No. 15-1111

In the Supreme Court of the United States

BANK OF AMERICA CORP. ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent,

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

REPLY BRIEF FOR PETITIONERS

ANDREW P. STEINMETZ
JOHN O. WRAY
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

ARGUMENT

I. The Interests Miami Seeks To Vindicate Fall Outside The FHA's Zone of Interests.

Miami lacks a cognizable claim because the FHA does not authorize recovery for purely economic injuries when such injuries are unaccompanied by allegations of broader social harm. Miami acknowledges that all statutory causes of action—including this one—are subject to the zone of interests limitation. Resp. Br. 8; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). Thus, to determine whether Miami can state a viable claim here, the Court must scrutinize the language, structure, and purpose of the FHA, and then ask whether the statute's private right of action provision extends to *this particular plaintiff* alleging *this particular injury*. *Lexmark*, 134 S. Ct. at 1388.

Miami, however, disregards this inquiry. Instead, it attempts to sidestep a textual interpretation of the statute by advancing two main arguments. First, Miami contends that a trilogy of prior cases—which interpreted FHA provisions that have since been entirely rewritten—established a precedent that the FHA's zone of interests is coextensive with Article III. Resp. Br. 8–9. This contention is demonstrably incorrect. In *Thompson v. North American Stainless, LP*, this Court held that the "common usage" of the word "aggrieved" incorporates the zone of interests test, and any contrary statements in prior FHA standing cases were merely dicta. 562 U.S. 170, 176–77 (2011). Miami's reliance on *stare decisis* is therefore misplaced, and its ill-considered reading of the statute should not control.

Second, Miami argues that a municipality's economic injuries must be cognizable under the FHA because such injuries satisfy the requirements of Article III. Resp. Br. 19. But this argument simply assumes the FHA covers all Article III plaintiffs. Miami has chosen to ignore the actual text of the statute, perhaps because the text yields no evidence that Congress intended to grant municipalities a right to bring suit to protect their budgets. In fact, the text shows the opposite—that the FHA does not contemplate claims like Miami's.

A. An FHA plaintiff who is injured only in an Article III sense, but whose interests fall outside the zone of interests, is not an "aggrieved person" under § 3613.

The zone of interests limitation is a *limitation*. *Lexmark*, 134 S. Ct. at 1388. In all but the rarest of circumstances, it excludes plaintiffs who might technically meet the minimum requirements of Article III, but whose injuries are only "marginally related" to the core purposes of the statute. *Id.* at 1389. For the zone of interests to extend as broadly as Miami suggests, Miami must show that Congress deliberately embedded an unusually expansive zone in the FHA. *See Bennett v. Spear*, 520 U.S. 154, 164–66 (1997). It cannot do so.

Instead, since the text of the statute is unavailing, Miami rests its entire zone of interests argument on the principle of *stare decisis*. Resp. Br. 9–13, 19. Miami contends that prior decisions conclusively interpreted the FHA's zone of interests to sweep as broadly as Article III, and that those decisions bind the Court here. Resp. Br. 8. Those contentions, however, reflect a misreading of precedent.

The statements on which Miami relies were unnecessary to the opinions in which they appeared, and do not bind the Court here. *See Thompson*, 562 U.S. at 177 (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)). Moreover, even if they were once precedential, the 1988 amendments to the FHA require re-interpretation of the statute. *See Hurst v. Florida*, 136 S. Ct. 616, 623–24 (2016) ("*stare decisis* does not compel adherence to a decision whose underpinnings have been eroded . . ."). Accepting Miami's reading would ignore the statutory text and produce absurd results.

1. The text of the FHA creates a zone of interests narrower than Article III.

Applying the zone of interests test "avoids the extremity" of recognizing claims from all plaintiffs with Article III standing. *Thompson*, 562 U.S. at 177. The zone of interests limitation, after all, *limits* a cause of action. If it merely reiterated Article III's requirements, it would be superfluous. Thus, under the vast majority of statutes, a cause of action presumptively requires *something more* than a mere "injury-in-fact." It must also seek to vindicate an interest that Congress specifically sought to protect in the statute. *Bennett*, 520 U.S. at 164.

