No. 15-1111

In the Supreme Court of the United States

BANK OF AMERICA CORP. ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent,

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The Fair Housing Act (FHA), creates a private right of action for an "aggrieved person" who is "injured by a discriminatory housing practice." 42 U.S.C. § 3602(i); 3613(a). This Court interpreted the term "aggrieved" in Title VII, a statute enacted only years apart from the FHA, to incorporate the "zone of interests" test. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011).

Despite this, the City of Miami brought suit against Bank of America (BOA), claiming that BOA and its subsidiaries violated the FHA by issuing discriminatory loans to Miami homeowners. J.A. 177. Miami claims it suffered a cognizable injury that began when discriminatory loans forced homeowners to default, which then forced the bank to foreclose on the property. When BOA could not resell the property, Miami alleges that property values decreased as a result, which caused municipal taxes revenues to decrease. Miami also argues that widespread mortgage foreclosures led to urban blight where foreclosures were most prevalent.

The questions presented are:

1. Does a plaintiff who alleges purely financial injury, unrelated to combatting discrimination or promoting integration, fall within the zone of interests of the FHA's private right of action?

2. Does a city satisfy proximate cause by alleging derivative harm to its economy from a bank's lending practices on the heels of a global economic meltdown?

PARTIES TO THE PROCEEDING

Petitioner Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Bank of America, N.A. is wholly owned by BANA Holding Corporation, which is wholly owned by BAC North America Holding Company, which is wholly owned by NB Holdings Corporation, which is wholly owned by respondent Bank of America Corporation.

Countrywide Home Loans is a wholly owned subsidiary of Countrywide Financial Corporation, which is wholly owned by the Bank of America Corporation.

Countrywide Bank is a wholly owned subsidiary of Bank of America Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 4–58) is reported at 800 F.3d 1262. The opinion of the district court (J.A. 61–79) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2015. The court of appeals denied a timely petition for rehearing on November 4, 2015. The petition for a writ of certiorari was filed on March 4, 2016 and granted on June 28, 2016. 136 S. Ct. 2544 (2016). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Pertinent statutory provisions and rules are reprinted in the appendix to this brief. Appendix A contains the pertinent provisions of the original Fair Housing Act of 1968, which are no longer in force. Appendix B contains the pertinent provisions of the current Fair Housing Act as amended by the Fair Housing Amendments Act of 1988.

STATEMENT OF THE CASE

A. Statutory History

In 1968, Congress enacted Title VIII of the Civil Rights Act, commonly known as the FHA, "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The Act prohibits various forms of discrimination related to housing transactions on the basis of race, color, religion, sex, handicap, familial status, or national origin. *Id.* §§ 3602, 3604–06.

The FHA was passed during a period of "considerable social unrest," mere months after the assassination of Dr. Martin Luther King Jr. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2516 (2015). At the time, "[n]early two-thirds of all nonwhite families living in the central cities . . . live[d] in neighborhoods marked by substandard housing and general urban blight." *Id.* (quoting REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 13 (1968) (KERNER COMMISSION REPORT)). As one of the FHA's drafters, Senator Mondale articulated, the goal of the FHA was to "replace the ghettos" with "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968).

To achieve this objective, Congress initially relied on an enforcement scheme centered around private civil actions. *See* Civil Rights Act of 1968, Pub. L. 90-284, § 810, 82 Stat. 81, 85–86. The original version of the FHA granted the Department of Housing and Urban Development (HUD) virtually no powers of enforcement. *Id.* While the Department of Justice (DOJ) was given a right to bring suit in "pattern or

practice" cases, it could only seek "preventive relief." *Id.* § 813(a), 82 Stat. at 88.

Congress recognized the law was ineffective because it "burdened [private persons] with primary enforcement responsibility." H.R. REP. NO. 100-711 at 16 (1988) (H.R. REP.). In 1988, Congress amended the FHA with a focus on its enforcement scheme. *See* Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3601, *et seq*.). The amendments empowered HUD to initiate and prosecute complaints through an administrative hearing process, and expanded DOJ's authority to seek monetary damages and civil penalties on behalf of housing discrimination victims. *Id.*

The current version of the law also maintains a private right of action for an "aggrieved person," which the Act defines as "any person . . . injured by a discriminatory housing practice." 42 U.S.C. §§ 3613(a), 3602(i). A discriminatory housing practice, is "any act that is unlawful" under the statute. *Id.* § 3602(f). Among the practices the FHA prohibits include discrimination in the sale or rental of housing and discrimination in residential real estate transactions. *Id.* §§ 3604, 3605.

B. The 2008 Housing Crisis

The 2008 financial crisis "was the worst financial crisis in global history, including the Great Depression." PHIL ANGELIDES ET AL., FINANCIAL CRISIS INQUIRY REPORT, COMMENTS OF BEN BERNANKE 354 (2011) http://tinyurl.com/7vqp9qe. One of the biggest effects of the crisis was the collapse of the overinflated housing market.

The causes of this massive crisis are myriad. In the 1990s, the federal government instituted a policy

that required 55% of government-backed mortgages to be issued to low and moderate income individuals. Peter J. Wallison, *Housing Initiatives and Other Policy Factors*, *in* WHAT CAUSED THE FINANCIAL CRISIS 177 (Jeffery Friedman ed., 2011). This was intended to create more minority homeowners, but it forced banks to issue more low income loans and engage in riskier lending activity. *Id.* This created a "race to the bottom" to recruit subprime borrowers. *Id*.

At the same time, the Federal Reserve's (Fed) "[l]ow interest rates increase[d] the demand for housing," causing more and more demand for home creation. Richard Posner, *The Causes of the Financial Crisis, in* WHAT CAUSED THE FINANCIAL CRISIS 280 (Jeffery Friedman ed., 2011). Desperate for returns greater than the meager Fed rates, investors searched for new investment opportunities. Many saw investment in the ever-burgeoning housing market as a way to outperform the Fed benchmark. *The origins of the financial crisis: Crash course*, THE ECONOMIST (Sep. 7, 2013). Housing prices had been rising since World War II, so an investment in the housing market was viewed as low risk. David Leonhardt, *Steep Rise in Prices for Homes Adds to Worry about a Bubble*, N.Y. TIMES, May 25, 2005, http://tinyurl.com/gsjpyu4.

These factors combined to cause a massive housing bubble. When the economy started to falter and people started to lose their jobs, mortgages defaulted and homes foreclosed, leaving the over-leveraged investors with little to show for their investments. Millions of Americans lost their jobs and millions more mortgages went underwater, leading to modern-day ghost towns and massive property devaluations. Alana Semuels, *The Unfinished Suburbs of America*, THE ATLANTIC (Nov. 14, 2014)

http://tinyurl.com/mkwsznb. Despite the over-leveraged market precipitating a financial catastrophe, the housing market crash itself was largely a market correction, and by the end of 2012, prices had returned to normal levels. *See* App. C, Fig. 3. The only thing that averted a global economic meltdown was massive government intervention to save the financial sector. Edmund L. Andrews and Stephen Labaton, *Bailout Plan: $2.5 Trillion and a Strong U.S. Hand*, N.Y. TIMES, Feb. 10, 2009, at A1.

C. Proceedings Below

1. *Miami's suit.* Miami brought suit against BOA in the aftermath of the housing crisis, alleging that BOA's issuance of subprime loans were discriminatory under the FHA. Specifically, Miami alleged that BOA violated 42 U.S.C. §§ 3604(b) and 3605(a) by (1) restricting home loans to minorities; (2) issuing subprime mortgages; and (3) refusing to refinance mortgages. J.A. 180–81. Miami alleged injury from lost property taxes and increased municipal expenses. J.A. 236–42.

