

DO MUNICIPALITIES HAVE ARTICLE III STANDING TO SUE MORTGAGE LENDERS UNDER THE FAIR HOUSING ACT?

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INTRODUCTION

*“I believe when somebody owns their own home, they’re realizing the American Dream.”*¹

By 2008, the U.S. housing market had veered off a cliff.² Along with it went many Americans’ life savings, cities’ tax bases and any realistic hope of a speedy macroeconomic recovery. As the financial contagion spread and layoffs arrived in force, millions of taxpayers residing in metropolitan areas faced the twin specters of foreclosure and eviction. Inner city rot only deepened as foreclosed-upon and vacant homes gave rise to higher crime rates and intensified the strain on cash-strapped public welfare agencies.

Battered by waves of foreclosures and desperate for relief, four cities brought suit in federal court against the largest mortgage lenders and

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1. President George W. Bush, Address to HUD Employees on National Homeownership Month (June 18, 2002), <http://archives.hud.gov/remarks/martinez/speeches/presremarks.cfm>.

2. See Fed. Reserve Bank of St. Louis, *National Composite Home Price Index for the United States*, FRED ECONOMIC DATA (last updated Nov. 28, 2012, 8:32 AM), <http://research.stlouisfed.org/fred2/series/USCSCOMHPISA?cid=32261> (observing the dramatic fall in home prices between 2006 and 2008); Bob Brundage, *Real Estate: More Homes in Nevada Underwater Than Anywhere in U.S.*, RENO GAZETTE-JOURNAL, Mar. 13, 2011, available at BIZ, available at 2011 WLNR 4970992 (stating that sixty-five percent of all Nevada mortgages were underwater, followed by Arizona at fifty-one percent, Florida at forty-seven percent, Michigan at thirty-six percent, and California at thirty-two percent).

securitizers.³ Three cities allege that Citigroup and Wells Fargo violated the Fair Housing Act (“FHA”), 42 U.S.C. §§ 3601-19, by using “reverse redlining” techniques to target minority borrowers with subprime mortgage products. These loans were purportedly aimed at minority borrowers to maximize the principal, interest, and fees that could be extracted from prospective homeowners who had neither the wherewithal to repay the loans nor the financial literacy to understand the transactions. Once the housing bubble popped and the U.S. labor market went into free fall, the ensuing mortgage defaults and foreclosures resulted in vast urban dead zones of vacant, crumbling houses.

The cities allegedly suffered two distinct injuries from lenders’ reverse redlining. First, the mass foreclosures resulted in sizable reductions in property tax receipts, shrinking already-limited municipal budgets.⁴ Second, the now-empty housing units became prime fodder for drug dealers, squatters and other criminals.⁵ In response, the cities were forced to divert scarce law enforcement resources to continually patrol and investigate abandoned properties.⁶ Even without the resulting spike in crime rates, the vacant units required constant maintenance and fire safety inspections. These ongoing risks imposed onerous fiscal burdens on cities already struggling to provide basic services to their residents. The cities alleged that but for the lenders’ discriminatory lending practices, neither the loss of property tax receipts nor the increased expenditure on crime control and infrastructure maintenance would have been necessary.⁷

The lenders responded to this initial salvo of complaints with a barrage of motions to dismiss for lack of standing.⁸ They argued that

3. *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 123123 (N.D. Ala. Aug. 19, 2009); First Amended Complaint for Declaratory & Injunctive Relief & Damages, *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857-STA, 2011 U.S. Dist. LEXIS 48522 (W.D. Tenn. May 4, 2011) [hereinafter *Memphis* Complaint]; Complaint for Declaratory & Injunctive Relief & Damages, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847 (D. Md. 2010) (No. JFM 108—CV-00062); Second Amended Complaint, *City of Cleveland v. Ameriquist Mortg. Sec., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009) (No. 1:08-CV-139).

4. *Memphis* Complaint, *supra* note 3, ¶ 140(a) (alleging that Wells Fargo’s reverse redlining caused loss of property tax revenue); Third Amended Complaint for Declaratory & Injunctive Relief & Damages ¶ 320, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. JFM-08-62, 2011 U.S. Dist. LEXIS 44013 (D. Md. Apr. 22, 2011) [hereinafter *Baltimore* 3d Complaint] (seeking damages for lost property tax revenues).

5. *Memphis* Complaint, *supra* note 3, ¶ 142.

6. *Baltimore* 3d Complaint, *supra* note 4, ¶¶ 119-308.

7. *E.g., id.* ¶¶ 97-108 (alleging that but for Wells Fargo’s racially motivated steering of customers into subprime loans, “borrower[s] would have continued to make payments on the mortgage and remained in possession of the premises”).

8. *E.g.,* Reply Memorandum in Support of Defendants’ Motion to Dismiss the Third Amended Complaint at 6, *Mayor and City Council of Baltimore v. Wells Fargo Bank, N.A.*,

neither reductions in tax revenue nor increased spending on municipal services qualified as cognizable injuries-in-fact for Article III standing purposes.⁹ Even conceding that these economic losses constituted actionable harms, the causal chain connecting any purportedly illegal mortgage practices and the resulting urban blight was too attenuated. That is, the cities' harms were not fairly traceable to the lenders' conduct, and the injuries were too derivative of those sustained by third parties (i.e., the foreclosed-upon homeowners).¹⁰ Thus, the lenders concluded, the plaintiff cities were not the proper parties to bring suit. District courts in Alabama, Maryland, Ohio, and Tennessee have decided these motions in mixed ways. These motions to dismiss have been met with mixed success in district courts in Alabama, Maryland, Ohio and Tennessee.

This Comment analyzes whether municipalities possess Article III standing to sue mortgage lenders in federal court for FHA violations. Starting with a quick primer on reverse redlining and its economic impact, I move into a literature review. I argue that, contrary to existing literature, cities lack constitutional standing to sue under the FHA. I reach this conclusion based on comparisons to the tobacco and handgun litigation from the late twentieth and early twenty-first centuries. Using a framework for causation drawn from the antitrust and RICO contexts, I determine that courts should grant lenders' 12(b)(1) motions. I conclude with the implications for municipalities, both as marginal actors in a federalist system and in the immediate wake of the national mortgage settlement between the large banks, federal government and state attorneys general.

A. *Economic Backdrop of the Reverse Redlining Problem*

*"You will love this place. There are no Black people here."*¹¹

No. JFM-08-62, 2008 U.S. Dist. Ct. Motions 62 (D. Md. Jan. 1, 2011) ("Standing doctrine requires the City to allege a plausible connection between specific loans and the vacancies to which the City traces its injuries.").

9. *E.g.*, *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, No. JFM-08-62, 2011 U.S. Dist. LEXIS 44013, at *6 (D. Md. Apr. 22, 2011) (acknowledging that Wells Fargo challenges only the causation and injury-in-fact prongs of the constitutional standing inquiry).