Of course, a plaintiff may attempt to rebut this presumption by showing that Congress imbued a particular statute with an unusually expansive zone. *See id.* at 164–66. But statutes within this category are rare, and they typically exhibit both remarkably broad language and an enforcement scheme that relies heavily on private lawsuits. *Id.*

Miami does not attempt to analogize the FHA to such statutes, and for good reason: the FHA exhibits neither of those features. The FHA grants a private right of action not to "any" person, but only to an "aggrieved" person—a person who has been "injured by" conduct that violates the FHA. 42 U.S.C. §§ 3613(a), 3602(i), 3602(f). Since the Court "must give effect to every word of a statute wherever possible," *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004), the central question here is: what is the function of the word "aggrieved"?

The word "aggrieved" in § 3613(a) is an adjective. Adjectives modify nouns, and in so doing, convey an additional level of specificity. THE CHICAGO MANUAL OF STYLE ¶ 5.66 (16th ed., 2010). For example, in the rules of this Court, "[a]n application to extend the time to file a document . . . may be acted on by the Clerk . . . and any *party aggrieved* by the Clerk's action may request that the application be submitted to a Justice . . . ." Sup. Ct. R. 30(4) (emphasis added). The word "aggrieved," in this instance, limits the word "party." Only a party "aggrieved" by the Clerk's initial decision—paradigmatically, a party whose application has been denied—may make a request for additional review. If the word "aggrieved" did not perform this limiting function, then *any* party, even a third party, could request submission to a Justice. An *amicus curiae*, for instance, could disagree with the Clerk's decision on principle and petition a Justice for review. Such a reading of the rule would be untenable.

Miami's preferred reading of the FHA similarly strips the word "aggrieved" of its limiting function. If the FHA truly grants *anyone* with Article III standing a right to sue, the word "aggrieved" becomes superfluous; a provision covering "any person" would

yield the same result. A better reading of "aggrieved" is one that "avoids the extremity of equating it with Article III," and instead filters claims through the zone of interests test. *Thompson*, 562 U.S. at 177–78.

2. Miami's reliance on *stare decisis* reflects a misreading of *Trafficante* and its progeny.

According to Miami, the breadth of the FHA's zone of interests is a settled matter, and thus no statutory interpretation is required. Resp. Br. 8. Miami contends that *Trafficante* and its progeny held that the FHA's private action provision extends to *all* Article III plaintiffs, and that Congress ratified this holding by reenacting the FHA in 1988. Resp. Br. 8–11. Thus, Miami maintains, *stare decisis* compels recognizing the claim at issue here. Resp. Br. 8–9. But Miami is incorrect.

Stare decisis directs a court to adhere to the results of prior cases and the portions of an opinion that are *necessary* to those results. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996). It does not, however, apply to broad doctrinal pronouncements that are *unnecessary* to a prior result. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1368 (2013). Such pronouncements are merely dicta, and this Court is not "bound by dicta should more complete argument demonstrate that the dicta is not correct." *Id.*

No prior decision in this Court has ever *held* that the FHA's private right of action extends to anyone with Article III standing. *Thompson*, 562 U.S. at 176. *Trafficante*, the first in the line of FHA standing cases, merely held that the term "person[s] aggrieved" (under the pre-1988 version of the FHA's

administrative enforcement provision) included anyone with Article III standing "*insofar as tenants of the same housing unit that is charged with discrimination are concerned*." *Trafficante*, 409 U.S. at 209 (emphasis added). Such a holding makes perfect sense: tenants of the same housing unit who allege their landlord has denied them the opportunity to live in an integrated community *are* squarely within the zone of interests of the FHA. *Thompson*, 562 U.S. at 176. As long as they can plead an Article III injury, they can sue. *Id.*

While two subsequent FHA cases reiterated *Trafficante*'s dictum without including its qualifying language, the sweeping doctrinal pronouncements that resulted were unnecessary to the outcome of either case. *See Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103, 109–12 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 376–79 (1982). The plaintiffs in *Gladstone* and *Havens* each alleged a diminution of "racial balance and stability" in their communities; their injuries were not purely economic. *Gladstone*, 441 U.S. at 111; *Havens*, 455 U.S. at 369. The interests they sought to vindicate were thus related to Congress' goals in enacting the FHA, and their ability to sue did not hinge on the zone of interests extending to Article III.