To connect the harms and alleged discrimination, Miami alleged that (a) BOA's loans were discriminatory, (b) the discriminatory loan rates increased the risk of foreclosures, (c) the homes foreclosed at a higher rate, (d) the homes remained vacant, (e) property values dropped, and (f) the vacant properties required increased municipal maintenance and police presence. J.A. 235–42. The complaint purported to draw a correlation, via regression analysis, between the subprime lending and the increased foreclosures. J.A. 231–32.

2. *The district court's dismissal.* The district court granted Petitioners' motion to dismiss, finding that

the neither the zone of interest nor proximate cause requirements had been adequately pled. J.A. 67. The court explained that Miami offered "no evidence that they possess 'rights granted' by the Fair Housing Act." J.A. 71, (quoting *Nasser v. City of Homewood*, 671 F.2d 432, 437 (11th Cir. 1982)). Because Miami "allege[d] merely economic injuries[,]" as opposed to "a racial interest[,]" the court held that Miami fell outside of the FHA's zone of interests. J.A. 71.

Turning to the question of proximate cause, the court noted that against "the backdrop of a historic drop in home prices and a global recession, the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers, thwart the City's ability to trace a foreclosure to [BOA's] activity." J.A. 73.

3. *The Eleventh Circuit's reversal.* While the Eleventh Circuit agreed with the district court's analysis requiring zone of interest and proximate cause, it disagreed with the application. J.A. 29. The court held that the phrase "aggrieved person" in the FHA "extends as broadly as is constitutionally permissible under Article III." J.A. 30. The Court acknowledged recent precedent suggesting otherwise, but noted that its "role as an inferior court is to apply the law as it stands, not to read tea leaves." J.A. 31. They further noted that the "Supreme Court has insisted on reserving to itself the task of burying its own decisions." J.A. 30–31.

The Eleventh Circuit rejected a directness approach to proximate cause and instead applied a foreseeability analysis. The court asserted simply that, although "there are several links in [the] causal chain, none are unforeseeable." J.A. 42. The Eleventh

Circuit reversed the decision of the district court and remanded for discovery. J.A. 58.

This petition and writ of certiorari followed.

SUMMARY OF ARGUMENT

I. Statutory causes of action are finite. They extend only to certain plaintiffs who fall within the zone of interests and whose injuries were proximately caused by the defendant's actions. Like all other statutory causes of action, a cause of action under the FHA is presumed to incorporate the zone of interests test.

A. The only plaintiffs who have a cause of action under the FHA are those whose interests fall within the zone of interests the statute was enacted to protect. There can be no doubt this test applies to the FHA because Congress limited private suit rights to only "aggrieved person[s,]" a term it has used in analogous contexts to incorporate the limitation.

The court below misinterpreted this Court's precedent to hold that the FHA's zone of interests is coextensive with Article III. It is not. While in rare cases some statutes have been found to protect a more expansive range of interests, the language and structure of the FHA say otherwise. Like its contemporaneously-enacted counterpart, Title VII, the FHA excludes plaintiffs who might technically be injured under Article III but whose interests are unrelated to the prohibitions in the statute.

B. The budgetary interests Miami asserts here fall squarely outside the FHA's zone of interests. The goal of the FHA is to prevent future discrimination, to remediate past discrimination, and to promote community integration. Miami seeks recovery unrelated to those aims. It has neither suffered direct

discrimination nor has it alleged any injury related to community integration. Moreover, Congress' 1988 amendments to the statute significantly narrowed the scope of the private enforcement mechanism, leaving cities like Miami outside the zone of interests.

II. An action under the FHA also requires a showing of proximate cause. Proximate cause places limits on factual liability, but also draws the line based on administrative considerations. Courts must deny recovery for remote harms that courts are ill-equipped to disaggregate from other factors.

A. Remote harms include injuries that are purely derivative. At common law, this concept of derivative harm flowed through restrictions on privity of contract and proximate cause. For example, a company put out of business by an antitrust violation has a cause of action against the price-fixer, but the same cannot be said of the company's electric company or landlord, even when they lost income as a result of the violation. Similarly, while homeowners may have a cause of action against BOA for discriminatory housing violations, Miami cannot bring suit simply because the homeowners failed to pay mortgages. The difference is in kind—not degree.

B. Miami's causal theory rests on the logical fallacy *post hoc ergo propter hoc* (after this, therefore because of this). Such a theory ignores that Miami's claims stem from injury suffered during the Great Recession. Miami alleges a correlation between discriminatory loans and foreclosures, but cannot show that the *discrimination* caused the foreclosure. To presume otherwise denies the more plausible outcomes. Even if Miami could show a connection, the alleged foreclosures make up a paltry 0.3% of the housing market, which dropped 57% during the crisis.

Miami's attribution to BOA of such a massive drop in property values and antecedent urban blight defies logic.

Massive job losses served as the primary driver of foreclosures, as nearly 20 million people nationwide lost their jobs. Whether the loans were discriminatory or not, these homeowners would still have defaulted. This fact alone means that the *discrimination* did not cause the foreclosure.

Miami's theory also fails to account for the massive home abandonment during the crisis. As home debt vastly outstripped equity, 1 in 5 homeowners voluntarily stopped paying their mortgages. This voluntary action in extreme times supersedes any discrimination by BOA and pushes their actions outside of the proximate cause purview.

C. The mortgage crisis was so unprecedented that no bank could have predicted it. The results were disastrous, as BOA stock dropped over 95%. Such unforeseeable causes cannot be used to hold a company liable.

ARGUMENT

"[T]he judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983)). No plaintiff can sue in federal court without plausibly alleging an actual or imminent "injury in fact" that is concrete and particularized, fairly traceable to the defendant's action, and likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). This

ensures that all claims meet the "irreducible constitutional minimum of standing." *Id.* at 559–60.

But standing is *never* the only hurdle a statutory plaintiff must clear before bringing suit. *Lexmark*, 134 S. Ct. at 1386. Every statutory cause of action also incorporates "standard common-law limitations on civil liability." *Id.* at 1389 n.5. Chief among these are the zone of interests and proximate cause limitations. *Id.*

In the past, these common-law limitations have been classified as species of the Court's "prudential" or "statutory" standing doctrines. *See, e.g.*, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004). These labels, however are "inapt." *Lexmark*, 134 S. Ct. at 1387 n.3. The zone of interests and proximate cause limitations have nothing to do with standing because they do not "implicate . . . the court's statutory or constitutional *power* to adjudicate [a] case." *Id.* at 1387 n.4. Nor do they derive from mere "prudential" concerns because they require the court to discern, through statutory interpretation, the scope of the private remedy Congress created. *Id.* at 1386.

Instead, the zone of interests and proximate cause limitations are implicit substantive elements of every statutory cause of action. *Id.* at 1391 n.6. And "like any other element of a cause of action, [they] must be adequately alleged at the pleading stage in order for the case to proceed." *Id.* at 1391 n.6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). To successfully exercise a private statutory right of action, a plaintiff's complaint must contain "sufficient factual matter" to "allow the court to draw a reasonable inference" that the claim at issue is within the zone of interests and that proximate cause exists. *Id.*; *Iqbal*, 556 U.S. at 678. Miami's claim fails to meet either requirement.

I. Miami's Claim Falls Outside The Zone Of Interests The FHA Was Enacted To Protect.

Miami's effort to use FHA litigation as a means to repair its municipal budget cannot succeed because Congress did not authorize cities to sue for financial injuries when they fail to allege any harm related to the core purpose of the Act. A private right of action under the FHA extends to only those plaintiffs whose interests "fall within the zone of interests protected by the law invoked." *Lexmark*, 134 S. Ct. at 1388 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This is a requirement "of general application." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). It "*always* applies and is never negated." *Id.* (emphasis in original).

