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BENCH MEMORANDUM

To: The Honorable Patty Shwartz

From: The Moot Court Board Bench Memo Committee

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Date: December 8, 2016

Re: University of Pennsylvania Law School Edwin R. Keedy Cup:
Bank of America Corp. v. City of Miami, No. 15-1111

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I. EXECUTIVE SUMMARY

The issues in this case concern the ability of putative plaintiffs to bring a lawsuit under the Fair Housing Act ("FHA") for damages resulting from allegedly discriminatory lending practices. The FHA makes it unlawful for "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person . . . because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a) (2012). The Act further provides that an aggrieved person, defined in relevant part as any person who "claims to have been injured by a discriminatory housing practice," may bring a civil action for the alleged discriminatory housing practice. §§ 3602(i)(1), 3613(a).

This case arises out of the wave of foreclosures that occurred in the wake of the 2008 subprime mortgage crisis. Respondent, the City of Miami, Florida, maintains that, as a result of discriminatory lending practices by Petitioners Bank of America and subsidiary holding companies, minority homeowners were forced into unnecessary or premature foreclosures, which caused financial harm to the City by depriving it of property tax revenue and forcing it to increase spending on municipal services to combat the negative consequences of the foreclosures and abandoned properties. As such, the City argues that it is properly considered an aggrieved person within the meaning of the FHA and that it has successfully demonstrated that it suffered these injuries as a result of the Bank's allegedly discriminatory lending

practices. The Bank counters that any financial harm allegedly suffered by the City is insufficient to establish an injury under the FHA and is too far removed from the any alleged discriminatory practice.

The District Court granted the Bank's motion to dismiss, finding that the City's economic injuries fell outside the FHA's zone of interests and that the City could not demonstrate that discriminatory lending practices were a proximate cause of the alleged injuries. The Eleventh Circuit reversed, holding that 1. The City was an aggrieved person under the FHA, because the term aggrieved person "sweeps as broadly as allowed under Article III"; and 2. The City had sufficiently alleged proximate causation because the Bank could reasonably foresee that discriminatory lending practices would cause borrowers to enter into premature foreclosure, "costing the City tax revenue and municipal expenditures." *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1278, 1282 (11th Cir. 2015).

Two distinct lines of Supreme Court cases offer conflicting views as to the proper scope of "aggrieved person" under the FHA. Several of the Court's early FHA cases seem to suggest that the FHA's private right of action should be construed as broadly as is permitted under Article III. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Contrasting with these opinions are cases that more recently interpreted

the "person aggrieved" language under Title VII and other statutes as limiting the class of people who could bring lawsuits to those that "fall[] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177-78 (2011); *see also Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014) (requiring courts to apply the zone-of-interests test "to all statutorily created causes of action").

Current precedent also does not address the proper standard for proximate cause under the FHA. In particular, the question here is whether proximate cause can be satisfied when the resulting harm is reasonably foreseeable or whether the discriminatory action must be directly related to the resulting harm.

The Supreme Court has granted certiorari as to two issues:

1. Whether, by limiting lawsuits to "aggrieved person[s]," Congress required that a Fair Housing Act plaintiff plead more than just Article III injury in fact; and
2. Whether the Fair Housing Act's proximate-cause element requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some chain of contingencies.

Issue 1: Scope of the Private Right of Action Under the Fair Housing Act

The first issue concerns the type of injury a plaintiff must allege to state a private claim under the Fair Housing Act. The Bank argues that the FHA is limited to those plaintiffs whose injuries fall within the narrow zone of interests the statute seeks to protect. By contrast, the City argues that the FHA allows private plaintiffs to bring suits for any injury cognizable under Article III.

The City and the Bank each present competing lines of Supreme Court cases to support their respective arguments. The City maintains that taken together, *Trafficante*, *Gladstone*, and *Havens* suggest that the FHA's text, structure, and legislative history demonstrate that Congress intended to extend private claims to the outer limits of Article III. *See Trafficante*, 409 U.S. at 206-08 (noting that the FHA broadly intended to protect any person "who claims to have been injured by a discriminatory housing practice"); *Gladstone*, 441 U.S. at 102-04 (interpreting the language and legislative history of the FHA to suggest that the statute authorized private claims "as broad as is permitted by Article III of the Constitution"); *Havens*, 455 U.S. at 378-79 (permitting an FHA plaintiff to proceed based on an allegation of an Article III injury in fact).

The Bank counters that a more recent line of cases beginning with *Thompson* should limit the private right of action under the FHA. In *Thompson*, which interpreted Title VII, the Court rejected an argument based on *Trafficante* that Title

VII allowed suits for all injuries cognizable under Article III. *Thompson*, 562 U.S. at 176. Instead, the court read the "person aggrieved" language of Title VII to incorporate a narrower zone-of-interests requirement into the statute. *Id.* at 178. Furthermore, the Court noted that the *Trafficante* line of cases was compatible with a zone-of-interests analysis. *Id.* at 176. This reasoning was reinforced in *Lexmark*, which recognized a broad presumption that all statutorily created causes of action are limited to injuries that fall within the statute's zone of interests. *Lexmark*, 134 S. Ct. at 1388.

Each side further maintains that it prevails regardless of which test this Court adopts. The Bank begins by noting that the City's claim of economic harm falls outside of the zone of interests because the primary interest sought to be protected by the FHA was community integration, not financial harm. Even if the Court decides that the cause of action is as broad as Article III, however, the Bank maintains that the City's claim still fails—its purported financial injuries are not Article III injuries in fact and the FHA excludes municipalities as potential litigants.

The City responds that it has standing under Article III because it has alleged an injury similar to those that allowed in *Gladstone* and *Havens*. Even under the zone-of-interests test, though, the City maintains that its claim is arguably with in the FHA's zone of interests because its economic injuries resulted from the Bank's discriminatory practices and thus are more than just marginally related to the FHA's

antidiscrimination purposes. The City also points to legislative history to demonstrate that loss of tax revenue and rising costs of municipal services were harms specifically contemplated by Congress when it passed the FHA. Finally, the City notes that under *Gladstone*, municipalities are permitted to bring suit under the FHA.

Issue 2: Appropriate Standard for Pleading Proximate Causation Under the Fair Housing Act

The second issue is whether City adequately pleaded proximate causation in the complaint. The Supreme Court "generally presume[s] that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark*, 134 S. Ct. at 1390. The parties here dispute whether proximate causation under the Fair Housing Act requires a showing of direct injury or whether mere foreseeability will suffice.

The Bank begins by arguing that a showing of proximate cause under federal statutory claims requires direct injury. Citing *Lexmark*, among other cases, the Bank notes that the purpose of proximate cause is to bar harms that are too remote from the defendant's alleged unlawful conduct. Furthermore, the Bank argues that the FHA incorporates a direct-injury requirement as a matter of common law. Because the FHA is a tort action, the Bank asserts that the common-law tort rule for direct-injury proximate cause applies. The City responds that courts do not apply a general

rule of proximate cause, and the Bank's blanket rule requiring directness misstates the court's flexible approach to proximate cause in the context of different statutes. Moreover, the City contends that even at common law, the directness inquiry was just one of the forms the proximate cause inquiry took.

In support of a foreseeability standard, the City points to Supreme Court precedent to demonstrate that the Court has permitted FHA claims to proceed despite allegations of indirect injuries when the party bringing suit was not the direct target of discrimination. *See Trafficante*, 409 U.S. at 207-09 (finding that a landlord's discrimination against nonwhites injured the tenants of that building despite the tenants not being the direct target of discrimination); *Gladstone*, 441 U.S. at 94-99 (finding that racial steering of third parties by real estate brokers resulted in damages to a municipality in the form of reduced property values and tax base); *Havens*, 455 U.S. at 378-79 (allowing an organization to pursue a claim for the drain on its resources caused by racial steering of third parties).

The Bank and City also assert that there are practical concerns associated with disallowing and requiring directness, respectively. First, the Bank notes that without a directness requirement, remote plaintiffs could bring lawsuits on foreseeability alone, which would in effect neutralize the legal standard of proximate cause. Furthermore, the Bank contends that without a directness requirement, it would be difficult to ascertain which damages resulted from the Bank's acts, as opposed to

those that resulted from the substantial intervening cause of the 2008 subprime mortgage crisis. Finally, the Bank argues that but-for causation is impossible to establish in this case.

The City points to several competing considerations. First, the City argues that allowing indirect victims to bring lawsuits furthers the purposes of the FHA by vindicating the rights of direct victims of discrimination who may not be able to file suit. Second, the City asserts that the Bank's fear that damages would be difficult to measure and apportion is exaggerated because the City identified specific discriminatory loans in its complaint that led to foreclosures. Even if intervening causes were partly to blame for the injuries, the City argues that the question of apportioning damages is not at issue because the City has alleged specific foreclosures that resulted in the harms here. Finally, the City argues that it has adequately alleged but-for causation through the use of regression analysis in the complaint and that it does not need to prove but-for causation at the motion to dismiss stage.

