to petitioners' alleged conduct from losses caused by myriad other factors, ranging from the global economy to vandalism. As an initial matter, regression analysis cannot identify whether an individual loan's terms were discriminatory, or whether default was caused by loan terms rather than borrower-specific factors like job loss or illness; that will require analysis of the details of each individual loan. Contrary to its brief (at 43), Miami never even alleged that statistical regression could do that work (J.A. 90-91), even though such proof would be necessary to prop up the front end of the City's daisy chain of causation.

Further, parsing through competing experts' regression analyses, even as to only part of the causation question, is precisely the type of complex damages analysis the directness requirement is intended to avoid. *See* ABA Br. 14-15; DRI Br. 11-15. *Miami*, ironically, cites (at 47 n.13) an article by statistician James Greiner that proves the point by critiquing regression analysis as unreliable and manipulable in this context. D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008). Dr. Greiner explains that regression analysis "facilitates biased, result-oriented thinking by expert witnesses"; "encourages judges and litigators to believe that all questions are equally answerable"; and "can give the wrong answer, or contradictory answers, to questions lawyers and judges care about." *Id.* at 534, 538. Miami's reliance on regression analysis exemplifies, not alleviates, this Court's concerns about spending judicial resources

attempting to trace downstream economic damages back to remote, challenged conduct.[8]

That complex indirect-damages analysis typically is unnecessary because "directly injured victims can generally be counted on to vindicate the law." Opening Br. 50; Chamber Br. 9-10; *Holmes*, 503 U.S. at 269-70. That is certainly so under the FHA, which has a fee-shifting provision to encourage victims of discrimination to sue. 42 U.S.C. § 3613(c)(2). Miami claims (at 48-50) that individual victims will not bring FHA suits because the FHA does not *also* award treble damages, and individual victims will be unable to identify disparate-impact claims; the government adds (at 32-33) that individual claims may be small. But this proves too much. Individual antitrust claims, too, are often small and hard to identify, yet this Court nevertheless found that the availability of such claims made complex indirect-damages analysis unnecessary. *Associated General Contractors*, 459 U.S. at 541-42; *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 265-66 (1972) (rejecting the notion that States should be able to sue on behalf of their citizens under federal antitrust law because individual suits are too costly and hard to bring). These types of concerns are doubtless why the federal government, in each instance, is given significant enforcement authority.

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[8] It is irrelevant that plaintiffs claiming downstream economic damages from discrimination may not "share a pool of damages with the individual who is discriminated against." U.S. Br. 32. This Court's concern was with "*ascertain[ing]*" indirect damages, not just apportioning a pool. *Holmes*, 503 U.S. at 269 (emphasis added).

3. Miami's foreseeability-only approach to proximate cause flies in the face of this Court's recognition that foreseeability is "hardly a condition at all" on liability because at a sufficiently high level, "all consequences … may be foreseen." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553 (1994). Miami tries (at 38-39) to distinguish *Gottshall* on the facts, but that misses the point—*Gottshall* may not have established a proximate-cause standard for every statute, but it clearly recognized that foreseeability alone is inadequate to avoid imposing "infinite liability for all wrongful acts." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984) (Prosser).

Miami's attempt (at 41-44) to explain why its damages were foreseeable only confirms why foreseeability is no meaningful limit. Miami claims that using risk-management tools and public reports, Bank of America could have foreseen that discriminatory loan terms could lead to foreclosures. From there, Miami argues (at 43), it requires "no giant leap" to foresee that such foreclosures could lead to city-wide decreases in property values, decreases in municipal taxes, and increases in costs. But it would similarly require "no giant leap" to foresee numerous other "ripples of harm" that could be traced to foreclosures that in turn are arguably traceable to discriminatory loan terms. *Associated General Contractors*, 459 U.S. at 535. This could include not only losses in property value throughout the city, but also losses to utility companies that served the foreclosed homes; losses to the stores where the former residents would shop; and perhaps even harms described by Miami's *amici*, such as increases in crime. Fraternal Order of Police Br. 16-

20. Given enough time to speculate and numbers to crunch, a nearly infinite number of harms could be deemed "foreseeable."