Moreover, by amending the FHA in 1988, Congress did not ratify the untenably broad construction that Miami seeks here. Miami cites a Report of the House Judiciary Committee, claiming that the drafters of the 1988 Amendments deliberately expanded the definition of "aggrieved person" to the limits of Article III. Resp. Br. 10–11. But the Report merely reaffirms the discrete holdings of *Gladstone* and *Havens*, namely that "standing

requirements for judicial and administrative review are identical," and that "testers have standing to sue." H.R. REP. NO. 100–711, at 23 (1988). As described in the report, these holdings had nothing to do with construing "aggrieved" to mean "Article III." *Id.*

Finally, even if these prior cases *did* expand the FHA's zone to the limits of Article III, the provisions at issue require reinterpretation. "[*S*]*tare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of . . . law." *Hurst*, 136 S. Ct. at 623–24. Congress only adopts the prior construction of a statute "when it re-enacts a statute *without change*." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (emphasis added). Here, however, the FHA has changed dramatically. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619; Pet. Br. 23–25. *Trafficante* and its progeny interpreted an FHA enforcement scheme that no longer exists. In fact, *Gladstone* and *Havens* concerned a provision that did not even include the word "aggrieved." Civil Rights Act of 1968, Pub. L. 90-284, tit. VIII, § 812(a), 82 Stat. 81, 88. Since the modern FHA's private right of action exists in a different statutory context, different statutory interpretation is necessary.

3. The construction Miami advocates would create absurd results.

Miami's argument contains no limiting principle. Miami maintains that any plaintiff can be "aggrieved" under the FHA so long as the requirements of Article III are satisfied. Resp. Br. 19. The petitioner in *Thompson* made the same argument with regard to Title VII, and this Court rejected it, reasoning that "absurd consequences would follow." 562 U.S. at

176–77. The same is true here. Miami's reading would create a whole new class of "collateral damage" claims for all incidental victims of discrimination—no matter how disconnected their injuries are from the purposes of the FHA. Under Miami's theory, a realtor could bring an FHA suit against a mortgage lender because foreclosures led to declining home values, decreasing the commissions he earned on his listings. Similarly, BOA could sue another lender like Wells Fargo because neighboring foreclosures led to a decrease valuation of the homes that BOA still owns. Congress did not intend to create a remedy for injuries so unrelated to the issue of fair housing. Therefore, claims like Miami's must be barred.

B. Miami falls outside the zone of interests because § 3613 was not enacted to protect municipalities from pure economic harm.

Miami assumes the FHA's zone of interests is coextensive with Article III, so it ignores the language and structure of the statute. However, Miami's assumption is incorrect. An analysis of the FHA's text is necessary to determine the viability of Miami's claim. *Lexmark*, 134 S. Ct. at 1387. Had Miami attempted to interpret the statute, as is required here, it would have found that a municipality—if it can bring a private FHA lawsuit at all—cannot recover for lost tax revenue and increased expenditures when it fails to assert an interest in combatting discrimination or promoting integration.

Miami brought suit under § 3613, a provision entitled "Enforcement by private persons." 42 U.S.C. § 3613. That provision grants a right to sue only to aggrieved "person[s]," a category that can include aggrieved "corporations." §§ 3613(a), 3602(d). Over

the course of six pages, Miami argues that a municipality is unquestionably a "person," even in the context of an "Enforcement by private persons" provision, because the term "person," should include "bodies politic and corporate." Resp. Br. 13–18, 15; *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 688 (1978). Finding otherwise, according to Miami, would require mixing § 3613's header into its text, and stripping the word *private* of its meaning. Resp. Br. 13.