II. QUESTIONS PRESENTED

1. Whether, by limiting lawsuits to "aggrieved person[s]," Congress required that a Fair Housing Act plaintiff plead more than just Article III injury in fact; and

2. Whether the Fair Housing Act's proximate cause element requires more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some chain of contingencies.

III. BACKGROUND

The Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, broadly prohibits discriminatory housing practices. One such practice is discrimination in "the making or purchasing of loans" on the basis of race, color, religion, sex, handicap, or national origin. § 3605(a), (b)(1). While the Department of Housing and Urban Development and the Department of Justice are tasked with primary enforcement of the FHA, the statute also provides a private right of action. Specifically, it entitles an "aggrieved person" to seek relief in a civil action, § 3613(a), and defines "aggrieved person" to include "any person who . . . claims to have been injured by a discriminatory housing practice," § 3602(i)(1).

Respondent City of Miami ("City") asserts just such a private right of action in this case. It alleges that Petitioners Bank of America and its subsidiaries (together, "Bank") engaged in racially discriminatory lending practices to Miami citizens, resulting in default, foreclosure, urban blight, and, ultimately, economic injury to the City in the form of lost property taxes and increased municipal-services expenses. *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV, 2014 WL 3362348, at *1-2 (S.D. Fla. July 9, 2014). The Bank argues that the City's suit exceeds the bounds of the FHA's private-suit provision because 1) a private FHA plaintiff must demonstrate more than the minimal showing of an Article III injury in fact to qualify

as an "aggrieved person" under the FHA, and 2) even if the City is a proper FHA plaintiff, its theory of injury is too attenuated to establish proximate cause.

A. Factual Allegations

As described above, the crux of the City's complaint is that the Bank's discriminatory lending practices caused it economic injury.

1. *The Bank's Allegedly Discriminatory Lending Practices*

The City's complaint alleges that the Bank engaged in two discriminatory lending practices: "redlining" and "reverse redlining." *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1267 (11th Cir. 2015). Redlining is "the practice of refusing to extend mortgage credit to minority borrowers on equal terms as to non-minority borrowers," while reverse redlining is a practice of extending minorities "mortgage credit on exploitative terms," even when those minority borrowers are of equal creditworthiness to non-minority borrowers. *Id.* According to the complaint, these practices combined to create an environment where favorable mortgage terms were unavailable to minority residents and the only available mortgage terms were riskier, more expensive, and more likely to lead to foreclosure. *Id.* at 1267-68.

The complaint further alleges that the Bank incentivized its employees to offer loans on a discriminatory basis. More specifically, the Bank set up a loan officer compensation system that "encouraged" employees to target minority applicants for more burdensome, higher risk loans, "even when they were not justified by the

borrower's creditworthiness." *Id.* at 1268-69. Loan officers were also directed to decline to offer refinancing terms to minority borrowers, to avoid disclosing premiums earned by loan officers, and to steer minority borrowers towards less advantageous forms of loans. *Id.* at 1269.

The City's complaint avers that, as a result of these practices, black and Latino Miami residents disproportionately received predatory loans that were especially likely to lead to unusually quick foreclosures. Between 2004 and 2012, "21.9% of loans made by [the Bank] to black and Latino customers in Miami were high-cost, compared to just 8.9% of loans made to white customers," and there were "significantly elevated rates of foreclosure" on the Bank's loans in minority neighborhoods. *Id*. at 1268. While only 53.3% of the Bank's loan originated in census tracts that are at least 75% black or Latino, 95.7% of the Bank's loan originations in foreclosure by June 2013 were from such census tracts. *Id.*

2. *The City's Alleged Injuries*

The City alleges that the Bank's practices caused it two forms of economic injury. First, the City argues that it lost property tax revenue from the concentrated and substantial loss in value of the foreclosed properties. *Id.* at 1269. The foreclosures also decreased the value of surrounding properties, which decreased the property tax revenues even from homes that were not foreclosed. *Id.* Second, the City seeks damages from increased expenditures on municipal services designed to

combat the problems caused by large numbers of foreclosed and vacant properties, such as additional police, firefighters, and building inspectors. *Id.* The City maintains that these additional services would not have been necessary had the Bank's lending practices not led to substantially more foreclosures than otherwise would have occurred.

B. Procedural History

The City brought suit in the Southern District of Florida on February 28, 2014, asserting two causes of action: first, a federal claim under the FHA, and, second, a Florida-law claim for unjust enrichment.[1] *Miami*, 2014 WL 3362348, at *1. The District Court granted the Bank's motion to dismiss on July 9, 2014. *Id.* It dismissed the FHA claim on three distinct grounds: First, it held that the City was outside the "zone of interests" that the FHA's private right of action intended to protect because it alleged only "economic injuries" stemming from a loss of property values. *Id.* at *4. Second, the District Court found that the complaint failed to allege facts sufficient to demonstrate that the Bank's lending practices proximately caused the foreclosures at issue or that the foreclosures caused the City's injury. *Id.* at *5. Finally, the District Court found that, in any case, the FHA claim would be barred by the statute of limitations. *Id.* at *6.

[1] Because the questions before the Supreme Court concern only the FHA, this memo does not discuss the unjust-enrichment claim.

The Court of Appeals for the Eleventh Circuit reversed the judgment of the District Court on September 1, 2015. *Miami,* 800 F.3d at 1262. The Court concluded that the private right of action under the FHA "extends as broadly as is constitutionally permissible under Article III." *Id.* at 1277. Consequently, the only requirements for a private person suing under the FHA are the essential constitutional requirements of Article III standing, which the City satisfied. *Id.* at 1273. On the question of proximate cause, the Court of Appeals rejected the Bank's argument that the FHA requires plaintiffs to establish direct injury and found that the City had adequately pleaded proximate cause because its alleged injuries were a reasonably foreseeable consequence of the Bank's alleged lending practices. *Id.* at 1282-83.

The Bank sought a writ of certiorari on March 4, 2016, and the Supreme Court granted certiorari on June 28, 2016.

IV. DISCUSSION

A. Can the City of Miami properly sue Bank of America under the Fair Housing Act?

The first issue in this case concerns the City's ability to sue as an "aggrieved person" under the Fair Housing Act. The City argues that the Act's private right of action sweeps as broadly as Article III allows, such that a plaintiff needs only to allege an injury in fact. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("[The] constitutional minimum of standing . . . [requires that] the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.") (quotation omitted). By contrast, the Bank argues that the FHA's right of action is more limited, requiring a private plaintiff to show that it falls within the specific "zone of interests" the statute was enacted to protect, namely direct victims of housing discrimination.

In addition, both parties argue that they can prevail regardless of which standard the Court adopts. Applying the narrower "zone-of-interests" test, the Bank argues that the City's claim is precluded because it is not a direct victim of housing discrimination. The City counters that its claim does fall within the statute's "zone of interests," broadly defined, because municipal and tax effects of housing discrimination were specifically contemplated by Congress as potential harms sought to be avoided or alleviated by the FHA. Under the broader, Article III injury-

in-fact test, the Bank argues that the City's claim still fails because the fiscal injuries the City alleges are distinct from the type of housing-discrimination injuries, like a loss of diversity or community integration, that are typically cognizable under the FHA. The City responds that the injuries it has alleged are in line with injuries the Supreme Court has approved in cases involving similar claims under the FHA.

1. Background: Relevant Supreme Court Precedent

The parties' arguments arise against a backdrop of Supreme Court precedent that offers some support for each side's conclusion. An older line of cases—*Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)—involves private FHA claims. Taken together, these cases suggest that the statute's text (particularly its use of the phrase "person aggrieved"), structure, and legislative history demonstrate an intent to allow private claims as broad as Article III permits. *See Trafficante*, 409 U.S. at 208-12; *Gladstone*, 441 U.S. at 101-08; *Havens*, 455 U.S. at 372-74. The second, more recent set of cases interprets similar text—"person[s] claiming to be aggrieved"—in other statutes more narrowly, to restrict claims to plaintiffs who fall within the narrow "zone of interests" the statute was enacted to protect. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175-78 (2011).