10. *E.g.*, *Defendants' Motion to Dismiss at n.9, City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 446523 (N.D. Ala. Apr. 6, 2009) (alleging that any causal connection between Birmingham's injuries and Citigroup's conduct was broken by a third party's independent action).

11. *Protecting the American Dream (Part II): Combating Predatory Lending Under the Fair Housing Act Before the H. Comm. on the Judiciary*, 111th Cong. 88 (2010) (statement of Thomas Perez, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice) (describing one realtor's statement to an undercover "tester" for HUD).

This Comment focuses on a particular subset of predatory lending that became rampant during the bubble years, known as “reverse redlining.” The practice consists of “offering high-priced mortgage loans to non-white ‘house-rich but cash-poor’ consumers,” on more punitive terms relative to those offered to Caucasian borrowers.¹² Lenders “specifically target and aggressively solicit minority, elderly and low-income homeowners who have traditionally been denied access to mainstream sources of credit.”¹³ The extent to which reverse redlining may have permeated the U.S. mortgage market over the last few decades is staggering.¹⁴ As the ongoing foreclosure crisis continues to expose significant levels of race-based lending in urban areas, it is only in the last few years that regulators have begun to address the degree to which racial prejudices infected the major banks’ lending policies.¹⁵ Wholly separate from the destabilizing effects on

12. William Apgar, Assistant Sec’y for Hous. & Fed. Hous. Comm’r, Dep’t of Hous. & Urban Dev., Testimony Before the House Committee on Banking and Financial Services (May 24, 2000) (transcript available at <http://archives.hud.gov/testimony/2000/5-24apgar.cfm>); see also *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998) (defining reverse redlining as “the practice of extending credit on unfair terms” to minority communities); Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 102 n.9 (2006) (defining reverse redlining as “the targeting of persons for credit on unfair terms based on their income, race, or ethnicity.”).

13. Apgar, *supra* note 12.

14. *Segregation as a Driver of Subprime Lending and the Ensuing Economic Fallout: Comments Before the Joint Economic Comm.*, 111th Cong. 4 (2009) (statement of Gregory D. Squires, Professor, George Washington Univ.) (relying on HMDA data to conclude that at the peak of subprime lending in 2006, 53% of African American borrowers in nonwhite communities received subprime loans, compared to 46% of Hispanics and 22% of whites); U.S. Dep’t of Hous. & Urban Dev., *Unequal Burden: Income and Racial Disparities in Subprime Lending*, HUD ARCHIVES (Apr. 2000), <http://archives.hud.gov/reports/subprime/subprime.cfm> (noting that in 1998 fifty-one percent of home loans in predominantly black neighborhoods were subprime, compared to nine percent in predominately white areas).

15. See, e.g., Written Agreement Between Wells Fargo & Co. and Federal Reserve Board of Governors, Docket Nos. 11-094-B-HC1, 11-094-I-HC1, 11-094-B-HC2 & 11-094-I-HC2 (July 20, 2011) (assessing an eighty-five million dollar civil money penalty against Wells Fargo for improperly steering prime borrowers toward subprime loans); Jo Ann Barefoot & Andy Sandler, *Red Alert on Redlining: Renewed Attention Plus Crisis Aftermath Stir Up Major Trouble for Banks*, ABA BANKING JOURNAL, Mar. 2011, at 34 (noting that “banking agencies have made more than 40 fair-lending referrals over the past two years” to the Justice Department which “has announced four fair-lending settlements” for, among other things, “redlining and charging higher rates and fees . . . to members of protected classes”); Brent Kendall, *Victims Sought in Countrywide Case*, WALL ST. J., Dec. 27, 2011, at C3 (announcing the Justice Department’s \$335 million settlement with Countrywide that resolved allegations that Countrywide charged higher fees and interest to African American and Hispanic borrowers between 2004 and 2008); Press Release, Dep’t of Justice, Financial Fraud Enforcement Task Force Announces Settlement with AIG Subsidiaries to Resolve Allegations of Lending Discrimination (Mar. 4, 2010), <http://ww>

financial markets, reverse redlining may have entrenched existing patterns of racial distribution across metropolitan areas.¹⁶ Worse, decades of agonizing economic progress for African Americans have been undone as the mortgage market's contraction continues apace, with the credit crunch disproportionately harming minority access to conventional banking channels.¹⁷

However, the purpose of this Comment is not to educate the reader on the evils of reverse redlining and the deleterious effects that predatory lending has on the social fabric.¹⁸ Other authors cover that topic, and in

w.justice.gov/opa/pr/2010/March/10-crt-226.html (stating that two AIG subsidiaries agreed to pay \$6.1 million "to resolve allegations that they engaged in a pattern of or practice of discrimination against African American borrowers"); Tracy Russo, *Enforcement of the Equal Credit Opportunity Act*, THE JUSTICE BLOG (Apr. 12, 2011), <http://blogs.usdoj.gov/blog/archives/1292> (announcing formation of fair lending unit in Justice Department's Housing and Civil Enforcement Section).

16. RICHARD ROTHSTEIN, ECONOMIC POLICY INSTITUTE, A COMMENT ON BANK OF AMERICA/COUNTRYWIDE'S DISCRIMINATORY MORTGAGE LENDING AND ITS IMPLICATIONS FOR RACIAL SEGREGATION 3 (Jan. 3, 2012) (warning that reverse redlining could have "reinforced, and may even have intensified, racial segregation in our major metropolitan areas").

17. Christine Dugas, *'Dual System': Minorities Lose Financial Ground, Critics Say*, USA TODAY (last updated Apr. 5, 2011, 5:20:27 PM), <http://www.usatoday.com/money/perfi/general/2011-04-04-real-estate-financial-discrimination.htm> (noting that the "overall share of conventional prime mortgage lending in communities of color fell 35%, while the share of loans to predominantly white neighborhoods increased 11%"); Press Release, Fed. Reserve Bank of N.Y., *Delinquent Debt Shrinks While Real Estate Debt Continues to Fall* (Feb. 27, 2012), <http://data.newyorkfed.org/newsevents/news/research/2012/an120227.html> (noting that mortgage and home equity lines of credit continued to fall, dropping \$146 billion in 2011:Q4).