This Court has never directly addressed the meaning of the word "person" under § 3613. *See Gladstone*, 441 U.S. at 109 n.21 ("the question whether Bellwood is a 'private person' . . . is not properly before us, and we express no views on it."). Generally, "the word 'person' *may* extend . . . to bodies politic and corporate . . . *unless the context shows that* [*it was*] *intended to be used in a more limited sense*." *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 127 (2003) (emphases added). Thus, the context in which the word "person" appears sheds crucial light on its meaning.

Here, the fact § 3613 is entitled "Enforcement by *private* persons" suggests Congress intended *private* persons to be able to invoke this provision—not governments. *See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (section headings "are tools available for the resolution of a doubt about the meaning of a statute."). In addition, when "Congress includes particular language in one section of a statute but omits it in another," Courts "presume" that Congress intended the words to mean different things. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). Here, the use of the term "political

subdivision of a State" to refer to a municipality in a different section, 42 U.S.C. § 3615, suggests that the term's exclusion from the definition of "person" was deliberate. *See id.*

Even if a municipality can be a "person" under the FHA, Miami still must show that *this municipality* in *this situation* has asserted an interest the FHA was enacted to protect. *See Lexmark*, 134 S. Ct. at 1388. And here, harm to a municipality's fiscal health is not such an interest.

Miami points to the Kerner Commission Report's mention of "inadequate municipal tax bases" and "increasing demands for public services" when describing the need for a fair housing law, suggesting that the FHA intended to protect municipal budgets. Resp. Br. 21. But this is a *non sequitur*. The Report discussed numerous potential ramifications of unchecked housing segregation patterns, including the threat of "continuing violence." REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 10 (1968). But that hardly means that someone who has been mugged in a segregated neighborhood can bring a private action under the FHA. Rather, the Report merely described the likely consequences of failing to address the main problem—racial segregation. *Id.* Despite Miami's contention, municipal budgets were not "a focus" of the FHA. Resp. Br. 21.

Finally, Miami argues its injuries are the same as those at issue in *Gladstone*. Resp. Br. 19. But that is incorrect. In *Gladstone*, the Village of Bellwood alleged it had been injured as a result of a racial steering scheme that "effectively manipulated the housing market . . . replacing . . . an integrated neighborhood with a segregated one." 441 U.S. at 110.

The Court allowed the Village to sue because the realtors' practices "ha[d] begun to rob Bellwood of its racial balance and stability," though it also recognized "other harms flowing from the realities of a racially segregated community" such as "a diminishing tax base." *Id.* at 111.

Miami makes no allegation these loans contributed to or exacerbated racial segregation in its neighborhoods. Nor does it claim injury "flowing from" social harm to its community. Rather, Miami asserts an entirely economic injury—one that has nothing to do with integration or diversity. In *Gladstone*, diminished tax revenue was the upshot of broader social injury. *Id.* Here, diminished tax revenue *is* the injury itself. The FHA was not enacted to vindicate an interest so marginally related to combatting discrimination and promoting integration. As such, Miami's suit must fail.

II. BOA Did Not Proximately Cause Miami's Injuries.

Miami's injuries were indirect and derivative. It concedes as much in its brief by failing to dispute those points. The question is whether BOA proximately caused Miami's indirect and derivative injuries. And "[t]he answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pac. Co. v. Darnell-Taenzer Lumber*, 245 U.S. 531, 533 (1918) (Holmes, J.). Miami seeks recovery at the third step.

Miami's analysis incorrectly presumes that proximate cause is an either/or mechanical test. Such a formalist analysis, however, misses the point—proximate cause tests are nothing more than an

attempt to understand "the fundamental policy of the law, as to whether the defendant's responsibility should extend to those results." W. PAGE KEETON ET AL., PROSSER AND KEETON ON LAW OF TORTS, § 43, 281 (5th ed. 1984). BOA is not responsible for ensuring that Miami maintains a balanced budget, and surely is not responsible for economic downturns affecting the Miami housing market.