The first of the FHA cases held that plaintiffs who broadly claimed to have been affected by housing discrimination, but were not themselves directly discriminated against, had standing to sue as "person[s] aggrieved" under the Act. *Trafficante*, 409 U.S. at 208. There, black and white tenants sued an apartment complex under the FHA for causing injury by discriminating against non-white potential tenants. *Id.* at 206-08. They alleged that the complex deprived the claimants of the social benefits of integration, cost them business opportunities, and stigmatized the claimants. *Id.* The Court held that the claimants had standing as "persons aggrieved" under the Act because the operative language broadly protected any person "who claims to have been injured by a discriminatory housing practice." *Id.* at 208. The Court further noted that the statute provided only limited administrative enforcement mechanisms, and, therefore, that enforcement through private suits "serve[d] an important role" in remedying harms beyond those incurred by direct victims of discrimination. *Id.* at 208-09.

In the next FHA case, *Gladstone*, the Court confirmed that the Act sweeps as broadly as Article III and affirmed the right of a municipal corporation to pursue private housing-discrimination claims. In *Gladstone*, the Village of Bellwood and several private plaintiffs sued real estate brokers for violating the FHA by steering housing applicants to certain neighborhoods based on race. *Gladstone*, 441 U.S. at 93-97. The Court held that the Village had standing to sue the realtors because the

language and legislative history of the FHA supported the idea that the statute conferred standing to the full extent of Article III, just as in *Trafficante*. *Id.* at 102-03. Although the particular section of the statute under which the Village sued did not contain the "persons aggrieved" language on which the Court relied in *Trafficante*, the Court noted that the statute did not suggest any intent to set up different classes of plaintiffs, *id.* at 103-04, and held that both sections of the Act authorized standing "as broad as is permitted by Article III of the Constitution." *Id.* at 109 (internal quotations omitted). The Village's allegations that the realtors' actions had begun to "rob" it "of its racial balance and stability" identified an injury in fact that gave the Village standing to sue the realtors under the FHA. *Id.* at 111.

Finally, in *Havens*, the Supreme Court held that a drain on plaintiff's resources was a cognizable injury under the FHA. 455 U.S. at 369. In *Havens*, a nonprofit organization claimed that a realty corporation's racial steering practices had injured it by frustrating the nonprofit's counseling services and referrals and draining the nonprofit's resources. *Id.* The Court held that the nonprofit had suffered an Article III injury in fact and, therefore, could pursue its FHA claim. *Id.* at 379. In evaluating the nonprofit's standing, the Court looked to whether it alleged a personal stake in the outcome of the controversy and found that a drain on the organization's resources was a "concrete and demonstrable injury to the organization's activities." *Id.* at 378-79.

More recently, in cases not involving the FHA, the Court has evinced a pattern of restricting the ability to sue to plaintiffs who fall within a statute's particular "zone of interests." *See Thompson*, 562 U.S. 170; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). In *Thompson*, an employee sued his former employer for violating Title VII by firing him in retaliation for his fiancé's claim of sexual discrimination with the company. *Thompson*, 562 U.S. at 172. The Court held that the plaintiff, although not a direct victim of sexual discrimination, had standing to sue his employers because he fell within the "zone of interests" protected by Title VII. *Id.* at 178. In the course of its analysis, the Court specifically rejected an argument based on *Trafficante* that Title VII standing sweeps as broadly as Article III. *Id.* at 176. The Court acknowledged that *Trafficante* could be read to suggest that the Court's broad interpretation of the FHA's "persons aggrieved" language extended to Title VII, but held that it was not bound to follow this "dicta." *Id.* The *Thompson* Court noted further, in dictum of its own, that, despite broad language suggesting that standing under the FHA extends to the full limits of Article III in *Gladstone* and other cases, the holdings in those cases were equally compatible with a narrower "zone-of-interests" limitation. *Id.*

In a still more recent case, the Supreme Court has also limited standing under the Lanham Act to plaintiffs who fall within the statute's zone of interests. *Lexmark*, 134 S. Ct. 1377 (2014). In *Lexmark*, Static Control, a competitor of Lexmark,

counter-claimed that Lexmark had engaged in false advertising under the Lanham Act to deceive customers into believing they needed to return empty printer cartridges to Lexmark, rather than to remanufacturers like Static Control. *Id.* at 1384. The Court held that Static Control had standing to sue under the Lanham Act because its injuries fell within the statute's zone of interests. *Id.* at 1393. The Court noted a presumption that the "zone-of-interests formulation" applies to all statutorily created causes of action and rejected an argument that the broad language authorizing suit by "any person who believes that he or she is likely to be damaged" suggested an intent to confer standing to the full extent of Article III. *Id.* at 1388.

a. The Bank argues that the Supreme Court's "zone-of-interest" test limits cognizable claims under the Fair Housing Act.

The Bank urges the Court to apply its modern "zone-of-interests" presumption to the FHA, reversing its earlier determination that the statute authorizes suits to the full extent of Article III. Relying on *Lexmark*, the Bank argues that the "zone-of-interests" test presumptively applies to all statutory claims. 134 S. Ct. at 1388. Only statutes that are extraordinary and "more-than-usually expansive" confer standing to the full extent of Article III. *Id.* Thus, to establish that Congress desired to expand a statute's standing to the limits of Article III, plaintiffs must show both overtly broad language and congressional intent to rely on private enforcement. *See Bennett v. Spear*, 520 U.S. 154, 164–66 (1997) (holding that a citizen suit provision in the Endangered Species Act that authorizes "any person" to sue is wide enough in

breadth to negate the need for a zone-of-interests test and that provisions for recovery of litigation costs demonstrated a reliance on private litigants).

Following *Thompson* and *Lexmark*, the Bank argues that Congress's use of the phrase "person aggrieved" in the FHA suggests an intent to limit private claims to those that fall within the statute's zone of protected interests, just as it did in Title VII. *See Thompson*, 562 U.S. at 177. Indeed, the language of the two statutes should be interpreted consistently, particularly because both the statutes involve the same broad subject matter—civil rights. ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of Legal Texts* 323 (2012). Moreover, because the FHA was enacted *after* Title VII by three years, Title VII's definition of "person aggrieved" should constrain this Court's understanding of the same term in the FHA. Pet'rs' Br. at 14-15. The Bank argues, further, that revisions to overall enforcement scheme of the FHA since *Trafficante* and its progeny confirm that the ordinary zone-of-interest rule should apply in this case. *Trafficante* was based in part on the fact that the statute's weak administrative enforcement mechanisms suggested an expansive role for private litigation. *Trafficante*, 409 U.S. at 210 ("The design of the Act confirms this construction. HUD has no power of enforcement."). But Congress amended the FHA in 1988 to expand administrative enforcement, authorizing the Department of Housing and Urban Development to take direct action against housing discrimination. H.R. Rep. No. 100-711 (1988) at 16. Specifically, the 1988

Amendments allow HUD to file complaints on its own initiative and to investigate housing practices independently to determine whether complaints should be brought. *Id.* According to the Bank, these Amendments signal Congress's intent to minimize the role of private litigation in the statute's overall enforcement scheme and narrow the scope of permissible private claims. Pet'rs' Br. at 17-18.

Even if this Court disagrees that the 1988 Amendments undermined the *Trafficante* line of cases, the Bank argues that limiting FHA claims to plaintiffs who fall within the statute's zone of interests is consistent with the holdings of *Trafficante* and its progeny, if not their text. *Thompson* specifically casts doubt the precedential value of the assertions in *Trafficante* and subsequent cases that standing under the FHA extends to the full limits of Article III. Justice Scalia stated that there was no need for the *Trafficante* Court to determine that the FHA conferred such broad standing when the plaintiffs fell squarely within the statute's zone of interests as tenants directly affected by housing discrimination. *Thompson*, 562 U.S. at 176. Although it acknowledged that later cases, including *Gladstone*, "reiterate that the term 'aggrieved' in [the FHA] reaches as far as Article III permits," the *Thompson* Court asserted that "the holdings of those cases are compatible with [a] 'zone of interests' limitation." *Id.* at 176.

The Bank further distinguishes *Gladstone* and *Havens* by arguing that, because those cases involved a different section of the FHA, they are not

authoritative as to the scope of "aggrieved persons" under the provision of the FHA that is relevant in this case. In its reply brief, the Bank argues that the fact that *Gladstone* and *Havens* did not depend on the *Trafficante* analysis means that neither case binds the Court for purposes of the City's case. The Bank further contends that even if the Court held that *Trafficante* had the benefit of stare decisis, the doctrine does not by itself compel the Court to adhere to the underlying reasoning if there have been dramatic changes in the law, like the 1988 Amendments. *See Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016) (citing various cases that establish principles as to when stare decisis may be abrogated).

b. The City argues that, following *Trafficante*, the FHA allows claims as broad as the outer limits of Article III.