4. The government's approach to proximate cause is broader still. It abandons *both* foreseeability *and* directness and argues (at 29-31) that a plaintiff can allege proximate cause simply by seeking to recover for the kind of injury the FHA was intended to prevent—including, according to the government, any damages relating to "urban blight" or the "ruin brought on by absentee ownership of property." There is no basis for this approach in the common law or this Court's cases. Prosser, which the government cites, describes no such rule: It states that a statute does *not* create a duty to prevent injury that the statute was *not* "intended to protect" against; but it never even suggested that traditional proximate-cause requirements can be replaced with a look at the *kind* of injury, irrespective of how it occurred. Prosser § 43, at 285-86.

The remarkable breadth of the government's theory is demonstrated by Miami's *amici*, which identify a host of unforeseeable urban-blight injuries. These include increases in: "dangerous flying debris when tropical storms and hurricanes hit"; Zika from abandoned swimming pools; hypertension; diabetes; crime; and rat attacks on pets and children. *E.g.*, Fraternal Order of Police Br. 16-18; Nat'l Assn. of Counties Br. 20; Lawyers' Comm. Br. 31-34. Bank of America fully embraces efforts to combat both segregation and urban blight more generally. But arguing that discriminatory loan terms are the proximate cause of Zika or diabetes, and could

support a federal lawsuit, cannot be squared with any established understanding of proximate cause.

5. Miami and the government half-heartedly argue that there are limits on the sweep of their proximate-cause theories. Miami ironically claims at (39-40) that the FHA's zone-of-interests limitation would limit recovery, an argument that depends on *rejecting* Miami's argument that everyone with Article III standing is "aggrieved." Given the expansive scopes of Miami's and the government's proposed zones of interests, they would not impose a meaningful limitation in any event. The government (at 33) points only to the FHA's statute of limitations, but the court of appeals here suggested Miami might circumvent that time bar through "continuing violation" allegations. Pet. App. 41a-47a. Miami, for instance, seeks to recover damages caused by loans issued as far back as 2004 on the theory that, while the subject practices of that earlier time ended by 2009, some *other* types of discrimination allegedly continued into the limitations period.[9] *Id.*

In asking this Court to abandon the common-law directness inquiry it has consistently employed, Miami and the government are in substance asking the Court to abandon the proximate-cause limitation altogether. That interpretation would read the FHA, unique among federal statutes, to create "infinite liability for all wrongful acts." *Prosser* § 41, at 264. This Court should reject it.

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[9] Miami's view of the FHA's statute of limitations is incorrect, but the court of appeals' analysis demonstrates how illusory the time-bar's protection could be.

B. Miami Does Not Allege Damages That Flow Directly From Bank Of America's Alleged Conduct

There can be little doubt that Miami failed to allege damages that flow directly from defendants' alleged conduct. *See* Opening Br. 52-58. The government does not argue that Miami's complaint satisfies the directness requirement. And Miami dodges the issue, arguing that it has the right to prove its allegations, and resorting to concepts of foreseeability and even but-for causation.

This Court has repeatedly held that where factual allegations, taken as true, do not establish that the defendant's alleged conduct proximately caused plaintiff's alleged damages, the complaint should be dismissed. *E.g.*, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 5 (2010); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 453 (2006); *Associated Gen. Contractors*, 459 U.S. at 541. Because Miami's proximate-cause allegations do not establish directness even if true, Miami's assertions that it should have a right to prove those allegations are beside the point. *E.g.*, Miami Br. 45-46, 47-48 n.13.

Miami's discussion of directness (at 50-57) barely discusses the chain of causation, let alone explains how its injuries are direct when the *Holmes* customers' injuries were not. Opening Br. 54-55. Instead, Miami resorts back to arguments that its alleged injuries would have been "foreseeable" (at 52, 54), and even suggests that only but-for causation is necessary (at 53), arguing that it would not have lost taxes "[w]ithout the Bank's actions." Miami simply cannot explain how the extended causal chain on which it relies is "direct."

* * *

Bank of America fully supports the FHA's laudable goals, and does not seek to undermine the suits plaintiffs have brought to vindicate those goals in the half-century since Congress passed the FHA. This case, however, is entirely new, and is far beyond anything Congress intended, or even imagined. It does not seek to vindicate the FHA's fair-housing objectives, but instead seeks a massive financial recovery supposedly traceable to alleged discrimination against distant third parties. Zone-of-interests and proximate-cause principles exist to avoid precisely this over-reading of federal causes of action. Those principles bar Miami's claim here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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