18. I take care to note that subprime lending and predatory lending, which includes reverse redlining, are not coterminous. While plenty of overlap exists between the two, they are conceptually distinct. HUD and Treasury define predatory lending as "engaging in deception or fraud, manipulating the borrower through aggressive sales tactics, or taking unfair advantage of a borrower's lack of understanding about loan terms." *Predatory Mortgage Lending: The Problem, Impact, and Responses: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. n.19 (2001) (testimony of Thomas J. Miller, Att'y Gen., State of Iowa). One California court characterized predatory lending as "a range of abusive and aggressive lending practices, including deception or fraud, charging excessive fees and interest rates, making loans without regard to a borrower's ability to repay, or refinancing loans repeatedly over a short period of time to incur additional fees without any economic gain to the borrower." *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 815 (Cal. 2005). Victims tend to be "homeowners who frequently cannot pay the associated costs and therefore lose their homes." Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 757 (2007). Contrast this with legal subprime lending, which merely consists of offering mortgages "to people who represent a higher level of risk than borrowers who meet standard prime underwriting guidelines." KENNETH TEMKIN ET AL, THE URBAN INSTITUTE, SUBPRIME

greater detail than here.¹⁹ My interest lies with local governments' disparate attempts to contain the fallout created by lenders' racial practices. In the next section, I describe cities' efforts to stanch the fiscal hemorrhaging.

B. *Cities' Resort to Litigation in the Federal Courts*

*"Subprime loan officers described African-American and other minority customers by saying 'those people have bad credit' and 'those people don't pay their bills,' and by calling minority customers 'mud people' and 'niggers.' They referred to loans in minority communities as 'ghetto loans.'"*²⁰

In response to the loss of property tax revenue and increased municipal spending perceived to be a byproduct of lenders' reverse redlining tactics, four cities filed civil suits in federal court against Ameriquest Mortgage Securities, Citigroup, and Wells Fargo.²¹ Three complaints allege FHA violations, along with state law claims under consumer protection statutes and common law.²² The fourth complaint, filed by the City of Cleveland, targeted mortgage-backed securities issuers under a common law public nuisance theory of liability.²³

The cities did not allege that the lenders or securitizers engaged in direct racial discrimination against them.²⁴ Instead, Baltimore,

MARKETS, THE ROLE OF GSES, AND RISK-BASED PRICING 4 (Dep't of Hous. & Urban Dev. 2002).

19. See, e.g., Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 169-75 (2009) (discussing reverse redlining practices and their impact on municipalities and communities of color); Brett Altier, Note, *Municipal Predatory Lending Regulation in Ohio: The Disproportionate Impact of Preemption on Ohio's Cities*, 59 CLEV. ST. L. REV. 125, 129-34 (2011) (describing predatory lending and its economic impact).

20. *Baltimore* 3d Complaint, *supra* note 4, ¶ 56 (citation omitted).

21. See *supra* text accompanying note 3.

22. *Id.*

23. See *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496, 498-99 (6th Cir. 2010) (discussing the complaint filed by the city of Cleveland).

24. E.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 207-08 (1972) ("The complaint alleged that the owner had discriminated against nonwhite rental applicants in numerous ways, e.g., making it known to them that they would not be welcome . . . manipulating the waiting list for apartments, delaying action on their applications, using discriminatory acceptance standards, and the like."); *Stevens v. Hous. Auth. of S. Bend, Ind.*, 663 F.3d 300, 303 (7th Cir. 2011) (alleging that defendants violated the Fair Housing Act by "locating her publicly-funded apartment building in a primarily African-American neighborhood, [and] segregating her on account of race"); *Mt. Holly Gardens Citizens in*

Birmingham, and Memphis each alleged that Citigroup and Wells Fargo engaged in reverse redlining against their taxpayers in violation of the Fair Housing Act.²⁵ Relying on statistical data, the cities argued that African American residents were targeted with subprime loans at rates much higher than those of financially comparable Caucasian borrowers.²⁶ The cities cite testimony of former loan officers who describe employee incentive programs for targeting ostensibly less-sophisticated minority borrowers with toxic mortgage products.²⁷ Black homeowners were saddled with mortgages that had interest rates, fees and other conditions that made the loans more onerous than prime mortgages.²⁸ These race-based steering practices were allegedly accompanied by campaigns of out-and-out deception on the part of lower level employees.²⁹ These high-cost loans were disproportionately located in African American neighborhoods in Baltimore, Birmingham, and Memphis.³⁰ The time between default and foreclosure on delinquent mortgages owed by African Americans was especially quick compared with the experience of white borrowers in delinquent mortgage situations.³¹ As a result of the banks' illegal lending practices, an "excessive and disproportionately high number of foreclosures in African-American neighborhoods" resulted once the housing sector's

Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011) (asserting that the township's redevelopment plan discriminated against minorities, violating the Fair Housing Act).

25. See, e.g., *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857-STA, 2011 U.S. Dist. LEXIS 48522, at *2 (W.D. Tenn. May 4, 2011) (asserting that Wells Fargo targeted African American mortgage borrowers); *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 849 (D. Md. 2010) (noting the city's assertion that "Wells Fargo . . . target[ed] the City's underserved and vulnerable minority neighborhoods . . . , causing an increase in abandoned and vacant homes in those areas").

26. See *City of Memphis*, 2011 U.S. Dist. LEXIS 48522, at *3 (noting that "41% of Wells Fargo loans resulting in foreclosures occurred in African-American neighborhoods," compared to only 23.6% of foreclosures occurring in predominantly white neighborhoods).

27. See, e.g., *Memphis* Complaint, *supra* note 3, ¶ 101 (describing "large commissions and bonuses of up to \$10,000 a month for meeting Wells Fargo's quotas for subprime loans"); see also *Baltimore* 3d Complaint, *supra* note 4, ¶ 59 (alleging that bank representatives made more money in referral fees by sending borrowers to subprime loan officers, creating a system that paid out "'bounties' on minority borrowers").

28. See *Baltimore* 3d Complaint, *supra* note 4, ¶ 96 (alleging that Wells Fargo's lending practices pushed borrowers to take out loans "more onerous than loans for which they qualif[ied]").

29. See, e.g., *Memphis* Complaint, *supra* note 3, ¶¶ 111-16 (alleging that Wells Fargo ordered employees to mislead customers about closing costs, fees, adjustable rates, size of mortgage payments, prepayment penalties and other terms and conditions).

30. See *Baltimore* 3d Complaint, *supra* note 4, ¶¶ 72, 74 (showing, through Wells Fargo's own data, that Wells Fargo issued high-cost loans to forty-three percent of African American customers in Baltimore, particularly in certain historically black neighborhoods).