The City responds that the FHA authorizes plaintiffs to bring claims to the full extent allowable under Article III, following the *Trafficante* line of cases. Because those cases directly interpret the FHA and remain good law, stare decisis counsels against adopting the narrower construction the Bank seeks. In contrast, *Thompson* and its related cases do not interpret the FHA at all, but rather only interpret other civil rights statutes, and thus these cases should not control the analysis under the FHA.

Trafficante explicitly defines the scope of the private right to sue under the FHA as coextensive with Article III injury in fact. Though not mandatory, the City argues that the Court should affirm and apply its holding in that case that "aggrieved

person" under the FHA means any person who has suffered an injury in fact under Article III because stare decisis carries increased weight in cases of statutory interpretation. *See* Resp't's Br. at 9; *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (noting that stare decisis is not only the "preferred course," but that decisions on statutory interpretation carry increase force requiring special justifications to overcome). To overcome this increased weight, the Court must both determine that its previous interpretation of the FHA was incorrect and that there is a special justification for altering the interpretation. *Id*. The City argues that the Bank has failed to show either.

First, the City argues that *Trafficante* remains correctly decided because no subsequent case law has interpreted the FHA to abrogate *Trafficante*. The City maintains that the Bank's argument regarding *Thompson* is self-defeating because the *Thompson* Court's attempt to cast the reasoning in *Trafficante* as dicta unrelated to the holding is itself dicta unrelated to the holding of *Thompson*. *Thompson* concerned a Title VII retaliation claim and not a Title VIII FHA claim. Consequently, the Court's criticism of *Trafficante* had no bearing on the actual issue in that case. Thus, even if the Court accepts the Court's reasoning in *Thompson*, which is critical of its earlier reasoning in *Trafficante*, this Court is still not bound by that *Thompson* reasoning.

Furthermore, since *Thompson*, lower courts have confirmed that employment discrimination and housing discrimination are not the same. *See*, *e.g.*, *City of Los Angeles v. JPMorgan Chase & Co.*, No. 2:14-cv-04168-ODW(RZx), 2014 WL 6453808, at *6 (C.D. Cal. Nov. 14, 2014) (explaining that *Thompson* specifically limited standing in the employment discrimination context to employees). In contrast to Title VII, the FHA specifically defines "aggrieved person" to be "any person who claims to have been injured by a discriminatory housing practice." *Id.* Indeed, this Court has previously stated that "[w]e have several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015).

Furthermore, the 1988 Amendments to the FHA does not create a "special justification" that would undermine stare decisis here. In *Dickerson v. United States*, 530 U.S. 428 (2000), this Court held that a special justification must be an overarching policy reason that counsels a change in law, not just a claim that the earlier Court made a mistake. *Id.* at 443-44. The City claims that the closest justification the Bank has provided has been the shift of "aggrieved persons" enforcement to the Secretary of HUD. But this justification does not account for the fact that the 1988 Amendments also further empowered private litigations. Although increasing administrative enforcement powers was one effect of those Amendments,

the Amendments also were designed to remove "barriers to the use of court enforcement by private litigants and the Department of Justice." H.R. Report 100-711 at 13. This legislative history is consistent with a desire to increase enforcement powers across the board rather than increase some powers at the expense of others. Moreover, the 1988 Amendments also specifically affirmed that the bill was meant to expand the broad standing conferred by Section 810 to ratify the holdings of *Gladstone* and *Havens*. H.R. Report 100-711 at 23. Thus, nothing in the 1988 Amendments undermines the *Trafficante* Court's interpretation of the FHA.

2. *Can the City of Miami pursue its claim?*

Each party argues that its side should prevail regardless of which test the Court adopts. The Bank argues, first, that the zone-of-interests test bars the City's claim because the City's asserted economic interest falls outside of the zone of direct discrimination harms sought to be remedied by the FHA. Alternatively, the Bank maintains that even under broader Article III standing, the City still has not adequately pleaded a particular injury in fact.

By contrast, the City asserts that its interest falls squarely within Article III's injury-in-fact requirement. Even if this Court applies a more limited zone-of-interests analysis, however, the City argues that its interest still falls within the FHA's zone of interests.

a. The Bank's arguments as to the City's ability to pursue the specific FHA claim in this case.

i. The City's claim falls outside the zone of interests because it is not the direct victim of discrimination the Act sought to protect.

The Bank argues, first, that the City's claim fails under a zone-of-interests analysis. The FHA was implemented to stop deepening racial division in American society by combating discrimination and promoting community integration. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities*, 135 S. Ct. 2507, 2516 (2015). These are the Act's zone of interests. The City's injury here is only marginally related to those interests because the City fails to make any claims that it suffered harm to community integration; instead, it only contends that the Bank's discriminatory actions ultimately cost the City monetary damages. Because a zone-of-interests test precludes marginally related claims, the Bank maintains that the City's claim should be dismissed.

Citing *Havens*, the Bank argues that Congress sought to empower direct victims of housing discrimination and not litigants indirectly and financially harmed. Thus, an injury is not within a zone of interests merely because it arises from a tangential benefit; rather the injury must stem from the original purpose behind the statute's formation. *See Havens*, 455 U.S. at 375 (focusing on direct representations to housing applicants in determining violations of the FHA)*; see also Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 528, 530-

31 (1991) (holding that although one benefit of the Postal Reorganization Act was to protect the jobs of postal workers, because this benefit was not the primary purpose of the statute, postal workers did not have standing to challenge a regulation that reduced the United States Postal Service's monopoly).

Here, the FHA's success in preventing housing discrimination offers the tangential benefit of stronger municipal economies and tax bases, but this benefit is not itself an interest or purpose of the Act. The FHA was enacted at a time of deep racial division at a time of great civil unrest to prevent the creation of "separate and unequal" societies. Kerner Commission Report, Cong. Rec. 4830, 4843. The Bank argues that nothing in the legislative history or the text of the law references suggests that its interests extend beyond combating discrimination in housing transactions to protecting municipalities from pecuniary harm.

Even if the original statute could be construed to protect a private plaintiff's financial interests, the Bank argues that the 1988 Amendments narrowed the zone of interests to exclude the City's financial claims. Pet'rs' Br. at 23-25. By empowering HUD and DOJ, the new strength of administrative agencies to enforce rights under the FHA meant a departure from reliance on private litigants for enforcement. *See Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) (holding that there was no private right of action to enforce disparate-impact regulations under Title VI because DOJ's role in the administrative remedy scheme was strong enough to determine exclusive

congressional preference for administrative enforcement). The robust, independent enforcement powers the 1988 Amendments granted HUD suggest a strong congressional preference for administrative enforcement of the statute, just as in *Alexander*. The Bank contends that the City of Miami's lawsuit is far from Congress's chosen method of enforcement through federal enforcement agencies empowered by the 1988 Amendments.

ii. Alternatively, the City has not pleaded any Article III injury.

Even if the Court agrees that the FHA authorizes claims that extent to the limits of Article III, the Bank argues that the City's claim still must fail because its economic injury is not an "injury in fact" in the sense of Article III and because the FHA excludes municipalities as potential litigants.

The Bank argues that the City has not pleaded any Article III injury in fact because the City has not been directly injured by the Bank's discriminatory activities. Even at the limits of Article III, a plaintiff cannot sue unless it demonstrates that it has suffered an injury that is concrete, particularized, fairly traceable to the defendant's action, and likely to be redressed by judicial action. *Lujan*, 504 U.S. at 560. The City, unlike the plaintiffs in *Gladstone* and *Havens*, whose injuries related directly to the issue of discrimination in housing practices, did not claim to suffer injury to its interest in fair housing. The City also does not claim injury from damage to racial diversity or loss of community integration. Because the

City has not alleged any injury directly relating to the purposes behind the FHA, the Bank urges its suit to vindicate a pecuniary interest as a third party to be dismissed. The Bank reinforces this argument in its reply brief by emphasizing how the City has neglected to allege any injury other than pure financial harm.

The Bank further asserts that the City is not permitted to sue under Article III. The FHA permits private "persons" to sue, and defines "persons" to be "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, Title 11 trustees, and fiduciaries." 42 U.S.C. §§ 3613(a); 3602(a). Because governments and municipalities are conspicuously absent from this list while present in other statutes, the Court should not read them in. *See* Scalia & Garner, 107 (discussing the canon of *expressio unius est exclusio alterius*, that an enumerated list in a statute necessarily excludes other items not included in that list).

b. The City's arguments as to its ability to sue under the FHA.

i. The City's injury in this case is analogous to the injuries this Court allowed to proceed in *Gladstone* and *Havens*.