To discern whether Congress intended a statute to cover a claim at issue, courts must use "traditional tools of statutory interpretation[.]" *Lexmark*, 134 S. Ct. at 1387. If the plaintiff is seeking to vindicate an interest only "marginally related to . . . the purposes implicit in the statute," then "it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

Here, despite the fact that the zone of interests test "*always* applies," *Lexmark*, 134 S. Ct. at 1388, the Eleventh Circuit chose not to conduct any meaningful zone of interests analysis in deciding the viability of Miami's claim. J.A. 29–33. Instead, relying on precedent interpreting a previous version of the statute, the Eleventh Circuit concluded that a zone of interests analysis would be superfluous because the class of plaintiffs who may sue under the FHA

"sweeps as broadly as allowed under Article III." J.A. 32. These conclusions were in error.

A. Only claims that fall within the FHA's zone of interests are cognizable under the statute's private right of action.

The only plaintiffs who have a private right of action under the FHA are those whose interests fall within the zone of interests the FHA was enacted to protect. There can be no doubt this test applies because Congress limited the private cause of action to persons who are "aggrieved." 42 U.S.C. § 3613(a). The "common usage" of the term "aggrieved" incorporates the zone of interests limitation. *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 177–78 (2011) (Title VII); *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 (1987) (APA). While the FHA's zone of interests is broad, it is not coextensive with Article III. Though some statutes have been interpreted to reach to the bounds of Article III, *see Bennett*, 520 U.S. at 164, the text and structure of the FHA reveal a much narrower zone.

The court below mistakenly cited *Trafficante v. Metro. Life Ins.*, 409 U.S. 205 (1972), *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) for the proposition that anyone with constitutional standing can sue under the FHA. J.A. 32. But as this Court unanimously recognized in *Thompson*, those precedents are "compatible with the zone of interests limitation," and any dicta expanding the term "aggrieved" to limits of Article III were "ill-considered" and not binding. 562 U.S. at 176. There is thus no plausible reading of the FHA that grants a private

right of action to a plaintiff like Miami whose interests fall outside the zone.

1. The FHA limits its private right of action to "aggrieved person[s,]" a category that defines the zone of interests of the statute.

The court below held that the FHA's definition of an "aggrieved person" is coextensive with constitutional standing, and thus, the zone of interests limitation—if it applies at all—does not apply with any force. J.A. 32. Such a reading finds no support in the text or structure of the statute.

Under § 3613(a), only "[a]n aggrieved person" may commence a private civil action under the FHA. 42 U.S.C. § 3613(a). The term "aggrieved" means "[t]reated unjustly," indicating that an aggrieved individual was the recipient of the unjust treatment. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (3rd ed., 1992). This common usage is used in numerous federal statutes to define which plaintiffs are authorized to sue. *See, e.g.*, 42 U.S.C. § 2000e-5(f)(1) ("may be brought . . . by the person claiming to be aggrieved."); 5 U.S.C. § 702 (entitling "[a] person . . . adversely affected or aggrieved by agency action" to judicial review). In other statutory contexts "aggrieved" is considered a "term of art," "requiring a litigant to show . . . that the interest he seeks to vindicate is arguably within the [statute's] zone of interests . . . ." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbulding & Dry Dock,* 514 U.S. 122, 127 (1995).

Employment discrimination is one such context. *Thompson*, 562 U.S. at 177–78. In *Thompson*, this Court confronted the question of who is authorized to

sue under Title VII. *Id.* at 175. The court below had construed Title VII's private suit provision—which limits suit to "person[s] claiming to be aggrieved"—to merely reiterate the requirements of Article III, but this Court unanimously disagreed. *Id.* at 175–78. Rather, the Court found the "common usage" of the term "aggrieved . . . avoids the extremity of equating it with Article III." *Id.* at 177. The term "incorporates [the zone of interests] test, enabling suit by any plaintiff with an interest 'arguably [sought] to be protected by the statute[],' while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to" the statutory prohibitions. *Id.* at 178 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 495 (1998)).

This interpretation of the word "aggrieved" also applies here. "When a statute uses the very same terminology as an earlier statute—especially in the very same field, such as . . . civil-rights law—it is reasonable to believe that the terminology bears a consistent meaning." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 323 (2012). In interpreting the FHA, it is not only helpful, but often "necessary" to look to contemporaneous antidiscrimination statutes like Title VII as a guide. *Inclusive Communities*, 135 S. Ct. at 2516. The statutes were re-enacted only three years apart from one another, and both were designed to "eradicate discriminatory practices within a sector of the Nation's economy." *Id.* at 2511. If Congress used the word "aggrieved" to incorporate the zone of interests test into Title VII, it must have done so in the FHA by using the same language.

2. Congress did not extend the FHA's zone of interests to the outer bounds of Article III.

The language and structure of the FHA, moreover, do not place it among the rare class of statutes that neutralize the zone of interests test. While "certain statutes will show that they protect a more-than-usually 'expan[sive]' range of interests," *Lexmark*, 134 S. Ct. at 1388 (quoting *Bennett*, 520 U.S. at 164), such statutes are the exception, not the rule. For a statute's zone of interests to extend to the outer bounds of Article III, the statute must employ extraordinarily broad language and the scheme must place heavy reliance on private, not governmental, enforcement. *See, e.g.*, *Bennett*, 520 U.S. at 164–66.

In *Bennett*, for example, a group of plaintiffs sought judicial review of a Fish and Wildlife Service opinion under the Endangered Species Act ("ESA"). *Id.* at 157. To determine whether the plaintiffs had a right to judicial review, the Court applied the zone of interests test. *Id.* at 162–66. The ESA's civil-suit provision provides that "any person may commence a civil suit . . . against any person" regardless of the type of injury. 16 U.S.C. § 1540(g). Such language, the Court observed, is "an authorization of remarkable breadth when compared with the language Congress ordinarily uses." *Bennett*, 520 U.S. at 164–65.

The Court held that Congress intended to expand the ESA's zone of interests as broadly as possible. *Id.* at 164–65. "Our readiness to take the term 'any person' at face value," the Court noted, was "greatly augmented" by the ESA's "obvious purpose" to encourage enforcement by "private attorneys

general." *Id.* at 165. This was evident because the statute lacked a robust enforcement scheme. *Id.*

By contrast, the language and structure of the FHA reveal a far more limited zone of interests. The FHA does not allow "any person" to sue; the person must be "aggrieved." 42 U.S.C. § 3613(a). An "aggrieved person" is "any person . . . injured by a discriminatory housing practice," 42 U.S.C. § 3602(i), but this definition hardly resembles the language "of remarkable breadth" in the ESA. Unlike the ESA, the language in the FHA is restrictive; it only permits suits by plaintiffs who have suffered *a certain kind* of injury. To be "aggrieved" within the meaning of the statute, a person must be injured by a practice that the Act was enacted to prevent. 42 U.S.C. § 3602(f).

The FHA's enforcement scheme is also markedly different than the ESA's. While the original version of the statute relied on private suits to be "the main generating force" of FHA enforcement, *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 210–11 (1972), that is no longer the case today. In 1988, Congress amended the FHA to address the glaring deficiencies in the Act's federal enforcement mechanisms. H.R. REP. at 16. Most notably, the revisions empowered HUD to prosecute claims through an administrative enforcement process, while expanding the Attorney General's ability to seek damages in "pattern or practice" cases. *Id.* at 17, 40. Together, these changes shifted the burden of enforcement away from "private attorneys general" and toward the federal government, further distinguishing the FHA from the ESA. *Id.* at 16.

3. *Trafficante* and *Gladstone* did not extend the FHA's zone of interests to the outer bounds of Article III.

In reaching its conclusion that Miami has a right to sue, the Eleventh Circuit relied upon a trilogy of precedent cases (*Trafficante*, *Gladstone*, and *Havens*) to establish the proposition that "the term 'aggrieved person' sweeps as broadly as allowed under Article III." J.A. 32. The opinion below suggests this proposition is "controlling precedent," and to hold that Miami *cannot* sue, this Court must either (i) find that Miami failed to allege an Article III injury; or (ii) overrule its precedent. J.A. 30. That choice, however, is a false one. Miami's inability to recover is entirely consistent with past precedent.