31. *Id.* ¶ 89 (alleging that there is an approximately sixty-five day difference between average time of foreclosure for white borrowers and for black borrowers).

implosion triggered a broader economic decline.³² As a result, the cities suffered reductions in property tax receipts on vacant housing units and were forced to increase spending on the municipal services required to combat accelerated urban decrepitude.³³

In response, the lenders moved to dismiss pursuant to Rule 12(b)(1), alleging the municipalities lacked Article III standing to sue.³⁴ Birmingham and Cleveland saw their complaints dismissed due to standing and proximate causation problems.³⁵ Baltimore survived Wells Fargo's 12(b)(1) motions only after repeatedly amending its complaint to satisfy constitutional standing requirements. Memphis also withstood Wells Fargo's 12(b)(1) motion after modeling its complaint on Baltimore's.³⁶ Clearly, potential exists for lenders to escape liability for reverse redlining violations via this attack on the court's subject-matter jurisdiction to hear the case. Depending on how courts choose to resolve the city standing issue, municipalities may be barred from seeking judicial redress for damage sustained as a result of lenders' illegal practices.

Furthermore, given the recent mortgage settlement between federal regulators, the state attorneys general and the largest mortgage lenders, claims under the FHA may prove to be invaluable in undoing the harm inflicted on cities and taxpayers by reverse redlining.³⁷ The national

32. *Memphis Complaint*, *supra* note 3, ¶ 4.

33. *See, e.g., id.* ¶¶ 142-45 (describing harms caused by vacancy, including “squatters, increased risk of crime and fire, and infrastructure damage such as burst water pipes and broken windows” as well as environmental issues, all of which require expensive “police and fire calls and housing code enforcement efforts”).

34. FED. R. CIV. P. 12(b)(1) (stating that a party may assert lack of subject-matter jurisdiction as a defense to a claim for relief).

35. *See City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 123123, at *13 (N.D. Ala. Aug. 19, 2009) (holding that “the City does not have standing to pursue any of these claims against the Defendants”); *City of Cleveland v. Ameriquet Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, 536 (N.D. Ohio 2009) (finding that because “the allegations [are] . . . insufficient to establish proximate causation, the City’s public nuisance claim fails as a matter of law”); Defendants’ Motion to Dismiss ¶ 14-21, *City of Birmingham v. Citigroup Inc.*, No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 44652 (N.D. Ala. 2009) (arguing that Birmingham failed to allege a cognizable injury-in-fact that is fairly traceable to Citigroup).

36. *See City of Memphis*, 2011 U.S. Dist. LEXIS 48522, at *16 (noting similarities between the Memphis, Baltimore and Birmingham suits); *id.* at *52 (denying Wells Fargo’s 12(b)(1) motion).

37. On March 12, 2012, the Justice Department, HUD, and forty-nine state attorneys general filed with the District of the District of Columbia a set of consent judgments with Bank of America, J.P. Morgan, Wells Fargo, Citigroup, and Ally Financial amounting to approximately twenty-five billion dollars in financial relief for borrowers and monetary sanctions. Press Release, U.S. Dep’t of Justice, \$25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012), *available at* <https://d9klfgibkcqcc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf>. The

settlement with Ally/GMAC, Bank of America, Citi, JPMorgan Chase, and Wells Fargo bars both state and federal regulators from bringing a wide range of civil claims against the lenders, including, but not limited to, “any civil or administrative claim, of any kind whatsoever, direct or indirect, that an Attorney General or [state mortgage] Regulator, respectively, has or may have or assert, including, without limitation, claims for damages, fines, injunctive relief, remedies, sanctions, or penalties of any kind”³⁸ However, despite the broad language of the releases, they appear confined to state and federal entities, and not local governments.³⁹ Direct suits by the cities against the banks may represent a substantial opportunity to extract compensatory damages from these financial institutions.

This Comment addresses the question of whether cities have Article III standing to pursue FHA claims against lenders for reverse redlining. I conclude that cities do not have standing to sue under the FHA, due to difficulties with satisfying the “fairly traceable” component of the standing inquiry necessary to sue in federal courts.⁴⁰ I begin with a brief review of the existing literature on this subject. The consensus is that actions under the FHA comprise a viable means of achieving restitution for harms sustained by cities as a result of lenders’ racially motivated lending practices. However, much of the literature predates the first wave of

settlements include “a broad release of the banks’ conduct related to mortgage loan servicing, foreclosure preparation, and mortgage loan participation services.” PHILIP A. LEHMAN, NORTH CAROLINA DEP’T OF JUSTICE, EXECUTIVE SUMMARY OF MULTISTATE/FEDERAL SETTLEMENT OF FORECLOSURE MISCONDUCT CLAIMS 4 (2012), *available at* https://d9klfgibkcquc.cloudfront.net/NMS_Executive_Summary-7-23-2012.pdf. Importantly, “[c]laims based on these areas of past conduct by the banks cannot be brought by state attorneys general or banking regulators.” *Id.*; *see, e.g.*, Consent Judgment at G-5, *United States v. Bank of America Corp.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf (releasing Bank of America from liability for various types of potential civil claims made by states). However, the terms of the settlement specifically provide that the release does not extinguish either claims arising out of fair lending laws or any claims by county and local governments. *Id.* at G-9.

38. *Id.* at G-5. Similar consent judgments with JPMorgan Chase and Wells Fargo have been filed in the District Court for the District of Columbia. The settlement requires the lenders to pay five billion dollars in cash to the federal and state governments, plus twenty billion dollars toward “various forms of financial relief to homeowners,” including principal reductions on underwater mortgages and loan refinancings. Press Release, U.S. Dep’t of Justice, \$25 Billion Mortg. Servicing Agreement Filed in Fed. Court (Mar. 12, 2012), <http://www.justice.gov/opa/pr/2012/March/12-asg-306.html>.

39. Consent Judgment at G-9, *United States v. Bank of America Corp.*, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* https://d9klfgibkcquc.cloudfront.net/Consent_Judgment_BoA-4-11-12.pdf.

40. While a few municipalities have brought suit against lenders in state court, this Comment does not address the ability of cities to sue in state court because the rules for standing to sue in state court vary by jurisdiction.

municipality-sponsored FHA litigation. This Comment is poised to draw new insights from the recently completed initial round of city-lender litigation. Existing literature disregards the “fairly traceable” element of the standing inquiry. Akin to a highly informal proximate causation test, standing law requires that the plaintiff allege injuries that can be “fairly traceable” to the defendant’s conduct. Much of the existing literature glosses over this requirement, rendering it a formality in the pleadings. Extending an analytical framework from the antitrust and RICO contexts for economic losses, I argue that the multitude of independent causal factors between any reverse redlining and eventual fiscal harm to the municipality renders it impossible for city-plaintiffs to satisfy this element of the standing test. As such, courts should dismiss FHA actions instituted by cities on this theory of liability.

First, I summarize the existing literature on this topic and the conclusions other authors have drawn. I rule out the possibility that cities can sue in *parens patriae*. I then delve into the standing analysis. Conceding that the economic losses sustained by cities constitute cognizable injuries-in-fact and that a favorable judicial decision would provide adequate redress, I make my stand on the “fairly traceable” component. I conclude with preemptive counter-responses to those who would argue that the cities possess constitutional standing, and ruminations on what this means for foreclosure-wracked municipalities going forward.