The City's central argument is that this Court has previously held that parties like the City can pursue precisely the types of claims the City has alleged in this case. The *Trafficante* line of cases includes a suit brought by a municipality, *see Gladstone*, 411 U.S. at 114 (holding that standing under the FHA does not vary if

the injured community is defined by "city blocks rather than apartment buildings"), and a suit over pecuniary damage to a third party arising from housing discrimination, *see Havens*, 455 U.S. at 379 (holding that the nonprofit could sue for an injury in fact if the discrimination "perceptibly impaired" its counseling and referral services and caused a drain on the organization's resources). Both cases were specifically cited by Congress in the 1988 Amendments to the FHA as examples of FHA case law that they intended to preserve. H.R. Rep. No. 100-711 at 23 (1988).

ii. The City's injury also falls squarely within the FHA's zone of interests.

The City also notes that the Court has always stated that an injury must only be "arguably" within the zone of interests of a statute to give the plaintiff the benefit of the doubt that the claim is cognizable. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). The test would only foreclose suit if the plaintiff's interests are only "marginally related to" or "inconsistent with" the purposes of the statute; "the benefit of any doubt goes to the plaintiff." *Id.* at 2210-12 (noting that the plaintiff's interest in land use arguably fell within the zone of interests of a land acquisition statute despite that statute not actually addressing land use because previous decisions under the statute linked considerations of land use and land acquisition); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-56 (finding the plaintiff's interest to be within the zone of interests of the statute based on one piece of legislative history

that suggested the plaintiff's interest was included in the statute's zone of interests). This supports a broad presumption that the City would fall within the zone of interests because its economic injuries are more than marginally related to the FHA's antidiscrimination purposes and not inconsistent with them. In examining the legislative history, the economic and tax damage the City alleges falls squarely within the zone of interests the FHA meant to vindicate. The legislative history of the FHA establishes financial harms to property value and tax revenue as injuries the Act was intended to prevent. The Kerner Commission Report specifically cited taxes and the rising costs of municipal services as problems the FHA was designed to solve. Kerner Commission Report, Cong. Rec. 4830, 4839. The 1988 Amendments do not change the purpose of the FHA and only adjust the FHA's enforcement options. *See* H.R. Rep. No. 100-711 at 23 (1988) (reaffirming the FHA's purposes with direct reference to *Gladstone* and *Havens*). In constructing the FHA as a remedy, Congress had municipalities and large societal effects of racial discrimination in mind as wrongs requiring remedies.

The City also maintains that the Bank's argument is tantamount to arguing that a plaintiff must be a direct victim to be within the zone of interests. This understanding, the City contends, contradicts evidence in the FHA's legislative history that indicates that both private parties and the government should enforce the Act's provisions. *See* H.R. Rep. No. 100-711 at 14 ("This bill seeks to fill that void

by creating an administrative enforcement system, which is subject to judicial review, *and by removing barriers to the use of court enforcement by private litigants* and the Department of Justice.") (emphasis added). Though a zone of interests can be limited to direct victims of discrimination, based on the legislative history of the FHA and its Amendments, that is not what Congress sought to do here. Here, the City functions both as a governmental entity and a private enforcer. Regardless, the City argues that its injury to its tax base was upheld as a direct injury of discrimination by the Court in *Gladstone*. *See Gladstone*, 411 U.S. at 110-11 (noting that "significant reduction in property values directly injures a municipality by diminishing its tax base").

iii. The City's status as a municipality does not prevent it from suing as a private litigant.

The Court has already upheld the ability of municipalities to sue under the FHA when it issued its *Gladstone* decision, which remains good law. *Gladstone*, 441 U.S. at 91 n.21. Though the Bank argues that the City is not a "private person," this interpretation would cause absurd results, according to the City. This would not only directly contradict *Gladstone*, but would also create a situation where a municipality could forward a complaint to HUD for enforcement, but would be unable to enforce the Act on its own. *See* Resp't's Br. at 18 (noting that the FHA allows complaints to be filed with the HUD Secretary irrespective of the complainant's status as a private person). This also would force municipalities to abdicate their own enforcement

obligations to a federal agency. The City claims that because municipalities are funded specifically to meet enforcement obligations, this would create a perverse incentive for municipalities to free-ride on HUD, even though municipalities have the resources and prerogative to fight discrimination on their own. Resp't's Br. at 17-18.

B. Has the City adequately pleaded proximate cause under the Fair Housing Act?

The second issue concerns whether the City's allegations establish that the Bank's discriminatory lending practices proximately caused the City's injury. The City claims that the Bank's unlawful lending practices led to foreclosures and urban blight, ultimately causing the City financial harm in the form of lost tax revenue and increased spending on municipal services like police and trash removal. The parties agree that (a) the FHA requires that the defendant's conduct proximately caused the plaintiff's injuries, *see, e.g., Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) ("[A] statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."), and (b) if the allegations in the City's complaint are true, any harm to the City is *indirect*—purely derivative of injuries that borrowers suffered as the result of the Bank's lending practices. The City nonetheless argues that these indirect injuries satisfy the FHA's proximate-cause element because the damages it suffered were reasonably foreseeable to the Bank. Thus, whether the City has adequately alleged the proximate-cause element of its FHA claim turns on whether the Act requires a showing that the plaintiff's injury is direct or whether mere foreseeability will do.

The City argues that, under the foreseeability standard, proximate cause is satisfied because the Bank had the data to know that the predatory loans would lead to foreclosures and the tools to predict macroeconomic forces. The Bank responds

that, even under a foreseeability standard, there was no way to predict the widespread consequences of the housing collapse. The Bank maintains, by contrast, that a directness requirement would preclude the City from demonstrating proximate cause because the City's claim is based entirely on harms to third parties, not the City itself. In response, the City argues that it prevails even under a directness standard because the lost tax revenue and increased municipal expenditures are inextricably linked with the discriminatory loans. In this way, the City argues that the facts here are similar to those in *Gladstone*, where the Court noted that discriminatory practices that result in reduced property values "directly injure[] a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Gladstone*, 441 U.S. at 110-11.

The parties' arguments on the proper standard of proximate cause include four main parts: first, the parties dispute whether the direct-injury requirement is the default rule for all federal statutory claims. Second, the parties contest whether the FHA incorporates the directness requirement from common law tort theory. Third, the City points to several cases that, it asserts, establish that courts permit FHA claims to proceed even when the alleged injury is indirect. Fourth, the parties each identify practical concerns regarding the other's proposed proximate-cause standard.

1. *Is direct injury the default rule for federal statutory claims?*

The Bank's central argument is that direct injury is generally required to show proximate cause for federal statutory claims. For support, the Bank relies primarily on *Lexmark*, a Lanham Act proximate-cause case. *Lexmark*, 134 S. Ct. 1377. In that case, in a discussion about federal causes of action generally, the Court wrote that proximate cause "bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct," which is "ordinarily the case if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Id.* at 1390 (quoting *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)). With regard to the specific claims in the case, the Court held that sales the defendant-competitor lost following the plaintiff-company's unlawful deception of consumers satisfied the proximate-cause requirement because the injury was direct: the company's deception directly resulted in harm to the competitor because that deception caused third-party consumers to withhold their business from the competitor. *Id.* at 1391. Though the injury to the competitor was sufficiently direct, the court noted that the same would not be true of others whose injuries were more removed, such as "the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's [injury]." *Id.* In other words, the Bank argues, *Lexmark* stands for the proposition that harms that are

purely derivative of injuries to a third party are too remote to meet the directness requirement of proximate cause.

Beyond *Lexmark*, the Bank points to other cases applying a direct-injury requirement to urge that the requirement is the default rule for federal statutory causes of action. *See, e.g.*, *Holmes*, 503 U.S. at 268 (barring recovery under RICO for "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts"); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 n.25 (1983) (discussing the importance of "directness of injury" in determining whether a plaintiff's injury is "too remote" for recovery under the Sherman Act).

The City responds that courts do not apply fixed and general rules about proximate cause and that the inquiry varies by statute and context. According to the City, the Bank's theory overstates the extent to which courts apply a single, fixed approach to proximate cause across a range of contexts. Indeed, two cases the Bank cites, *Lexmark* and *Associated General Contractors*, themselves suggest that the inquiry is more nuanced than the Bank allows. In *Lexmark*, the Court wrote that "[t]he proximate-cause inquiry is not easy to define, and over the years it has taken various forms." *Lexmark*, 134 S. Ct. at 1390. Instead, the proximate-cause analysis "is controlled by the nature of the statutory cause of action." *Id.* Furthermore, in *Associated General Contractors*, the Court examined the Sherman Act's legislative

history to determine Congress's intent with respect to the directness inquiry rather than applying the direct-injury requirement as a matter of course. *Associated General Contractors*, 459 U.S. at 530-32.