Trafficante, the first in the line of cases, involved two tenants—one black, one white—who each alleged that the owner of their apartment complex had delayed or denied the applications of prospective nonwhite renters on the basis of race. 409 U.S. at 206–08. Though they had not been discriminated against, the plaintiffs argued they had been injured, and therefore "aggrieved," because they had lost the social and professional benefits of living in an integrated community. *Id.* at 210.

Trafficante arose under the pre-1988 version of the FHA. *Id.* at 208. The plaintiffs sued under the original Act's administrative enforcement provision, § 810(d), which granted a separate private right of action to HUD complainants whose complaints were not resolved within thirty days. Fair Housing Act of 1968, § 810(d), Pub. L. 90-284, tit. VIII, 82 Stat. 81, 86. Like the FHA's current *private* enforcement provision, the original § 810(d) limited suits to persons

"aggrieved." *Id.* But unlike the current version, the alternatives to private enforcement were "severely limited." H.R. REP. at 16.

The *Trafficante* Court recognized this limitation and held that the statute gave the plaintiffs a right to sue. 409 U.S. at 210–12. "Since HUD has no enforcement powers," the Court reasoned, the main source of enforcement "must be private suits, in which . . . the complainants act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" *Id.* at 211.

In coming to this conclusion, the Court cited a Third Circuit case interpreting the similarly-worded Title VII, which concluded that the word "aggrieved" signified "a congressional intention to define standing as broadly as is permitted by Article III." *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). Though the Court cited the Third Circuit's expansive reading favorably, it declined to endorse such a broad rule. *Id.* The Court expressly restricted the Third Circuit's expansive Article III language by adding the qualifier, "*insofar as tenants of the same housing unit that is charged with discrimination are concerned*." *Id.* at 209 (emphasis added).

Looking back on *Trafficante*, the *Thompson* Court noted that the inclusion of this language was "ill-considered," unnecessary, and indeed, the *Trafficante* decision "did not adhere to it." 562 U.S. at 177. Instead, the decision held that housing unit tenants who lose the benefits of racial integration due to their landlord's discrimination are squarely within the ambit of the FHA. *Id.*

Seven years after *Trafficante*, the Court revisited the scope of FHA private suit rights in *Gladstone*. 441 U.S. 91. In *Gladstone*, residents of the Village of Bellwood sued real estate firms for directing prospective home buyers to neighborhoods according to their race. *Id.* at 94. The Village joined their complaint, alleging that the firms' racial steering practices manipulated the housing market, "replacing what is presently an integrated neighborhood with a segregated one" and "diminishing [the Village's] tax base." *Id.* at 110–11.

Like *Trafficante*, *Gladstone* arose under the pre-1988 version of the statute. *Id.* at 94. However, in *Gladstone*, the plaintiffs sued under a different private right of action provision—§ 812(a). *Id.* Unlike the provision at issue in *Trafficante*, § 812(a) *did not* explicitly limit private actions to "aggrieved" persons. Civil Rights Act of 1968, Pub. L. 90-284, tit. VIII, § 812(a), 82 Stat. 88. Instead, it provided that the rights granted by the substantive statutory prohibitions "may be enforced by civil actions in appropriate" district courts. *Id.*

The holding of *Gladstone* interpreted § 812, an old provision of the FHA that was eliminated in the 1988 amendments. The language was extremely broad, with "no particular statutory restrictions on potential plaintiffs." *Gladstone*, 441 U.S. at 103. Since the terms of § 812 were even *broader* than those at issue in *Trafficante*, the Court held that "standing under § 812" must extend "as broadly as is permitted by Article III." *Id.* at 103, 109 (quoting *Trafficante*, 409 U.S. at 209).

The Court then turned to the issue of whether the Village had a right to sue. *Id.* at 109. The Court grappled at length over whether the Village satisfied

standing "in light of Art. III," but ultimately held that it did, conditioning the Village's ability to sue on the alignment of its interests with the purposes of the statute. *See id.* at 110–12 ("If the "petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct."). Because the alleged racial steering scheme had begun to frustrate community integration, the Village had a right to sue. The Court also found that the Village's "economic injury" was cognizable under § 812, but nowhere in the opinion did the Court suggest such an injury *alone* would be sufficient. *Id.*

The Eleventh Circuit also considered *Havens*, a case, like *Gladstone*, that arose under the original § 812(a). 455 U.S. at 366. The *Havens* Court again employed the premise that there are no "prudential barriers to standing in suits brought under [the original § 812(a)]." *Id.* Thus, the Court found, both the fair housing nonprofit and its employees could sue because their alleged injuries included the deprivation of interracial association and the "frustrat[ion] . . . [of their] efforts to assist equal access to housing." *Id.* at 376–79.

As this Court recognized unanimously in *Thompson*, the holdings of *Trafficante* and its progeny are fully "compatible with the 'zone of interests' limitation." 562 U.S. at 176. The plaintiffs in *Trafficante*, *Gladstone*, and *Havens*, each alleged some form of injury related to the deprivation of community integration—interests not alleged here. *Gladstone* and *Havens* also dealt with an old statutory provision that had broad, sweeping language. To view such outdated statutory interpretations as controlling, as the Eleventh Circuit did, would be "ill-

considered" and a misreading of past precedent. *See id.* at 176–77.

B. Miami's claim falls outside the FHA's zone of interests because the interests it seeks to vindicate are unrelated to the core purposes of the statute.

The zone of interests inquiry is not uniform. *Lexmark*, 134 S. Ct. at 1389 ("the breadth of the zone of interests varies according to the law at issue."). To have a cause of action under a particular statute, "the plaintiff must establish that [the injury] falls within the 'zone of interests' sought to be protected by the statutory provision." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523–24 (1991) (quoting *Lujan*, 497 U.S. at 883).

Miami attempts to bring suit here seeking to remediate what it calls "the profound financial consequences" that allegedly stemmed from BOA's loan transactions—consequences including "lost tax revenues" and "the costs of repairing and maintaining properties that go into foreclosure." J.A. 178. But Miami fails to allege any injury or interest related to the core purposes of the FHA: combatting discrimination and strengthening community connectedness. In short, Miami seeks recovery merely to bolster its budget, not its diversity—and Congress did not create a private right of action under the FHA to serve that purpose.

1. The injuries Miami alleges are unrelated to community integration.

The period around the FHA's enactment was fraught with "deepening racial division." *Inclusive Communities*, 135 S. Ct. at 2516. The "[n]ation [was]

moving toward two societies, one black, one white—separate and unequal." *Id.* (quoting KERNER COMMISSION REPORT 13). Congress adopted the Kerner Commission's recommendation to pass "a comprehensive and enforceable open-occupancy law making it an offense to discriminate in housing transactions[,]" KERNER COMMISSION REPORT 263, and the result was the FHA—a statute designed to combat discrimination and to promote community integration. *Inclusive Communities*, 135 S. Ct. at 2516.

The zone of interests test will preclude a plaintiff's claim if it is only "marginally related to . . . the purposes implicit in the statute[.]" *Lexmark*, 134 S. Ct. at 1389 (quoting *Bennett*, 520 U.S. at 163); *Postal Workers*, 498 U.S. at 520. In *Postal Workers*, two postal workers' unions attempted to bring suit under the APA to challenge a regulation that enabled private couriers to handle international mail because they were concerned the couriers would steal postal worker jobs. *Id.* at 519–20. Applying the zone of interests test, this Court concluded that the unions could not sue because their interests were not protected by the statutes. *Id.* at 528. Nothing, in the language, structure, or history of the statutes indicated that they were "designed to protect postal employment or further postal job opportunities." *Id.*

Miami's interests here are likewise incongruent with the purposes of the FHA. The FHA was enacted to achieve the twin objectives of preventing discriminatory housing practices and promoting community integration. By including a private right of action under the statute, Congress intended to grant the direct victims of discriminatory housing practices a right to sue. *Havens*, 455 U.S. at 375.