I. LITERATURE REVIEW

*“Where a city can demonstrate that lenders have deceived borrowers into accepting loans on terms that they could not afford and, as a result, the borrowers lost or could not maintain their homes, resulting in reduced tax revenues and increased demand for city services, a court could find that the city’s injuries were ‘fairly traceable’ to the predatory lending.”*⁴¹

In this section, I conduct a brief overview of the literature on municipalities’ Article III standing to pursue various types of claims in federal court, including under the Fair Housing Act, state consumer protection statutes and common law public nuisance.

Most of the literature on the subject acknowledges, albeit briefly, the notion that cities must first establish standing to sue predatory lenders.⁴²

41. Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 376 (2006).

42. E.g., David D. Troutt, *Disappearing Neighbors*, 123 HARV. L. REV. FORUM 21, 27 (2010), http://www.harvardlawreview.org/media/pdf/123forum_troutt.pdf (noting that “[c]ities suing lenders in their own capacities face federal standing hurdles on *parens*

However, several existing publications predate the city-sponsored litigation arising out of the 2008 financial crisis.⁴³ Kathleen Engel's 2006 article focuses primarily on "whether cities have standing to recover damages for the externalities that predatory lenders impose on them and whether cities have standing as *parens patriae* to protect the interests of their residents."⁴⁴ After a short introduction of the threshold issue of standing, Engel moves quickly to consider whether cities can institute *parens patriae* suits to remedy harms suffered by a large segment of the resident population.⁴⁵ This includes a brief discussion of the separate elements required to establish *parens patriae* standing: (1) quasi-sovereign interests in the public welfare vindicated by the suit, (2) numerosity of citizens harmed by the defendant's alleged behavior, and (3) an interest in the controversy wholly distinct from that of private parties involved in the action.⁴⁶

The author notes that the lower federal courts have securely locked the courthouse doors to cities seeking to sue as *parens patriae*, observing that:

[t]he federal courts have unequivocally held that political subdivisions cannot bring claims as *parens patriae* because their power is derivative, not sovereign. Thus, cities bringing claims as quasi-sovereigns in federal court or whose claims as quasi-sovereigns are removed to federal court are certain to face dismissal [T]he federal courts have made it clear that they will not grant cities quasi-sovereign standing.⁴⁷

Engel then briefly discusses the possibility of filing suit in state court as a means of escaping the federal courts' heightened standing requirements.⁴⁸ Having established the futility of bringing federal derivative actions on the taxpayer's behalf, Engel also addresses the hurdles to proprietary litigation against mortgage lenders in federal court that are posed by Article III standing doctrine.

Engel's analysis focuses primarily on injury-in-fact and conduct fairly

patriae grounds" and "cities are often denied standing to sue in federal court").

43. E.g., Kyle Cutts, Comment, *City on the Brink: The City of Cleveland Sues Wall Street for Public Nuisance*, 58 CASE W. RES. L. REV. 1399 (2008) (gauging the likelihood of success of Cleveland's then-pending public nuisance lawsuit, including potential standing and proximate causation barriers to recovery); Frank Lopez, Note, *Using the Fair Housing Act to Combat Predatory Lending*, 6 GEO. J. ON POVERTY L. & POL'Y 73, 94 (1999) (noting that the FHA's lax prudential standing requirement, which "extend[s] to the full reach permitted by the Constitution," may prove to be the most viable method for combating reverse redlining).

44. Engel, *supra* note 41, at 355.

45. *Id.* at 362.

46. *Id.* at 361-65.

47. *Id.* at 365-68.

48. *Id.* at 366-68.

traceable to the defendant's actions. She validly observes that "[w]hen predatory lending leads to abandoned and neglected homes, cities experience declines in tax revenues Numerous courts have held that lost tax revenues can affect governmental entities' proprietary interests."⁴⁹ She also notes the second general class of harms that courts have acknowledged as constituting a cognizable injury for standing purposes—increased expenditures on public services necessitated by the urban blight that follows a sudden wave of foreclosures.

Whether by engaging in fraud, discrimination, or other forms of illegal activity, predatory lenders cause borrowers to become financially vulnerable. Victims of predatory lending can lose their homes to foreclosure or forego necessities like food and heat in order to keep their homes. They then turn to public agencies for assistance. Cities must meet an increased demand for homeless shelters, heat subsidies, food stamps and other relief programs. In addition, when families are dislocated, children's educations are interrupted, which can impose added costs on cities. Neighborhoods become vulnerable, too. Abandoned homes become targets for drug dealing and arson. As neighborhoods lose their cohesion, crime increases. The need for police and fire services rises in relation to neighborhood decline, further burdening city resources. It is a short distance from acknowledgment of this immediate economic reality to the judicial conclusion that "[t]he increased costs for city services directly affects the proprietary interests of cities."⁵⁰

However, Engel subordinates the "fairly traceable" element of the standing analysis to the "injury-in-fact" component, concluding that:

Where a city can demonstrate that lenders have deceived borrowers into accepting loans on terms that they could not afford and, as a result, the borrowers lost or could not maintain their homes, resulting in reduced tax revenues and increased demand for city services, a court could find that the city's injuries were 'fairly traceable' to the predatory lending.⁵¹

Similarly, Raymond Brescia's 2009 article goes directly to the merits of Baltimore's case against Wells Fargo. Brescia restricts his inquiry to determining the proper test to apply in a disparate impact claim under the FHA, measuring the degree of reverse redlining in urban communities, applying the appropriate statistical tests to establish a prima facie case of reverse redlining, and devising the correct judicial response to lenders'

49. *Id.* at 374-75.

50. *Id.* at 375-76 (emphasis added).

51. *Id.* at 376.

affirmative defenses for subprime lending.⁵² He acknowledges the importance of establishing cities' standing to sue in a proprietary capacity, but directs his attention elsewhere, beyond the threshold jurisdictional issue.⁵³

In a separate article published that same year, Brescia devotes some space to the argument that cities possess Article III standing. He asserts "there is no doubt that governments have standing to bring suits alleging harms to their interests, either as property owners or in their representational capacity for their constituents."⁵⁴ Brescia compares the municipalities' situation to that faced by states suing in their quasi-sovereign capacities, and he relies on *Massachusetts v. EPA* to conclude that the recent Supreme Court case bolstered government claims of standing.⁵⁵ In particular, he argues that alleging reduced property values arising from predatory lending is "sufficient enough to confer standing, especially where the municipality itself owns property impacted by foreclosures of subprime loans."⁵⁶

Brescia expands on his assertions in an article from 2010. Relying on the majority opinion from *Massachusetts v. EPA*, he argues that "[w]hile the *Massachusetts* decision is nominally about the rights of states, . . . there are also aspects of the decision that have implications for standing doctrine generally."⁵⁷ Brescia asserts that the relaxed standing requirements that attach to the states should be extended to municipalities as well.⁵⁸ Based on this diluted test for Article III standing, he posits that "[a]ctions that *contribute* to harm, even when other forces may also be responsible for that harm, even overwhelmingly, are actionable."⁵⁹ This would include third parties whose actions resulted in a spike of foreclosures on private homeowners, thereby depressing local property tax receipts.⁶⁰ Where the city can allege that a third party contributed to an actionable harm, that is enough to have caused that harm for standing purposes.⁶¹ Any parsing of

52. Brescia, *supra* note 19, at 195-96.

53. *Id.* at 195.

54. Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 65 (2009).

55. *Id.* at 64.

56. *Id.* at 65.

57. Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 11 (2010).

58. *Id.*; *see also id.* at 48-49 (concluding that "courts need to take a fresh look at causation in municipal lawsuits").

59. *Id.* at 48-49.

60. *Id.* at 49.

61. *Id.* at 49 (concluding that where "illegal loan terms contribute to the reasons that individual borrowers end up defaulting on their mortgages, the causation prong is met").

separate causal factors must wait until the damages stage of the judicial process.⁶²

Delving into a historical analysis of standing doctrine as it relates to public nuisance actions, he cites Justice Harlan's dissent in *Flast v. Cohen* for the proposition that suits brought by private parties standing as "representatives of the public interest" should not automatically be excluded by Article III's case or controversy clause.⁶³ From there, Brescia discusses the historical tradition by which governmental bodies held the power to enjoin public nuisances, even without "proof of special injury."⁶⁴ He is careful to qualify that this power has traditionally rested in the *states*, and a scrutiny of history does not provide an answer to whether any other public bodies have wielded this authority.⁶⁵ Regardless, states may maintain a public nuisance action with a showing of harm to the community, and nothing more.⁶⁶ The particularized injury requirements articulated in *Lujan* are not necessary to invoke federal jurisdiction.⁶⁷

Like Engel, Brescia aptly observes that as landowners, "municipalities can allege damage to . . . property due to actions that diminish the value of that property."⁶⁸ Brescia perceives that a showing of economic harms due to fair housing violations, by itself, is sufficient to grant constitutional standing, based on the analysis of *Gladstone, Realtors*. He correctly states that the "questions of causation and redressability are *nowhere to be found* in the court's *Gladstone, Realtors* decision . . ."⁶⁹ From this, he concludes that for the purposes of gauging a municipal entity's standing to sue under the FHA, factual pleadings that establish a cognizable injury-in-fact, in the form of an economic loss to the city, are enough to survive a 12(b)(1) motion.

Upon review of the literature, there appears to be no article or comment devoted exclusively to whether municipalities have Article III standing to pursue FHA claims against lenders for reverse redlining violations. Rather, many authors proceed straight to the merits, choosing to focus their attention on the cities' ability to establish disparate impact claims under the FHA. Such an analysis puts the cart before the horse. This Comment addresses how and whether cities can get their foot in the

62. *Id.*

63. *Id.* at 40-41 (citing *Flast v. Cohen*, 392 U.S. 83, 119-20 (1968) (Harlan, J., dissenting)).

64. *Id.* at 41-42.

65. *Id.* at 42.

66. *Id.*

67. *Id.* at 44-45.

68. *Id.* at 45.

69. *Id.* at 46 (emphasis added).

courthouse door at all.

II. Why Can't Cities Simply Sue on Behalf of Their Residents?

*"It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted . . . that the forests on its mountains . . . should not be further destroyed or threatened . . . that the crops and orchards on its hills should not be endangered"*⁷⁰

Before I move to the Article III question, the reader likely asks why cities are barred from bringing suits on behalf of the public, much like an administrative agency or state. However, derivative standing on behalf of the taxpayer is not a viable option for municipalities injured by lenders' reverse redlining. Bringing suit in this auxiliary capacity, otherwise known as *parens patriae*, is a common law concept with historical antecedents in English tradition. The sovereign is vested "with powers and duties—the 'royal prerogative'—to protect certain interests of his subjects."⁷¹ Rather than suing in a private capacity to remedy wrongs sustained to one's own interests, the sovereign sues on behalf of the body politic. In the United States, "the federal government and the states, as the twin sovereigns in our constitutional scheme, may in appropriate circumstances sue as *parens patriae* to vindicate interests of their citizens."⁷² Over time, this concept morphed from an idea that the state has the power to intervene and "represent the interests of citizens who cannot represent themselves because they are under a disability," into the notion that the state may "seek[] to protect a set of interests that it has in the well-being of its populace."⁷³

One would intuit from a superficial reading of this doctrine that cities possess the power to sue lenders on behalf of their residents to abate the social ills that have befallen taxpayers as a result of the lenders' alleged FHA violations—even if municipalities as governmental units have sustained none of these harms. Indeed, Brescia relied on *Massachusetts v. EPA*'s relaxation of standing requirements for states to advance the

70. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238 (1907).

71. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973).

72. *Id.* at 131.

73. *People ex rel. Hartigan v. Cheney*, 726 F. Supp. 219, 222 (C.D. Ill. 1989). *See Tenn. Copper*, 206 U.S. at 237 ("[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) ("[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.").

proposition that cities can also sue on behalf of taxpayers to protect the public interest without specifying any cognizable harm sustained by the municipality proper.⁷⁴

While states retain the ability to sue in this manner on behalf of the citizenry, that power typically stems from “the unique quasi-sovereign rights of a state to sue to protect the health and welfare of their citizens.”⁷⁵ In contrast, the longstanding Dillon’s Rule for municipal corporations states that cities are largely creatures of the state’s making.⁷⁶ From this perspective on state and local relations, any power wielded by local governments is limited to what legislatures have delegated for the management of the local government’s day-to-day affairs. Thus, any comparison of municipalities to state governments in the arena of abating threats to the public welfare through affirmative litigation is inapposite.

Concededly, the Supreme Court has never specifically held that cities may not pursue *parens patriae* actions.⁷⁷ Nonetheless, its unsympathetic treatment of these units “implies that they may not do so.”⁷⁸ Yazback and Entin conclude as much based on “a more general view that cities and other

74. See *Brescia*, *supra* note 54 (arguing that because *Massachusetts v. EPA* reduced the standing burden for government plaintiffs, municipalities “should have a far easier time overcoming the standing hurdle”); see also *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (stressing “the special position and interest of Massachusetts” as a sovereign state). Justice Stevens, writing for the majority, relied on cases from the early twentieth century for the assertion that “States are not normal litigants for the purposes of invoking federal jurisdiction.” *Id.* In a footnote, he referenced “the long development of cases permitting States ‘to litigate as *parens patriae* to protect quasi-sovereign interests—*i.e.*, public or governmental interests that concern the state as a whole.’” *Id.* at 520 n.17 (quoting RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 289-90 (5th ed. 2003)).