2. *Does the FHA incorporate a direct-injury requirement as a matter of common law?*

The Bank next argues that the FHA's proximate-cause element must incorporate a directness requirement as a matter of common law. As with other federal causes of action, the Supreme Court has indicated that an FHA claim is essentially "a tort action" that adheres to the general principles of the common law of torts. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 285 (2003) (holding that the common-law rule on vicarious liability applies to FHA claims and reasoning that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious-liability rules and consequently intends its legislation to incorporate those rules"). Moreover, according to the Bank, the common law of torts incorporates a direct-injury rule for proximate cause. *See, e.g.*, J.G. Sutherland, 2 A Treatise on the Law of Damages § 33 (1893) ("Where the plaintiff sustains injury from the defendant's conduct to a third person it is too remote [to recover].").

The City counters that the directness requirement was an unstable feature at common law, and was just one of the many shapes proximate cause took. For example, in one case cited in a 19th century legal treatise, the Supreme Court of New Jersey found that a plaintiff-horseshoer could show proximate cause when his

business reputation was damaged by the defendant, who loosened a horseshoe that was recently put on by the plaintiff such that the shoe would come off easily. The defendant's action only directly harmed the plaintiff's customer, and the horseshoer only suffered indirect harm because the defendant made it appear that the plaintiff was a careless horseshoer. Nevertheless, this was sufficient to demonstrate proximate cause. *Hughes v. McDonough*, 43 N.J.L. 459 (1881); *see also Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) ("[T]o warrant a finding that negligence . . . is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."). Thus, the City argues that the common-law rule permits some indirectness of injury to sustain a theory of proximate cause.

3. *The City argues that federal courts have permitted FHA claims to proceed when the injury claimed was indirect.*

More recently, the City argues, the Supreme Court has often allowed plaintiffs to proceed on FHA claims arising out of injuries that are indirect. Thus, despite dicta in cases concerning the importance of the direct-injury requirement, in practice the fact patterns of many FHA cases belie the notion that indirect harms are not recoverable. *See Havens*, 455 U.S. 363; *Gladstone*, 441 U.S. 91; *Trafficante*, 409 U.S. 205.

Indeed, all of the three major Supreme Court FHA standing cases involved injuries that could be characterized as indirect. In *Trafficante*, the Court held that white tenants of an apartment complex had standing to sue their landlord for discrimination not against them, but against third-party, nonwhite prospective tenants. *Trafficante*, 409 U.S. at 207-09. The tenants claimed that they "lost the social benefits of living in an integrated community, . . . missed business and professional advantages which would have accrued if they had lived with members of minority groups, . . . [and] suffered embarrassment and economic damage in social, business, and professional activities from being stigmatized as residents of a white ghetto." *Id.* at 208. In *Gladstone*, the Court found that the Village of Bellwood had standing to bring a claim for damages when real estate brokers unlawfully steered third-party buyers of certain racial groups toward different residential areas. *Gladstone*, 441 U.S. at 94-99. The Village claimed that the steering resulted in a reduction in property values, which resulted in a diminished tax base. *Id.* Finally, in *Havens*, a fair housing organization brought a claim against a realty firm for racial steering. *Havens*, 455 U.S. at 367-68. The firm gave certain prospective residents misinformation, which "frustrated the [fair housing] organization's counseling and referral services, with a consequent drain on resources." *Id.* at 369. This drain on resources caused by racial steering of third parties, the Court held, was sufficient to meet the proximate cause standard. *Id.* at 378-79. The City admits that *Trafficante*,

Gladstone, and *Havens* did not explicitly discuss the issue of the appropriate proximate-cause standard, but argues that the results of all three support a finding that direct injury is not required: in every case, the Court allowed a party other than the direct victim of the alleged discrimination to maintain an FHA claim.

Indeed, even in *Lexmark*, the primary case on which the Bank relies, the injury was indirect as a practical matter: the Court held that the plaintiff's unlawful deception of third-party consumers was the proximate cause of the defendant-competitor's lost sales. Thus, despite the Court's suggestion in *Lexmark* that the defendant was "directly" injured, *id.* at 1391, *Lexmark* in fact suggests exactly what the Bank claims to be false: that in a federal cause of action, a party may sue for harms which are purely derivative of misfortunes visited upon a third person.

4. *The Bank and the City both point to practical concerns associated with disallowing and requiring directness, respectively*.

Finally, the Bank presents several practical concerns that arise if a showing of directness is not required under the FHA. In particular, the Bank claims: (a) without a directness requirement, there would be no limit on remote plaintiffs bringing suits; (b) calculating and apportioning damages would be difficult, if not impossible; and (c) that but-for causation is impossible to prove in this case.

First, the Bank argues that the reasons for requiring directness go beyond theory: as a practical matter, the directness requirement forestalls suits brought by remote plaintiffs—suits which would frustrate the purposes of Congress and thwart

the work of fact-finders as they attempt to trace causes and effects through a fog of intervening acts. Without the directness requirement, remote plaintiffs would be free to bring suits on a foreseeability theory alone. In that context, courts worry that virtually any injury traceable to a defendant's conduct would be actionable, which would in effect neutralize the legal standard of proximate cause. "[F]oreseeability," this Court has written, "is hardly a condition at all," because virtually "all consequences . . . no matter how far removed in time or space, may be foreseen." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 553 (1994).

Here, the Bank argues that the City's theory of proximate cause imposes virtually no restriction on the class of potential plaintiffs. A local gas station could sue the Bank for lost revenue caused by the urban blight. A public-school pupil could sue for diminished services caused by the City's adjusted budget, caused the City's declining tax revenue. None of these actions, the Bank maintains, fits Congress's purposes in the FHA.

The Bank also contends that, without a directness requirement, it would be difficult to ascertain which damages resulted from the Bank's acts, and which damages resulted from other causes. The Court explained the practical importance of the directness requirement in *Holmes*, which dealt with a cause of action under RICO:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the

> violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 268 (internal citations and quotations omitted).

The Bank argues that these same practical reasons apply with equal force in the FHA context. Here, significant, independent factors substantially contributed to the City's economic harms. The City's harms coincided with the catastrophic 2008 collapse of the housing market—a fact which motivated the District Court below to conclude that the City failed to adequately plead proximate cause. The collapse itself led to massive job losses, which the Bank maintains are largely responsible for the high rate of the City's foreclosures. And decreased home values nationally led to negative equity mortgages, resulting in voluntary home defaults. Any and all of these independent factors, whose effects are only separable in theory, may have played a role so significant as to dwarf the effects of the Bank's alleged discriminatory lending practices. These reasons tend to favor the Bank's position that, in the FHA context, proximate cause includes a directness requirement.

Finally, the Bank argues that but-for causation is impossible to prove in this case. The Bank primarily contends "many homeowners defaulted due to their own

poor fiscal management [or] voluntary default" and thus that the foreclosures would have resulted even without the allegedly discriminatory practices. Reply Br. at 17. On that ground, the Bank asserts that the City has failed to establish that the Bank's alleged discrimination resulted in the harm to the City.

In response, the City argues that practical considerations actually weigh *against* a directness requirement in FHA claims: (a) directly injured victims *cannot* generally be counted on to vindicate housing discrimination violations as private attorneys general; (b) difficulties in ascertaining the amount of a plaintiff's damages attributable to a violation, as distinct from independent factors, need not result in an absolute bar to recovery; and (c) but-for causation has been adequately pleaded in this case.

First, the City argues that allowing foreseeable victims to sue under the FHA actually furthers the statute's purpose of preventing and remedying housing discrimination because direct victims of discrimination may be poorly situated to file claims. In *Havens*, a realtor systematically misinformed certain people in order to steer them away from particular housing. *Havens*, 455 U.S. at 363-69. Without the organization's resources to use testers to see if the realtors were actually engaging in discriminatory practices, individuals might not have been able to discover that discrimination was indeed occurring. *Id.* at 379. In this sort of situation, a fair housing organization, with its experience and legal resources, is better

positioned to conduct tests and file a lawsuit. *See also* Resp't's Br. at 27 (describing housing discrimination as difficult to detect and therefore difficult to remedy through individual complaints of discrimination).

Second, the City maintains that problems measuring and apportioning damages are exaggerated. The City's complaint identifies specific discriminatory mortgages that led to foreclosures, which in turn resulted in specific, measurable damages. For instance, one portion of the Complaint reads:

> Routinely maintained property tax and other data allow for the precise calculation of the property tax revenues lost by the City as a direct result of particular BoA foreclosures. Using a well-established statistical regression technique that focuses on effects on neighboring properties, the City can isolate the lost property value attributable to BoA foreclosures and vacancies from losses attributable to other causes, such as neighborhood conditions.