Because such practices deprive the whole community of the benefits of diversity, Congress intended to allow others to recover on those grounds as well. *See id.* at 375–76 (discussing "neighborhood" standing and identifying the frustration of community integration as a cognizable injury under the FHA). Purely financial injuries that are unrelated to community integration, however, are of an entirely different nature, and nothing in the text or structure of the FHA suggests Congress intended such injuries to be cognizable.

2. The 1988 amendments to the FHA's enforcement provisions narrowed the statute's zone of interests.

Even if Congress initially intended to grant private plaintiffs an opportunity to recover for all financial contingencies stemming from housing discrimination, Congress' amendment of the FHA in 1988 tapered the statute's zone of interests such that the recovery Miami seeks is no longer permitted.

Shortly after the passage of the FHA, the glaring deficiencies in the Act's federal enforcement mechanisms became readily apparent. Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L. REV. AM. U. 59, 62 (1993). Commentators lamented HUD's feeble enforcement procedures, which were essentially limited to "sanctionless conciliation, a process tantamount to voluntary compliance that the real estate industry largely ignored." *Id.*; Pub. L. 90-284, tit. VIII, § 810, 82 Stat. at 85–86. And while DOJ was authorized to initiate enforcement actions in "pattern and practice" cases, such actions could only seek

"preventive relief." Pub. L. 90-284, tit. VIII, § 813(a), 82 Stat. at 88. The primary method of enforcement was private lawsuits, but "even if a litigant could secure a federal forum, the remedies available were limited . . . ." Ware, *supra*, at 76.

As early as 1978, Congress recognized these shortcomings and convened hearings on bills that sought to fill the FHA's enforcement gaps. *Id.* at 79. In 1988, Congress passed the Fair Housing Amendments Act, which completely revamped the FHA's enforcement scheme to shift part of the enforcement burden from private parties to the federal government. *Id.*; Pub. L. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. § 3601, *et seq*.).

First, the 1988 amendments vested HUD with one of the "most comprehensive civil enforcement mechanism[s] of any of the various federal agencies that have civil rights enforcement responsibilities." Ware, *supra*, at 87. The new administrative enforcement provision empowered HUD to initiate investigations on its own volition. 42 U.S.C. § 3610(a). Moreover, the new HUD Secretary enforcement provision established procedures for administrative actions before an ALJ, in which HUD can pursue compensatory damages, civil penalties, and injunctive or other equitable relief on behalf of housing discrimination victims. *Id.* § 3612.

Second, the amendments increased DOJ's enforcement authority by granting the Attorney General the right to intervene in private civil actions "of general public importance." *Id.* § 3613(e). They also expanded the available remedies in "pattern or practice beyond mere "preventive relief" to include monetary damages and civil penalties. *Id.* § 3614.

"The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). Here, Congress expressly provided a robust federal enforcement scheme to remedy *Trafficante*'s concerns about the need for private attorneys general. *See* 42 U.S.C. §§ 3610–15. The amendments empowered the state to take significant action on matters of general public importance, and in so doing, they narrowed the zone of interests with respect to the FHA's private right of action. Even if Miami could have recovered under the original version of the statute, it cannot recover here.

Moreover, Miami is not a *private* "person" capable of bringing a *private* enforcement action. Section 3613(a) defines "Enforcement by private persons." 42 U.S.C. § 3613(a). The word "private" means "[o]f, relating to, or involving an individual, as opposed to the public or the government." BLACK'S LAW DICTIONARY (10th ed. 2014). The FHA defines "person" as "one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries." 42 U.S.C. § 3602(d).

Conspicuously, this exhaustive list does not include municipalities or Governments, as other antidiscrimination statutes do. *See Id.* § 2000e(a) ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . "). Congress could have included such language, but did not. Reading a term into the definition would violate the canon *expressio unius est exclusio alterius*. SCALIA & GARNER, *supra*, 107.

II. Bank of America Did Not Proximately Cause Miami's Injuries

Even if Miami can make a showing that it falls within the FHA's zone of interests, it cannot show that the purportedly discriminatory conduct caused the harm that it complains of. Miami has not met the standard required to raise its claims above the "mere possibility" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) of causation because its harm was overcome by an unprecedented collapse of the housing market.

"A damages action under the [FHA] sounds basically in tort[.]" *Curtis v. Loether*, 415 U.S. 189, 196 (1974). The FHA grants a private cause of action to an "aggrieved person" who "claims to have been injured by a discriminatory housing practice." 42 U.S.C. §§ 3613(a)(1)(A); 3602(i). Every statutory cause of action requires proof of proximate cause. *Lexmark*, 134 S. Ct. at 1388. Congress is presumably "familiar with the common-law [proximate cause] rule and does not mean to displace it *sub silentio*." *Id*. at 1390. "If a plaintiff's allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed." *Id.* at 1391, n.6.

Similarly-worded statutes all require proximate cause. *See*, *e.g.*, *id.* at 1390 (Lanham Act); *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005) (securities fraud); *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258 (1992) (RICO); *Associated Gen. Contractors*, 459 U.S. at 533 (Clayton Act). Both courts below, in the face of this wall of precedent, correctly found that the FHA requires proof of proximate cause. J.A. 34, 67.

When assessing causal connection, it is a well-settled principle that "*in jure non remota causa, sed*

proxima spectator. [In law the near cause is looked to, not the remote one.]" W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS § 42, at 273 n.4 (5th ed. 1984) (quoting BACON, MAXIMS OF THE LAW, REG. I). The "line against liability must be drawn somewhere[, and] proximate cause rules reflect the effort courts make to draw that line." DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 15.2, at 340 (2d ed. 2000). Proximate cause is more than just a factual inquiry. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, 503 U.S. at 268 (quoting PROSSER AND KEETON, *supra*, § 41, at 264). To be a proximate, or legal, cause, the "conduct [must be] a substantial factor in bringing about the harm[.]" RESTATEMENT (SECOND) OF TORTS § 431 (1977). Whatever remote harms Miami suffered are too remote, and sound judicial principles demand that Miami not recover for such attenuated harms.

A. The harm that Miami suffered was purely derivative because the mortgages impacted homeowners, not third parties.

The "proximate cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct[.]" *Lexmark*, 134 S. Ct. at 1388. Proximate cause is not satisfied "if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts." *Id.* (quoting *Holmes*, 503 U.S. at 268–269).

This restriction on derivative harm had roots in common law. Privity of contract has long been a restriction of suits to enforce a contract. PROSSER AND KEETON, *supra*, § 93. The concept of privity relies on an understanding that individuals who are party to a

contract are best suited to vindicate those rights, and should not be liable to third parties outside of the contract. *Id*. The privity restriction served as a logical stopping point because there "would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect." *Nat'l Savings Bank of D.C. v. Ward*, 100 U.S. 195, 202 (1879). Over time, this analysis has infiltrated modern-day proximate causation analysis, such that derivative harm for a third party's failure to adhere to a legal obligation is insufficient.

For example, "a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, [but] the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'" *Lexmark*, 134 S. Ct. at 1391 (quoting *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 458 (2006)). Courts are ill-suited to resolve the "intricate, uncertain inquiries" that derivative claims require. *Anza*, 547 U.S. at 460.

Miami's claims rely solely on a derivative theory of causation, since all of the alleged harms to the city derive from third party homeowners' mortgage defaults. J.A. 235–42. Miami cannot recover because the law "does not attribute remote consequences to a defendant" when those consequences derive from third parties. *Southern Pac. Co. v. Darnell-Taenzer Lumber*, 245 U.S. 531, 533–34 (1918) (Holmes, J.). Miami is no different than a "landlord," "electric company," or "other commercial part[y]" who suffers derivative harm. *Lexmark*, 134 S. Ct. at 1391.