75. *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229, 243-44 (2d. Cir. 1999); see also *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610 (W.D. Pa. 1999) (holding that state governments can sue tobacco companies without regard to proximate cause, because of their inherent “political power,” “threat of legislative action” and the *parens patriae* right to protect the public health) (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 934 n.18 (3d Cir. 1999)), *aff’d*, 228 F.3d 429, 436 (3d Cir. 2000).

76. See *Smith v. Jefferson Cnty. Bd. of Sch. Comm’rs*, 641 F.3d 197, 218 n.10 (6th Cir. 2011) (describing Dillon’s Rule as limiting a municipality’s powers to those expressly granted through the city’s charter, authorities implicit from those explicit delegations and powers essential to accomplishing the municipal corporation’s purposes); Terrence P. Haas, Note, *Constitutional Home Rule in Rhode Island*, 11 *ROGER WILLIAMS U. L. REV.* 677, 679-80 (2006) (noting that Dillon’s Rule states that municipal corporations possess the powers explicitly delegated to them, the powers that are necessarily or fairly implied to those expressed powers and the powers that are essential to the declared purposes of the corporation).

77. Entin & Yazback, *supra* note 18, at 763.

78. *Id.*

political subdivisions do not enjoy the protections of the Eleventh Amendment because they are not sovereign.⁷⁹ This view of cities as the low men on the totem pole in the federalist system was affirmed in the 1890 case of *Lincoln County v. Luning* and again in the 2001 case of *Board of Trustees v. Garrett*.⁸⁰ Thus, it should come as no surprise that lower federal courts have consistently held that political subdivisions at the local level cannot sue as *parens patriae*.⁸¹ Hence, the *parens patriae* avenue to litigation is likely closed to cities, and perhaps rightfully so.⁸² Even if this mode of litigation were available to municipalities, this form of standing comes with its own burdensome requirements that must be satisfied to successfully invoke federal jurisdiction.⁸³

79. *Id.*

80. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 369 (2001); *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890) (holding that political subdivisions do not get Eleventh Amendment protection).

81. *E.g.*, *Colo. River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985) (“[P]olitical subdivisions . . . cannot sue as *parens patriae* because their power is derivative and not sovereign.”); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir. 1979) (rejecting the city’s assertion of *parens patriae* standing because cities and counties cannot sue in a derivative capacity); *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032, 1047 (2d Cir. 1976) (Meskill, J., dissenting) (noting that the “power of a political subdivision of a state is even more rigidly circumscribed” because “a city cannot sue as *parens patriae*, but is limited to the vindication of such of its own proprietary rights”), *cert. denied*, 434 U.S. 1034 (1978); *United States v. W.R. Grace & Co.*, 185 F.R.D. 184, 189 n.3 (D.N.J. 1999) (recognizing courts’ refusal to let municipalities invoke *parens patriae* to obtain federal jurisdiction); *City of New York v. Heckler*, 578 F. Supp. 1109, 1123 (E.D.N.Y.) (stating that a city “generally does not have *parens patriae* standing”), *aff’d*, 742 F.2d 729 (2d Cir. 1984), *aff’d*, 476 U.S. 467 (1986); *Town of Orangetown v. Gorsuch*, 544 F. Supp. 105, 108 (S.D.N.Y. 1982) (noting that a municipal plaintiff “cannot maintain this action as *parens patriae*”).

82. See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2545-46 (2006) (“American political decentralization is regional rather than municipal—states, not cities, are the salient sites for constitutionally protected ‘local’ governance. As a result, cities and their leaders are three levels down the political food chain and must normally ask the states for whatever powers they have or wish to exercise.”). In the context of his exposition on the role of the city mayor as executive officer, Schragger observes that “the city operates within a larger political and constitutional framework that significantly shapes the powers of the city and its officials.” *Id.* at 2556. Even those cities that enjoy substantial home rule power do so “contingent on grants of authority from the state or subject to revision by the state.” *Id.* at 2558.

83. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (“In order to maintain such a[] [*parens patriae*] action, the State must articulate an interest apart from the interests of particular private parties The State must express a quasi-sovereign interest First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”); see also *New York v. Holiday Inns, Inc.*, 656 F. Supp. 675, 678 (W.D.N.Y. 1984)

However, the capacity to sue in a proprietary interest remains available to cities.⁸⁴ In this sense, a municipality acts as a private litigant and seeks redress for some harm it suffered, rather than suing on behalf of individual taxpayers. This way, cities can sue on their own behalf to vindicate those interests that are consistent with the taxpayer's interests. Given that the lower federal courts have closed off the *parens patriae* avenue for cities, if municipalities are going to get their day in court on a reverse redlining theory of liability, the prospective FHA action must be proprietary in nature. Suing in a proprietary interest entails the conventional three-pronged standing inquiry fashioned by the courts over the last several decades.

III. The Three-Part Standing Inquiry: Why Cities Cannot Sue in a Proprietary Capacity under the FHA to Recover on Reverse Redlining Violations

*"The City seeks to expand the law of standing to give every neighbor with a pest infestation and every crime victim within a few blocks of a house in foreclosure access to financial institutions in federal court."*⁸⁵

In this section, I discuss why cities lack Article III standing to sue mortgage lenders under the FHA. I conclude that cities can allege significant economic losses as cognizable injuries-in-fact (specifically, reduced property tax values and increased public maintenance expenditures to remedy urban blight). I also do not dispute the contention that a sizable damages award would work to remedy the harm inflicted on municipalities as they attempt to stem the rising tide of urban degradation, thereby satisfying the third "judicially redressable" element. However, I break from existing literature with my contention that damages alleged by the cities cannot be said to be fairly traceable to the defendant-lenders' conduct, given the array of independent causal factors working to create the harms suffered by the cities. But first, I include a brief explanation of

(conditioning a finding of *parens patriae* standing on a determination that "individuals involved could not obtain complete relief through a private suit") (citing *New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982)). The upshot of the conditions necessary to support a finding of *parens patriae* standing is that "the required showing here [is] *harder*, not easier." *Massachusetts v. EPA*, 549 U.S. 497, 538 (2007) (Roberts, C.J., dissenting) (emphasis added).

84. *Harris*, 601 F.2d at 1044; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 131 (9th Cir. 1973).

85. Memorandum of Law in Support of Defendants' Motion to Dismiss the Third Amended Complaint at 11, *City of Baltimore v. Wells Fargo Bank, N.A.*, No. 1:08-CV-00062-JFM, 2011 U.S. Dist. LEXIS 44013 (D. Md. Dec. 3, 2010).