A. Derivative harms are not cognizable.

Both sides agree that (a) Miami's harms were derivative and (b) that derivative harm is generally *not* cognizable. Resp. Br. 25–29. To avoid that bar, Miami asserts that derivative injury is cognizable "when it is bound up in the direct injury caused." Resp. Br. 29. But that argument simply conflates the concept of derivative harm and direct harm. Miami has not quoted, and we have been unable to find, *any* support for such a notion in case law.

The lone support that Miami offers for this novel concept is *Lexmark*, which dealt with causation for component manufacturers of an end product. *Lexmark*, 134 S. Ct. at 1394. But the Court in *Lexmark* explained that "there [was] no reason to regard either party's injury as derivative of the other's; each [was] directly and independently harmed[.]" *Id*. Here, Miami was not "directly and independently harmed." *Id*. Instead, it seeks recovery for indirect and dependent harm stemming from alleged conduct affecting only homeowners. Put simply: issuing the discriminatory mortgages may have increased monthly mortgage payments, but it did not lower the values of homes. It was not until years later, when the homeowners defaulted, that any harm befell the city. Knowing that parties to a

contract will pay taxes after executing the contract does not somehow make the harms "bound up in the direct injury caused." Resp. Br. 29. And even if it did, Miami cites no authority for such a novel concept.

B. Under any standard of proximate cause, the harms are too attenuated.

Even if the city could prove that the harm was not derivative, the causal chain is still too attenuated, no matter the "standard" of proximate cause used. Proximate cause "must be adequately alleged at the pleading stage" to survive a motion to dismiss. *Lexmark*, 134 S. Ct. at 1391 n.6. Miami contends that its causal allegations must be accorded a presumption of truth, and that a factual attack on the causal chain is "inappropriate" at the motion to dismiss stage. Resp. Br. 30. But this Court has held that such bare allegations are insufficient to pass the plausibility bar. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly* itself, this Court analyzed a conspiracy allegation by looking at the "considered views of leading commentators" on whether the alleged statistical correlation was plausibly a conspiracy. *Id.* at 556. The same inquiry is appropriate here to determine whether the alleged causation meets the requirement of proximate cause.

Miami does not dispute that while the data set used in its regression analysis spans 2004-2012, the only loans alleged in the complaint were issued between 2004 and 2008, before the catastrophic housing crisis. J.A. 15, 74; Pet. Br. 31. Miami again rests on *Gladstone* to prove proximate cause, Resp. Br. 21–22, but *Gladstone* did not address proximate cause. 441 U.S. 91. Moreover, *Gladstone* concerned a different subsection that was overhauled in 1988. *See*

section I.A.2, *supra*; Pet. Br. 10–25. Add to that the fact that the harm alleged there was deepening racial segregation in the community, not an attenuated chain spanning a financial crisis, and the precedential value of the decision quickly erodes. *Gladstone*, 441 U.S. at 110.

1. Even under the city's "foreseeability" causal argument, nobody saw the housing collapse coming.

The focal point of Miami's proximate cause argument is the concept of foreseeability. Resp. Br. 22–25. But Miami incorrectly conflates *foreseeability* with *mere possibility*. In Miami's view, the fact that an outcome is economically possible makes it foreseeable. Miami argues that the slightest bit of risk creation gives rise to foreseeability, but proximate cause attempts to "limit liability to the reasons for imposing liability in the first place." DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 199 (2d ed. 2000). It is not BOA's duty to guard against the possibility of declining property values whenever it issues mortgages. Miami's standard of foreseeability fails to restrict the scope of liability beyond establishing but-for causation—and even that fails to serve as an adequate check in this case. *See* section II.C, *infra*.

Moreover, Miami does not even address (and therefore concedes) that the housing collapse was (a) of historic magnitude, Pet. Br. 32–36, (b) resulted in massive job losses that would have caused home defaults no matter the loan rate, Pet. Br. 36–37, and (c) led to negative equity mortgages and voluntary defaults. Pet. Br. 37–38. Miami similarly does not engage with the fact that the homes in question make up only 0.3% of the housing market, Pet. Br. 34–35,

and that if Miami lumped all of BOA's loans together, they would account for *less than half of one month* of foreclosures across Miami. Pet. Br. 35. BOA's loans were a drop in the housing crisis bucket. Such outside forces serve to overwhelm BOA's conduct and cut the causal chain.