This logical restriction is necessary. Otherwise, a state could bring suit any time anything taxable declined in value. For example, a city could bring suit against an employer claiming lost tax revenue any time an individual is hospitalized due to a workplace accident and she deducts the medical bills from her taxes. Such an odd rule would allow cities to manufacture injury just by creating a tax. In other words, a rule allowing this type of derivative harm would allow the state to bring a cause of action simply because parties sign a contract that proves to be economically-suboptimal.

This derivative restriction arises from the proximate cause requirement of duty. "It is quite possible to state every question which arises in connection with 'proximate cause' in the form of a single question: was the defendant under a duty to protect the plaintiff against the event which did in fact occur?" PROSSER AND KEETON, *supra*, § 42, at 272.

This requirement also manifests itself in proximate cause through the analysis of privity. *Id.* § 93 at 671. For example, "a company which contracts with a city to supply water to the public is not liable to a private citizen when the service fails at a critical moment, and his house is destroyed in fire as a result." *Id.* The "defendant, by entering upon the supplying of the water for other purposes, has not begun an undertaking to extinguish fires." *Id.* Similarly, by entering into a mortgage agreement, BOA did not undertake to pay property tax.

These common law rules, which we presume Congress does not abdicate *sub silentio*, *Lexmark*, 134 S. Ct. at 1390, instruct that *"[w]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote*" to recover. *Associated Gen.*

Contractors, 459 U.S. at 533 n.25 (quoting 1 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES 55–56 (1882) (emphasis in original)). This same principle rings true here. Miami's derivative harm, derived from a third party's failure to pay their mortgage, places Miami's injuries outside the scope of the causal analysis.

B. Miami's causal theory ignores the consequences of the catastrophic economic collapse of 2008.

Miami alleges a decrease in property tax revenue from BOA's discriminatory lending policy. J.A. 236. It also alleges that BOA loans led to foreclosures, which left houses empty, requiring increased municipal resources to protect neighborhoods from crimes associated with abandoned properties. J.A. 241. The Eleventh Circuit, citing data that correlates predatory lending and increased foreclosures to prove the causal chain, presumed *post hoc ergo propter hoc* (after this, therefore because of this). J.A. 41. But taking these temporal connections as causal absolutes is insufficient as a matter of logic and law.

Such a reading is shocking, not only for its staggering dearth of causal analysis, but because it ignores the crucial backdrop of this case. The court below presumed that an increase in risk of foreclosure necessarily led to the foreclosures when the more likely explanation is that the global financial collapse led to the home foreclosures. Perhaps most alarming about the Eleventh Circuit's proximate cause analysis was that the opinion is devoid of *any* discussion of the global housing market collapse, not once discussing the fundamental economic forces of this case. *See generally* J.A. 04–60.

The district court below correctly followed the "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. The court correctly explained that "[a]gainst the backdrop of a historic drop in home prices and a global recession, the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers, thwart the City's ability to trace a foreclosure to [BOA's] activity." J.A. 73.

While Miami claims home foreclosures (and therefore damages) from 2004 to present, both the court below and the district court recognized that "the City had not alleged that any loans were made later than 2008[.]" J.A. 15, 74. This is with good reason—the global financial collapse effectively halted BOA's ability to dispense subprime loans as the company teetered on bankruptcy (*see* Section II.C. *infra*) and Miami alleges that subprime loans were the only discriminatory loans at issue. J.A. 196–200.

Proximate (or legal) cause requires an injury rooted in the defendant's behavior. The "defendant is to be held liable if, but only if, the intervening cause is foreseeable." PROSSER AND KEETON, *supra*, § 44, at 302. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another . . . ." RESTATEMENT (SECOND) OF TORTS § 440 (1977). 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." *Holmes*, 503 U.S. at 269.

For these reasons, "the defendant who cannot reasonably be expected to foresee that a dangerous natural force will appear is usually simply not" liable

for the damage. DOBBS ET AL., *supra*, § 15.15, at 365. For example, if "no flood is foreseeable, the defendant is not negligent in failing to sandbag the river." *Id*. BOA cannot be held liable for the flood of mortgages stemming from the "the worst financial crisis in global history," especially when there are dozens of more substantial causes for that flood. ANGELIDES ET AL., *supra*, at 354.

1. Bank of America's actions were *de minimus* relative to the macroeconomic forces at play.

The Eleventh Circuit's causal explanation does little to define the scope of the inquiry, summarily stating that "the Bank's discriminatory lending caused property owned by minorities to enter premature" foreclosure. J.A. 42. But it is not enough to prove that the property owners had homes purchased with discriminatory mortgages. Miami must show that these homes foreclosed primarily because of the difference between a non-discriminatory loan rate and the discriminatory loan rate they received.

It is quite easy—and appealingly simple—to only address whether the loans defaulted, as the Eleventh Circuit did. J.A. 42. But temporal connections cannot suffice to prove causation. The proper inquiry is "if the predicate act [produces] the result, [when] other factors alone would not have done so[.]" *Burrage v. United States*, 134 S. Ct. 881, 888 (2014). Miami must show that the foreclosures would not have occurred if homeowners had standard loans.

This is a nearly impossible task for a subprime mortgage, which Miami calls "reverse redlining" in its complaint. J.A. 180, n.6. The city would need to show

that the increased mortgage rate was what caused the foreclosure. For example, a $200,000, 30-year mortgage, issued at a discriminatory loan rate 1% above a 3.5% prime point would only be actionable if the extra $115 per month (the monthly amount of the 1% increase) was what caused the foreclosure. In other words, that $115 would need to be the primary reason that the individuals missed payments. It is impossible for Miami to prove that but-for the increased mortgage rate, each homeowner would not have defaulted. What if a homeowner refused to give up his morning $5 latte to cover the mortgage? This is not a fanciful notion, as millions of homeowners voluntarily defaulted as the housing market collapsed. *See* Section II.B.3. *infra*.

Not only that, but even if the discriminatory difference in rate were a but-for cause—its impact is still *de minimus*. To borrow an analogy that this Court used in *Burrage*, if a baseball team wins 1-0 from a home run in the 9th inning, surely that homerun is both the but-for and proximate cause of the victory. It accounts for the entirety of the scoring necessary to win the game. But a home run in the first inning of a 5-4 game is less clear. While it was still a but-for cause of victory, it is far from the proximate cause. More likely, the grand slam 4-run home run was the proximate cause. *See Burrage*, 134 S. Ct. at 888. Put simply, even when a straw breaks the camel's back, it is not the legally proximate cause—the lead weights mounted on the camel's back are.

In an attempt to combat this proof problem, Miami has alleged numerous other versions of predatory subprime loans, including loans with hidden fees, variable-rate mortgages, and refusals to refinance. J.A. 197–99. But far from curing these remedies, the

same proximate cause questions affect these allegations—were the driving factors primarily the increased fees and variable rates, or were they more attributable to other causes? Nothing on the record answers the question, save a conclusory allegation that "the borrower would have continued to make payments on the mortgage [had BOA] made the loan without improperly steering the borrower into a subprime, or less advantageous loan." J.A. 232–33. Such a conclusory allegation, with no facts, figures or support cannot survive a motion to dismiss because it does not allege more than "the mere possibility of misconduct" such "'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)).

Miami also seeks recovery on the remarkable theory that the foreclosed homes decreased property values across the county generally. J.A. 237–39. Such a reading is an untenable attribution for such a massive decline in home values. *See*, *e.g.*, *Daily Chart, American house prices: realty check*, THE ECONOMIST, Aug. 24, 2016, http://tinyurl.com/z8cqe4p (showing a 57.4% decline in Miami housing prices between the 2005 and 2012). Such drastic drops in housing prices cannot derive from the discriminatory loans alleged by Miami. Miami alleges that BOA had 3,326 discriminatory loans J.A. 242 compared to 989,435 housing units in the county in April of 2010. This accounts for just 0.3% of homes. *Quick Facts, Miami-Dade County*, U.S. CENSUS BUREAU, http://tinyurl.com/j3d47lo.