J.A. at 238. Thus, the City argues, the practical worry that recovery for indirect harms involves complicated rules and risks of multiple recoveries is unfounded. Moreover, even if intervening causes like the subprime mortgage crisis were partly to blame for the City's injuries, the City maintains that these questions are factual inquiries best evaluated by the fact-finder. At the same time, the City argues that the question of apportioning damages is not at issue here because the City has identified specific foreclosures that caused its harm. *See* Resp't's Br. at 32-33. At this stage of the litigation, the Court should accept the factual allegations in the complaint regarding the causal chain as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Finally, the City argues that it has sufficiently alleged but-for causation. The question at the motion to dismiss stage is not whether the City can prove but-for causation, but whether the City has adequately pleaded but-for causation in the complaint. The City points to several regression analyses in the complaint that indicate that the foreclosures would not have occurred had the loans not been predatory, demonstrating but-for causality. The City also notes that this Court has approved of these regression analyses in antidiscrimination contexts. *See Bazemore v. Friday*, 478 U.S. 385, 400 (1986) ("[R]egression analysis that includes less than all measurable variables may serve to prove a plaintiff's case.") (internal quotation omitted). Alternatively, the City notes that when an injury has multiple causes, this Court has treated several causes as concurrent but-for causes of harm.

V. Case Summaries

A. *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972)

Two tenants of an apartment complex alleged that the owner of their complex had violated the FHA by discriminating against non-white applicants who wished to rent out apartments in the complex. *Trafficante*, 409 U.S. at 206-07. The tenants maintained three forms of injury: first, that they had "lost the social benefits of living in an integrated community;" second, that they were deprived of professional advantages that would have stemmed from living with members of a minority; and, third, that they suffered harm from "being 'stigmatized' as residents of a 'white ghetto.'" *Id.* at 208. The district court dismissed the complaint, holding that the tenants were not "persons aggrieved" within the meaning of the FHA, and the court of appeals affirmed. *Id.*

The Supreme Court reversed. The Court noted that the statutory definition of a "person aggrieved" was broad, and concluded that the language reflected "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* at 209 (internal quotation marks omitted). The Court relied on the fact that, under the form of the FHA then in effect, the Department of Housing and Urban Development, while empowered to receive and investigate complaints of discriminatory housing under the FHA, did not itself have any direct enforcement power. *Id.* at 208-09, 210. Instead, in the context of the statute as it then existed,

private suits by plaintiffs acting on their own behalf and as "private attorneys general . . . vindicating a policy that Congress considered to be of the highest priority" had a central role to play in addressing "the enormity of the task of assuring fair housing." *Id.* at 211 (quotation omitted). The Court observed, further, that the FHA's private right of action "serves an important role . . . in protecting not only those against whom a discrimination is directed but also those whose complaint" reaches more broadly, in that case "that the manner of managing a housing project 'affects the very quality of their daily lives.'" *Id.* (citation omitted).

B. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)

A group of test buyers and a municipal corporation brought suit against a group of realtors responsible for showing residential listings in a suburb of Chicago. *Gladstone*, 441 U.S. at 93-94. The test buyers demonstrated that the realtors showed them different homes in different areas of the village depending on their race, in effect enforcing de facto segregation by "steering" non-white buyers away from predominantly white areas. *Id.* at 94. The buyers sued under section 812 of the version of the FHA then in effect, which authorized civil enforcement suits generally, but did not contain the "person aggrieved" language that was in section 810 of the FHA, on which the Supreme Court had relied on in *Trafficante*. *Id.* at 93 n.1; *see* 42 U.S.C. §§ 3610, 3612 (1970) *amended by* Pub. L. No. 100-430 § 8(2) (1988). The district court granted summary judgment, holding that the general civil suit section only provided a right of action to the "direct victims" of FHA violations and concluding that the test buyers did not fit within that umbrella. *Id.* at 96-97. The court of appeals reversed, holding that the two sections of the Act made remedies available to the same class of plaintiffs and that the private right in section 812 was coextensive with the private right at issue in *Trafficante*. *Id.* at 98.

The Supreme Court affirmed the court of appeals. The Court noted that the language of the statute did not indicate any intent to set up two separate classes of plaintiffs and that the legislative history indicated "that all [FHA] complainants were

to have immediate judicial review." *Id.* at 106. Echoing *Trafficante*, the Court held that standing under both sections of the FHA was "as broad as is permitted by Article III of the Constitution." *Id.* at 109 (internal quotations omitted).

The Court held that the municipal corporation's complaint that the realtors' actions "affect[ed] the village's racial composition, replacing what is presently an integrated neighborhood with a segregated one," stated an injury cognizable under Article III. *Id.* at 110-11. It reasoned that "[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," and that other, unspecified "harms flowing from the realities of a racially segregated community" were "not unlikely." *Id.* Accordingly, the municipal corporation's allegations that the realtor's actions had begun to "rob" it "of its racial balance and stability" gave the corporation standing to sue the realtors under the FHA. *Id.* at 111.

C. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)

Three individuals and one organization brought suit under the FHA's private right of action against Havens Realty, a property manager for several apartment complexes. *Havens*, 455 U.S. at 367-68. The plaintiffs alleged that Havens engaged in "racial steering," whereby it "encourage[d] patterns of racial segregation in available housing by steering" applicants of certain racial and ethnic groups into housing already occupied by members of those same groups. *Id.* at 366, n.1.

One of the individual plaintiffs was a black applicant sincerely seeking housing, and was falsely told by the defendant that there was no availability in the apartment complex about which he was inquiring. *Id.* at 368. The other two individual plaintiffs were "tester" applicants, one a black individual and the other a white individual, both of whom made inquiries of Havens Realty about available apartments. *Id.* The black tester was told that no apartments were available, while the white tester was told that there were available units. *Id.* The final plaintiff was a nonprofit organization that employed the tester plaintiffs, whose other activities "included the operation of a housing counseling service" and housing discrimination investigations. *Id.* All three individuals alleged that they had suffered harm in the loss of the various "social, professional, business and economic, political and aesthetic benefits" that "arise from living in integrated communities." The sincere renter plaintiff also alleged that he had been denied "the right to rent real property,"

while the organization alleged that it had suffered economic injury because Havens "had frustrated the organization's counseling and referral services, with a consequent drain on resources." *Id.* at 369. The district court dismissed the claims by the two tester plaintiffs and the organization for being time-barred by the statute of limitations. *Id.* at 369-70. The court of appeals reversed, holding that all three plaintiffs had timely asserted their claims and had standing to bring them. *Id.*

The Supreme Court affirmed the court of appeals in part and reversed in part. *Id.* at 382. The Court reviewed the standing for each plaintiff to assert the private right of action under the version of the FHA then in effect. *Id.* at 372. The Court first reaffirmed *Gladstone*'s statement that "'Congress intended standing under [the FHA] to extend to the full limits of Art[icle] III,'" and that therefore the only requirement for standing is the "minima of injury in fact." *Id.* (citations omitted). In examining that injury-in-fact standard, the Court concluded that: 1) the black tester plaintiff had been injured by the defendant's discriminatory misrepresentation, *id.* at 374; 2) the white tester plaintiff did not have standing on the basis of Haven's statements to him, because he received accurate information and thus suffered no injury, *id.* at 375; 3) both tester plaintiffs could maintain an injury on the basis of the loss of the social, professional, and other intangible benefits of living in an integrated community, but that plaintiffs would have to be able to demonstrate that Havens's practices were not limited to a single housing complex, *id.* at 377-78; and 4) that the

organization had standing because the "drain on [its] resources" that it had alleged was a "concrete and demonstrable injury to the organization's activities" and thus sufficient to establish injury in fact. *Id.* at 379.

D. *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011)

An employee of the North American Stainless company filed an employment discrimination suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, alleging that he had been fired in retaliation for an Equal Employment Opportunity Commission (EEOC) complaint filed against the company by his fiancé, who was also an employee. *Thompson*, 562 U.S. at 172. Title VII permits charges before the EEOC and, eventually, suits in federal court, by "person[s] claiming to be aggrieved." *Id.* at 173. The district court granted summary judgment to the company, holding that retaliation claims by a third party were outside the scope of the right of action created by the statute. *Id.* at 172. A panel of the court of appeals reversed, but the en banc court of appeals affirmed the district court's ruling. *Id.* at 172.