Miami's *only* response to the intervening cause argument is that "market fluctuations do not and should not break the causal chain." Resp. Br. 33. In other words, Miami equates the Great Recession, the "worst financial crisis in global history[,]" PHIL ANGELIDEA ET AL., FINANCIAL CRISIS INQUIRY REPORT, COMMENTS OF BEN BERNANKE 354 (2011) with a mere "market fluctuation." Resp. Br. 33. To support this assertion, Miami cites *Robers v. United States*, 134 S. Ct. 1854 (2014), but *Robers* did not contemplate market collapses like 2008. If the "worst financial crisis in global history," BERNANKE at 354, is a foreseeable market fluctuation, then it would be hard to conceive of what an unforeseeable economic phenomenon would look like. Miami offers no feasible scenario.

No experts—not the federal government, banks, investors, BOA, or Miami—saw this crisis coming. And the few people that did see it coming were derided as insane. MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2011). To be sure, it was possible to *imagine* that such a bubble would happen, but that does not mean it was *foreseeable*.

Moreover, the alleged scheme itself is evidence that BOA did not foresee the harm. The alleged scheme to issue these subprime mortgages was premised on the idea that the individuals would not default on the mortgages. J.A. 184–85. If BOA thought that individuals would be defaulting on the

mortgages, it would not have been advantageous to the bank to issue them in the first place. In fact, the spate of foreclosures that did occur nearly destroyed BOA, dropping its stock price more than 95%. GOOGLE FINANCE, *BAC*, http://tinyurl.com/hr2qyuk. The bank would have collapsed were it not for last-minute government intervention to save the economy. 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.

2. Allowing proximate causation purely because of taxation would lead to unintended consequences

If everyday tortious acts or statutory violations proximately harm the state's taxable interests, governments can sue for almost anything. Miami offers no logical stopping point for its theory of proximate cause. For example, a city imposing a soda tax could bring suit against a newspaper for defaming Coca Cola on the theory that soda sales (and therefore soda taxes) went down. Such a causal nexus would give a city standing merely by regulating an industry.

Miami incorrectly conflates this "no limitations" argument with the argument that too many lawsuits will be brought. Resp. Br. 28–29. While Miami's theory would indeed result in more lawsuits, the real problem lies in a city's unfettered ability to create a causal nexus. A city could sue any tortfeaser simply because judicial resources are expended by a plaintiff bringing suit. After all, it is foreseeable when acting negligently that a suit would be brought and the city would expend judicial resources.

That is not to say that a city can never sue for economic injuries. Schemes to defraud taxes easily

cause proximate harm to the city, as would negligent investment advice for pension funds. The problem arises when a city sues merely because it chose to tax a given area and the economy goes down. Such causal links would create absurd results.

C. The city has not pled but-for causation.

The most striking aspect of Miami's brief was its failure to respond to the fact that many homeowners defaulted due to their own poor fiscal management, voluntary default, or valuing their morning latte over their vacation home in Miami. Pet. Br. 33–38. Miami argues that but-for the loans, the homes would not have foreclosed. Resp. Br. 35. But this argument is inapt. Issuing loans does not violate the FHA—only discrimination does. The city must prove that the difference between the *discriminatory* mortgage rate and a *standard* mortgage rate caused the foreclosure. Miami did not respond to that point because it cannot.

1. Miami's regression analysis does not show that the discrimination caused foreclosure.

To show but-for cause, Miami pointed to a regression analysis showing that minorities with a predatory loan foreclosed at a rate between 2.74 (African Americans) and 2.86 (Latinos) times greater than white borrowers with similar underwriting characteristics. Resp. Br. 36; J.A. 234. Regression analysis can never prove more than correlation, but this data does not even prove a correlation because it compares apples to oranges.