The foreclosure pandemic was far more widespread than that. To get a sense for the extent of the collapse, even if *all* of BOA's allegedly discriminatory foreclosures happened in *one month*

(as opposed to over the 8-year period Miami alleges) they would still only account for less than half of Miami's total foreclosure filings in March of 2009 alone. *Residential Foreclosures*, MIAMI-DADE DEPARTMENT OF PLANNING AND ZONING, July 9, 2009 http://tinyurl.com/jspuuad. It is implausible to argue that .3% of the housing market could precipitate a 57% drop in value. Even if it were, there is no way to disaggregate the impact of the alleged discriminatory foreclosures from the myriad other influences on the economy. The "need to grapple with [complicated proof] 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 269–70. In other words, this game is not worth the candle.

These broad causes do not even scratch the surface of the myriad individual causes that affect home values. Gentrification, home values or even the advent of Uber's increased accessibility could all affect property values. The list could continue for pages, but all of them contribute to render any discrimination by BOA *de minimus* relative to the totality of other circumstances.

2. The massive job losses from the global economic collapse caused the foreclosures.

These macroeconomic forces began affecting individual homeowners in profound ways. Millions of Americans began losing jobs as the economy spiraled downward. *The Low-Wage Recovery and Growing*

Inequality, NATIONAL EMPLOYMENT LAW PROJECT (Aug. 2012). Unemployment skyrocketed from 4.4% in May of 2007 to 10% in October of 2009, and 11.2% in Florida, adding nearly *20 million people* nationwide to the unemployment rolls. BLS BETA LABS, *Unemployment*, U.S. DEPARTMENT OF LABOR http://www.bls.gov/data. These job losses were an overwhelming precipitating factor for default. Whether the mortgages were prime or subprime, the homeowners would be unable to pay because they lost their jobs. The decision below again failed to grapple with the possibility that historic job losses, rather than the increased loan rates, led to the foreclosure. J.A. 33–44. Three-in-five homeowners in financial distress seeking loan modifications from the federal government listed "curtailment of income" as the reason for default—a rationale that was remarkably consistent across races. J.A. 172.

These massive job losses would not have caused such severe foreclosure rates had the early 2000s not experienced a drastic housing boom. "The boom and subsequent bust of housing construction and prices over the 2000s is widely regarded as a principal contributor to the financial panic of 2007 and the ensuing 'Great Recession.'" FEDERAL RESERVE BANK, THE SUPPLY SIDE OF THE HOUSING BOOM AND BUST OF THE 2000S 1 (2012). On the heels of the booming 90s, house prices doubled between 1995 and 2007, Wallison, *supra*, at 173, and an estimated "3 to 3.5 million excess housing units were produced during the boom." SUPPLY SIDE, *supra*, at 1; *See* App. C, *Fig*. 1.

The surplus of houses ensured that even when individuals in dire straits experienced financial hardship, their houses would not sell in such a saturated market. The result was foreclosure. Had

there been no surplus, those entering financial hardship could simply sell those homes—possibly at a loss to them, but not at a loss to the city. BOA "cannot reasonably be expected to foresee" such once-in-a-generation harms, and cannot be held liable. DOBBS ET AL., *supra*, § 15.15, at 365.

3. Decreased home values nationwide led to negative equity mortgages, causing homeowners to abandon their homes.

Determining the amount of harm from the broader economy poses its own challenges, but it is even harder to disaggregate homeowners' intervening actions, including voluntary home defaults. The court below erred in implicitly assuming that every mortgage default was involuntary. J.A. 42. On the contrary—as mortgages around the country began collapsing, homeowners began abandoning their homes at record rates. "By the end of 2008, with home values plunging, one in six homeowners found themselves underwater—owing more on their homes than they were worth. Borrowers, even those with stable jobs, began to see such negative equity as a reason to stop making their payments." Robbie Whelan, *Faces of the Home-Foreclosure Crisis*, WALL ST. J., Dec. 29, 2010.

High debt to equity ratios make it fiscally advantageous for a homeowner to default, "even if he or she has the money to keep paying." David Streitfeld, *No Help in Sight, More Homeowners Walk Away*, N.Y. TIMES, Feb. 3, 2010, at A1. The number of homes underwater in Florida in 2008 was *46 times* the same number in 2005. EXPERIAN-OLIVER WYMAN, UNDERSTANDING STRATEGIC DEFAULT IN MORTGAGES PART I, 12 (2009). Nearly one in five foreclosures

nationwide in the fourth quarter of 2008 strategically defaulted. *Id*. at 4.

This type of voluntary default is particularly problematic when assessing the causal link between BOA's conduct and Miami's harm. There is no way to separate out (a) how many foreclosures were voluntary or (b) how much the voluntary foreclosures affected home values. These questions underlie the generalized problems with such an attenuated causal chain. Such a theory "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts," an ancillary cost that is not commensurate with its complexity. *Holmes*, 503 U.S. at 269.

C. The harm to the city was unforeseeable.

The indirect nature of the harms alone fall outside of the proximate cause test, but the court below also erred by summarily concluding that although "there are several links in [the] causal chain, none are unforeseeable." J.A. 42. "[F]oreseeability of harm, though not sufficient, is necessary" to show causation. DOBBS ET AL., *supra*, § 12.2, at 265. The proximate cause inquiry does not ask whether an individual can conceivably think of a scenario where harm occurs, "but [whether] a reasonable person in a similar position would have foreseen a risk of harm" by acting. DOBBS ET AL., *supra*, § 15.2, at 340.

Whatever the negative effects of this financial market for homeowners, this alleged scheme was (ironically) intended to *increase* the value of housing, and increase the property taxes paid to the city. Home values had been on the rise since World War II, and increased by a third between 2000 and 2005.

Leonhardt, *supra*. "Over all, home prices have never fallen by a significant amount, and Alan Greenspan, the chairman of the Federal Reserve, said [in 2005] that a national drop in price remained unlikely." *Id.*

Mortgages were considered extremely safe investments. "More than half of the [mortgage backed securities] rated by Moody's carried a AAA rating — the highest possible credit rating." Efraim Benmelech and Jennifer Dlugosz, *The Credit Rating Crisis*, NATIONAL BUREAU OF ECONOMIC RESEARCH 161 (2009). Nobody seriously thought that there was a chance of a housing market collapse; even the naysayers "predicted that sales would decline a little in 2005 and prices would rise more modestly." Leonhardt, *supra*. If the market predicted such dire consequences, investors would not have poured such capital into the mortgage market. The book "The Big Short" was an entertaining best-seller precisely because it profiled the only four people in America who saw this crisis coming. MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2011).

When the economy finally collapsed, the results were catastrophic. BOA stock plummeted from a high of $52.96 to a low of $2.53—a 95.3% drop in value—before and after the housing collapse. GOOGLE FINANCE, *BAC*, http://tinyurl.com/hr2qyuk. The Dow Jones dropped 53% between October 2007 and March 2009. GOOGLE FINANCE, *DJI*, http://tinyurl.com/44fe5sf. These results show that neither BOA nor the financial market as a whole expected such a collapse. Deven Sharma, president of S&P, testified before the U.S. House of Representatives, noting that "[v]irtually no one — be they homeowners, financial institutions, rating agencies, regulators, or investors — anticipated what

[happened.]" *Hearings before the Committee on Oversight and Government Reform*, 110th Cong. (2008) (testimony of Deven Sharma). The collapse was felt across the housing market, not just in the subprime sector, as "twice as many prime borrowers lost their homes than did subprime borrowers" from 1997-2012. Fernando Ferreira and Joseph Gyourko, *A New Look at the U.S. Foreclosure Crisis: Panel Data Evidence of Prime and Subprime Borrowers from 1997 to 2012*, NATIONAL BUREAU OF ECONOMIC RESEARCH 3 (2015). Because of this lack of connection, Miami cannot state a claim for relief.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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DATED: October 21, 2016

APPENDICIES

APPENDIX A

Civil Rights Act of 1968
Original Provisions of the "Fair Housing Act"
Pub. L. 90-284

§ 810, 81 Stat. 85–86: Enforcement

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary [of HUD]. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c), the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned. Any employee of the Secretary who shall make public any

information in violation of the provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title, the Secretary shall notify the appropriate State or local agency of any complaint filed under this title which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment,

under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint: *Provided,* That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this title. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 812 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 812 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

* * * * *

§ 812, 81 Stat. 88: Enforcement by private persons

(a) The rights granted by sections 803, 804, 805, and 806 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected."