The Supreme Court reversed. It concluded that, as an employee of North American Stainless and the intended victim of the company's unlawful conduct, the plaintiff was within the "zone of interests" that Title VII sought to protect. *Id.* at 178. The Court's opinion addressed an argument that *Trafficante*, in construing the "person aggrieved" language in the FHA, had established that similar phrasing allowed standing to the full extent of Article III in Title VII cases, too. *Id.* at 176. The Court rejected that argument and referred to *Trafficante*'s broad interpretation of "person aggrieved" as applied to Title VII as "ill-considered" dicta. *Id.*

Instead, the Court looked to the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, as the source of a narrower, "common usage" of the term "person aggrieved." *Id.* at 177. In this usage, a person is only aggrieved and entitled to sue if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Id.* at 177-78 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Under this test, Title VII permits suits by plaintiffs with interests "arguably" sought to be "protected by the statute," but not those "who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* at 178 (internal quotations omitted).

In dicta, the Court's analysis also touched on the meaning of the "person aggrieved" standard within the context of the FHA. The Court noted that the *Trafficante* Court had only said that the FHA "was coextensive with Article III '*insofar as tenants of the same housing unit that is charged with discrimination are concerned*,'" and that consequently the *Trafficante* holding "did not adhere" to the breadth of its language concerning the breadth of possible FHA claims. *Id.* at 176. The Court acknowledged that subsequent cases, including *Bennett v. Spear*, 520 U.S. 154 (1997), and *Gladstone*, had "reiterate[d]" *Trafficante*'s statement that the FHA reaches to the full extent of Article III standing, but argued that "the holdings of

those cases are compatible with the 'zone of interests' limitation" the Court applied to the Title VII claim. *Id.*

E. *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)

Lexmark, a printer cartridge manufacturer, brought copyright claims against Static Control, a company that produced supplies for other companies that refilled used printer cartridges, including those manufactured by Lexmark. *Lexmark*, 134 S. Ct. at 1383-84. Lexmark had produced a microchip that locked its cartridges when they were empty to attempt to corner the market on refilling its cartridges. *Id.* at 1383. Static Control created a chip that could defeat this security system, and this formed the basis of Lexmark's copyright claims. *Id.* at 1384. Static Control counterclaimed, alleging that 1) Lexmark had included packaging on the printer cartridges that misleadingly indicated to consumers that they had a legal obligation to return the cartridges to Lexmark, as opposed to one of the refilling companies that were Static Control's customers, and 2) that Lexmark had sent letters to the refilling companies "falsely advising . . . that it was illegal to use Static Control's products to refurbish" cartridges equipped with the microchip. *Id.* Static Control alleged that these assertions constituted false advertising in violation of the Lanham Act. *Id.*; 15 U.S.C. § 1125(a).

The district court granted Lexmark's motion to dismiss the counterclaim on standing grounds, holding that "prudential" standing doctrines barred Static Control's injury as too remote, because it was just a "byproduct" of Lexmark's interference between two other parties, namely individual consumers and the

refilling companies. *Id.* at 1385. In reaching this conclusion, the district court applied a "multifactor balancing test" for prudential standing taken from *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). *Id.* The court of appeals reversed. The court of appeals surveyed the conflicting standards for Lanham Act standing in several circuits: the "antitrust standing" multifactor test from *Associated General Contractors*, a categorical "actual competitors" test, and a "'reasonable interest'" approach. *Id.* (citations omitted). The court of appeals adopted the "reasonable interest" test and concluded that Static Control did have standing for its Lanham Act claims because it had a "'cognizable interest in its business reputation'" with the refilling companies. *Id.* The Supreme Court granted certiorari to clarify "'the appropriate analytical framework for determining a party's standing'" for a false advertising claim under the Lanham Act. *Id.*

The Supreme Court unanimously affirmed the court of appeals' disposition, and clarified both the standing test and the role of "prudential standing" doctrines. The Court noted that it had, in the past, described "prudential" doctrines of standing, which were "not derived from Article III," and which included at least "'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances . . . and the requirement that a plaintiff's complaint fall with the zone of interests protected by the law invoked.'" *Id.* at 1386

(citations omitted). The Court clarified, however, that the "prudential standing" was a misleading label for the zone-of-interests concept, which was better understood as straightforward statutory interpretation. *Id.* at 1387-88. In other words, once the constitutional standing requirements of Article III were satisfied, the question in this case was not actually about prudential standing, but about "whether Static Control falls within the class of plaintiffs whom Congress has authorized to sue under [the Lanham Act]." *Id.* at 1387. The Court answered this question by applying "two relevant background principles," the zone-of-interests concept and proximate cause. *Id.* at 1388.

Although it acknowledged that the zone-of-interests test originated in an interpretation of the language of the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, the Court noted that it had "since made clear, however, that it applies to all statutorily created causes of action" and that Congress must expressly negate a zone-of-interests limitation if it wishes to create a broader right of action. *Id.* In fact, the Court went on to say that the zone-of-interests limit is such a strong background principle that "the limitation *always* applies and is never negated" even though certain statutes may be given more expansive zones of interest than others. *Id.*

Although the zone of interests protected by the APA is broad, the Court noted that not every statute protects a zone of interests of comparable breadth. *Id.* at 1389.

Rather, "the breadth of the zone of interests varies according to the provisions of law at issue." *Id.* In determining the zone of interests protected by the Lanham Act, the Court looked to the "detailed statement of the statute's purposes" codified at 15 U.S.C. § 1127, which included the purpose to "protect . . . persons engaged in [commerce] against unfair competition." *Id.* (quotation omitted). Applying this purpose, the Court concluded that Static Control's claim as alleged was within the zone of interest of the Lanham Act, which it held required an "injury to a commercial interest in reputation or sales." *Id*. at 1390.

The Court made similar declarations about the general applicability and strength of the background principle of proximate cause. *Id.* The Court "generally presume[s] that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Id.* Proximate cause is a "venerable principle [that] reflects the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Id*. (internal quotation marks omitted). The Court noted that it assumes that Congress is "familiar" with the rule of proximate cause and would not intend to alter it without explicit indication.

Although the inquiry was "not easy to define," the Court described the proximate cause requirement as one that "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct," for instance, it prevents suits for injuries that are "purely derivative of 'misfortunes visited upon a third person by

the defendant's acts.'" *Id.* (citations omitted). However, because the analysis is controlled by "the nature of the statutory cause of action," not every harm that is derivative of an injury to a third party is "too remote;" in the case of false advertising, "a plaintiff can be injured by a misrepresentation even where 'a third party, and not the plaintiff, . . . relied on it.'" *Id.* at 1390, 1391 (citation omitted). Applying general principles of proximate causation to the case at hand, the Court held that a Lanham Act plaintiff must show "economic or reputational injury flowing directly from the deception wrought by the defendant's advertising," and that the standard is satisfied when a plaintiff alleges that a defendant's "deception of consumers causes them to withhold trade from the plaintiff." *Id.* at 1391. The Court recognized that "the causal chain linking Static Control's injuries to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers." *Id*. at 1394. Despite this indirectness, because there was no "discontinuity between the injury to the direct victim and the injury to the indirect victim," there was no question that the latter was "attributable to the former." *Id.*

F. *Texas Department of Housing & Community Affairs v. Inclusive Communities, Inc.*, 135 S. Ct. 2507 (2015)

In the most recent occasion the Supreme Court has had to address the language of the FHA, the Court concluded that the Act created liability for housing policies that had racially disparate impact even in the absence of an invidiously discriminatory motive. *Inclusive Communities*, 135 S. Ct. at 2525. However, the Court also included warnings about the importance of demonstrating a causal connection between the policy and the disparate impact in any FHA claim.

The plaintiff, a nonprofit focused on low-income housing, sued the Texas Department of Housing and Community Affairs ("TDH"), alleging that it was distributing state tax credits for low-income housing in such a way that disproportionately created low-income housing in segregated minority areas in the city of Dallas. *Id.* at 2514. The district court found for the plaintiffs, recognizing the disparate-impact theory and issuing a remedial order against TDH. *Id.* The court of appeals also recognized the disparate-impact theory but remanded to the district to reconsider whether the plaintiff had demonstrated enough of a causal connection to make out a prima facie case of housing discrimination. *Id.* at 2515.

The Supreme Court affirmed the decision, explicitly holding for the first time that the FHA recognized a disparate impact theory.[2] *Id.* at 2525. However, the Court

[2] The Court's lengthy analysis in reaching this conclusion is not discussed, because this case raises allegations of intentional discrimination, and is not premised on a disparate-impact theory.

noted that principles of causality impose important limitations on disparate impact liability under the FHA. *Id.* at 2522. The Court stated that "disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity." *Id.* The Court noted that claims based on statistical disparities "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity." *Id.* at 2523. Furthermore, "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact." *Id.* According to the Court, these limitations are "necessary to protect potential defendants against abusive disparate-impact claims." *Id.* at 2524. The Court concluded its discussion of causation under the FHA by warning that if "standards for proceeding with disparate-impact suits [did not] incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities," which would distort the purposes of the FHA. *Id.*