To show a correlation between the predatory loans at hand and foreclosures, Miami must show in a regression analysis that *minorities with predatory*

loans foreclose at higher rates than *minorities with non-predatory loans* (while holding constant similar underwriting characteristics). By comparing minorities to whites, the data fails to take into account socio-economic issues that correlate with race. For example, when comparing among high school graduates (a group that is more plausibly subprime than college graduates) 16.2% of African Americans were unemployed at the height of the crisis in 2010, while only 9% of whites were. BLS BETA LABS, *Unemployment*, U.S. DEPARTMENT OF LABOR http://www.bls.gov/data. Because blacks were unemployed at a rate nearly twice that of whites, that factor alone accounts for nearly all of the disparity. Miami fails to control for this.

Unemployment is just one metric that differentiates minorities' ability to repay. For example, whites are socio-economically advantaged in myriad ways and therefore have similarly advantaged social networks. When they fall on hard times, there is more money in their communities to lift them up. Minorities enjoy far less socio-economic community support. And during economic downturns, racial impacts can become more acute, leading minorities to be fired at higher rates than whites (as is borne out in the unemployment data).

This was a simple comparison for Miami to do. Minorities with non-discriminatory loans were not a null set. Miami alleges in its complaint that minorities were only issued predatory loans at a rate 1.581 times that of white borrowers. J.A. 225. This relatively small differential, while enough to create a plausible claim of discrimination, shows that there is a large set of minorities who received loans consummate with their risk profiles, and therefore

were not discriminated against. If Miami had simply compared those two groups, its but-for causation would plausibly be established.

Correlation can never prove causation. For example, when analyzing Google searches, people who search for "diets" search for many things, like "food calorie" (92.3% correlated) or "exercise programs" (91.3% correlated). GOOGLE CORRELATE, *Diets* http://tinyurl.com/z6v9jtb. Most of those correlated terms make sense.

Curiously, the number one correlated search term is "honeymoons" (92.8% correlated). *Id*. This is not because diet searches cause people to start fantasizing about getting fit, meeting their soulmate, getting married, and going on honeymoons. The more probable explanation is that those who are getting married search for both diets and honeymoons. They search the former to find out how to look good in their wedding photos; the latter to plan for the beginning of their married life.

Miami's failure to control for a factor as major as race makes it impossible to tell if the cause of the foreclosures was predatory loans, systemic racial disparities, or some third unknown.

2. But-for causation is required.

Miami's statistical failures doom its complaint. Sensing that such a deficiency exists, Miami argues in the alternative that even "if it is impossible to show[,] . . . but-for causation should not apply in this case." Resp. Br. 36. Instead, Miami argues that a contribution to the mortgage crisis should make BOA liable. Resp. Br. 36–37. In other words, Miami argues that even an individual who negligently spills a gallon of water into a rapidly-rising flood tide, no matter how

de minimus, should be liable because it adds to the flood. Such an idea defies logic. Miami curiously cites *Burrage v. United States*, 134 S. Ct. 881 (2014) and *Paroline v. United States*, 134 S. Ct. 1710 (2014) for support, but neither case held such an alternative. Resp. Br. 36. Both cases discussed, then flatly rejected the idea. *Burrage*, 134 S. Ct. at 890–91; *Paroline*, 134 S. Ct. at 1723. *Paroline* ordered restitution only after a lengthy discussion finding that Congress intended to vitiate the but-for requirement. 134 S. Ct. at 1727.

Miami's struggle to satisfy even the low level of but-for causation highlights the problem with this type of attenuated recovery. The individual homeowner could easily establish a causal chain to recover damages for the increased rate of loan—neither side disputes that. But Miami's reliance on the attenuated causal chain dooms its causal argument as a matter of law.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

/s/ Andrew P. Steinmetz
/s/ John O. Wray
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Petitioners

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 5,303 words in 20 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

UNIVERSITY OF PENNSYLVANIA LAW SCHOOL
3501 Sansom Street
Philadelphia, PA 19104

Counsel for Petitioners

DATED: November 18, 2016