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

APPENDIX B

Current Statutory Provisions
42 U.S.C. § 3601 et seq.

* * * * *

42 U.S.C. § 3602: Definitions

As used in this subchapter—
(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.
(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, 3606, or 3617 of this title.
(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.
(i) "Aggrieved person" includes any person who--

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

* * * * *

42 U.S.C. § 3604: Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

* * * * *

42 U.S.C. § 3605: Discrimination in residential real estate-related transactions

(a) In general: It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

(b) "Residential real estate-related transaction" defined
As used in this section, the term "residential real estate-related transaction" means any of the following:

(1) The making or purchasing of loans or providing other financial assistance--

(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or

(B) secured by residential real estate.

(2) The selling, brokering, or appraising of residential real property.

* * * * *

42 U.S.C. § 3613: Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

* * * * *

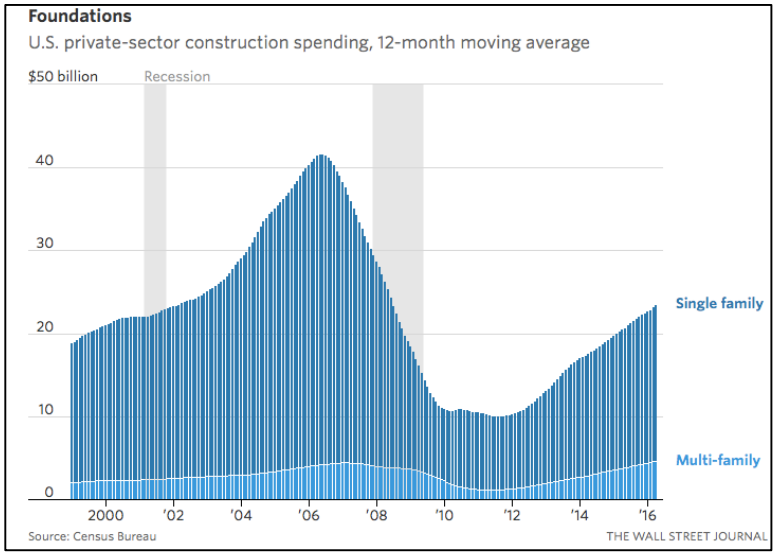
42 U.S.C. § 3616: Cooperation with State and local agencies administering fair housing laws; utilization of services and personnel; reimbursement; written agreements; publication in Federal Register

The Secretary may cooperate with State and local agencies charged with the administration of State and local fair housing laws and, with the consent of such agencies, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist him in carrying out this subchapter. In furtherance of such cooperative efforts, the Secretary may enter into written agreements with such State or local agencies. All agreements and terminations thereof shall be published in the Federal Register.

* * * * *

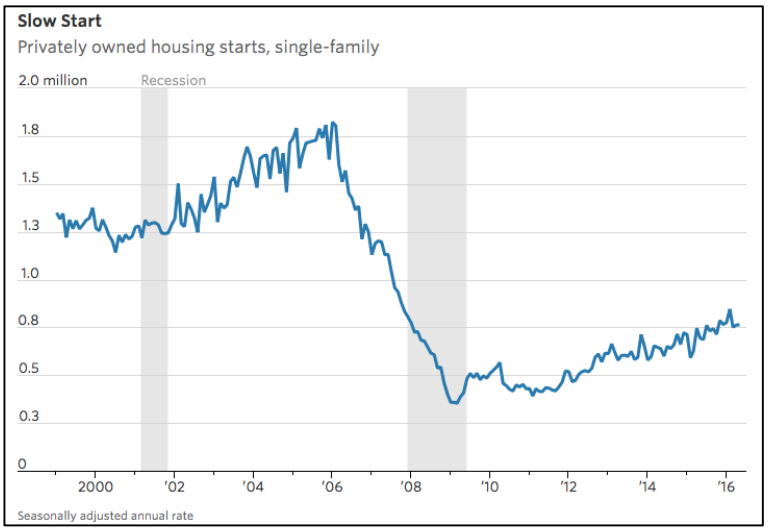
APPENDIX C
Pertinent Housing Charts

Figure 1:



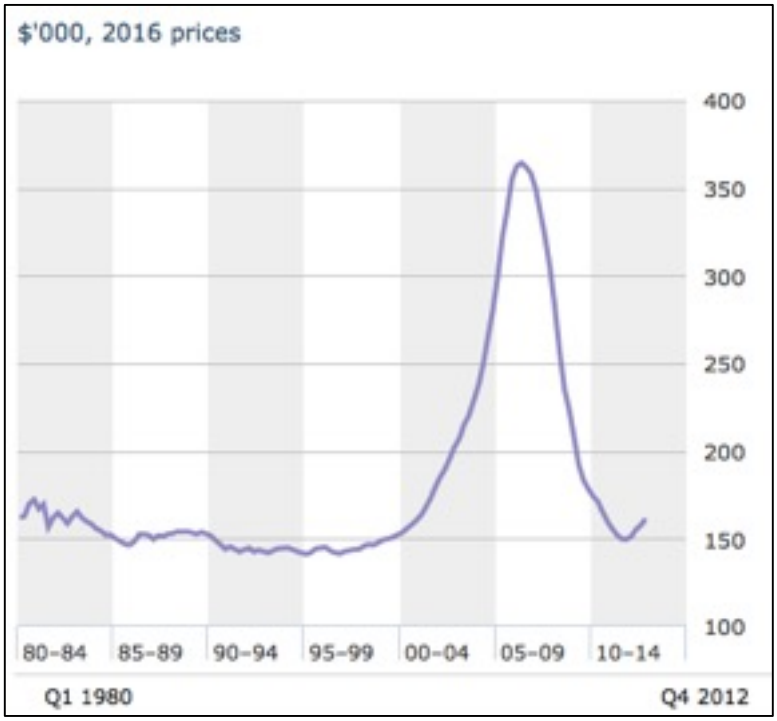
Source: Jeffery Sparshott, *The U.S. Housing Market in 9 Charts: The housing market has rebounded, but only part of the way*, WALL ST. J., June 23, 2016, http://tinyurl.com/zeobdf4.

Figure 2:



Source: Jeffery Sparshott, *The U.S. Housing Market in 9 Charts: The housing market has rebounded, but only part of the way*, WALL ST. J., June 23, 2016, http://tinyurl.com/zeobdf4.

Figure 3:
Average home prices in Miami over time, adjusted to 2016 dollars.



Source: *Daily Chart, American house prices: realty check*, THE ECONOMIST, Aug. 24, 2016, http://tinyurl.com/z8cqe4p.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rules 33.1(g) and (h), as modified by the Keedy Cup Rules, petitioner certifies that this document contains 10,442 words in 40 pages, excluding the parts exempted by Supreme Court Rule 33.1(d).

Petitioners declare under penalty of perjury that the foregoing is true and correct.

/s/ Andrew P. Steinmetz
/s/ John O. Wray

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