Article III standing.

A. What Is Article III Standing?

In this section, I provide a short overview of the constitutional doctrine known as Article III standing. Standing is a jurisdictional doctrine that has evolved out of Article III's cases and controversies requirement.⁸⁶ The court must ask "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."⁸⁷ Put another way, "[s]tanding concerns 'whether the plaintiff is the proper party to bring th[e] suit.'"⁸⁸

Over time, the Supreme Court has specified the necessary elements to demonstrate the standing required for subject-matter jurisdiction. The three elements of Article III standing that a plaintiff must allege include: (1) some cognizable injury-in-fact inflicted on the plaintiff (2) fairly traceable to the defendant's conduct which (3) can be redressed through a favorable court decision.⁸⁹ The plaintiff bears the burden to allege facts that show that these three elements exist.⁹⁰ Would-be plaintiffs ignore this component of subject-matter jurisdiction at their peril. The court reporters are replete with cases dismissed for lack of jurisdiction due to plaintiffs' failures to properly allege standing.⁹¹

Its original justification was rooted in the constitutional separation of powers.⁹² Designed to prevent courts from issuing advisory opinions and

86. U.S. CONST. art. III, § 2 ("The judicial power shall extend to all cases . . . [and] controversies.")

87. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

88. *ProEnglish v. Bush*, 70 F. App'x 84, 87 (4th Cir. 2003) (per curiam) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)).

89. *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979). The injury-in-fact can exist "solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" *Warth*, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Even where the plaintiff is pursuing state law claims in a diversity action, the plaintiff must still satisfy the federal standards for standing, not the corresponding state court standard. *White v. Nat'l Union Fire Ins. Co.*, 913 F.2d 165, 167 (4th Cir. 1990).

90. *Warth*, 422 U.S. at 518; *W. Mining Council v. Watt*, 643 F.2d 618, 627 (9th Cir. 1981).

91. *E.g.*, *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 901 (C.D. Cal. 2011) (dismissing complaint in its entirety because plaintiffs "failed to set forth factual allegations establishing Article III standing"); *Dash v. FirstPlus Home Loan Trust 1996-2*, 248 F. Supp. 2d 489, 500 n.12 (M.D.N.C. 2003) (refusing to address the merits of plaintiff's contentions because "the Court does not have subject matter jurisdiction over the instant matter" for lack of standing).

92. *See Warth*, 422 U.S. at 498 (noting that standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society"); *Vander Jagt v.*

value judgments, standing ensures that abstract concerns for some subject do not imbue a plaintiff with the ability to have a court decide the merits of a dispute or a particular issue.⁹³ The practical result is that the standing inquiry “focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.”⁹⁴ This requirement ensures that all parties to the litigation have personal and diametrically opposed interests in the outcome.⁹⁵ In the vast majority of cases litigated in the federal courts, “there is scant need for courts to pause over the standing inquiry In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident.”⁹⁶

In this Comment, I focus specifically on Article III standing and not on prudential standing, which is a closely related but still separate doctrine.⁹⁷ Given that the Supreme Court “has held that standing to bring a FHA claim is coextensive with constitutional standing,” the question of whether a city can bring a claim under the FHA in a proprietary capacity collapses into the broader constitutional question.⁹⁸ Thus, for the purposes of this analysis, one “need only assess the three requirements of

O’Neill, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring) (explaining that standing concerns “the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”).

93. *Warth*, 422 U.S. at 500; *see also* *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (“[A]n organization’s abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III.”); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (noting that the burden of producing some actionable injury is not reduced by virtue of suing in an organizational capacity); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (“Without this [standing] requirement, the federal judicial process would be transformed into ‘no more than a vehicle for the vindication of the value interests of concerned bystanders.’”) (quoting *Valley Forge Christian Coll. v. Ams. United for the Separation of Church & State*, 454 U.S. 464, 473 (1982)).

94. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

95. *Id.* at 101.

96. *Friends of the Earth*, 204 F.3d at 154.

97. Prudential standing requires that the plaintiff assert its own interests (and not those of third parties). Furthermore, those interests cannot amount to generalized grievances and must reside within the zone of interests protected by the statute granting the plaintiff his cause of action. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (“A plaintiff must also satisfy the non-constitutional standing requirements of the statute under which he or she seeks to bring suit Once the Article III standing requirement is satisfied, this is a purely statutory inquiry.”); *Friends of the Earth*, 204 F.3d at 155 (“[A]n individual must also satisfy any statutory requirements for standing before bringing suit.”).

98. *Nat’l Cmty. Reinvestment Coalition v. Accredited Home Lenders Holding Co.*, 573 F. Supp. 2d 70, 74 (D.D.C. 2008); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982).

constitutional standing”⁹⁹ But before I do so, I discuss the appropriate standard of review for 12(b)(1) motions.

B. The District Courts Apply the Twombly/Iqbal Standard of Review for a 12(b)(6) Motion to a 12(b)(1) Motion

*“The district court erroneously concluded that lack of Article III standing was grounds for dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Though lack of statutory standing requires dismissal for failure to state a claim, lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).”*¹⁰⁰

As FHA litigation continues to bubble out of the cauldron of the foreclosure crisis, a curious schism has arisen in the district courts over the proper standard of review governing a motion to dismiss for lack of standing. In reviewing lenders’ motions to dismiss, several district courts have elected to apply the heightened “plausibility” standard formulated for a 12(b)(6) motion in *Bell Atlantic Corp. v. Twombly*, and later extended in *Ashcroft v. Iqbal*.¹⁰¹ The courts’ use of *Twombly* and *Iqbal* to scrutinize whether the plaintiff is the proper party to bring suit is wrong. The Article III standing requirement did not evolve out of a need for plaintiffs to set forth “plausible” (as defined by *Twombly* and *Iqbal*) factual allegations that, taken as true, would entitle that party to relief. Rather, standing formed as a response to the necessities of compliance with Article III’s “cases and controversies” requirement.

At least one court of appeals has noted the problem with applying heightened scrutiny to the pleadings when reviewing a motion alleging lack of subject-matter jurisdiction. In *Maya v. Centex Corp.*, the Ninth Circuit noted the difference between a complaint’s failure to allege *statutory* standing, which is properly subject to a 12(b)(6) motion, and its failure to allege *Article III* standing, which is to be reviewed under 12(b)(1).

99. *Mayor of Baltimore v. Wells Fargo Bank*, No. JFM-08-62, 2011 U.S. Dist. LEXIS 44013, at *5 (D. Md. Apr. 22, 2011).

100. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

101. See *Mayor of Baltimore*, 2011 U.S. Dist. LEXIS 44013, at *5 (assuming that “the plausibility standard applies equally to allegations concerning standing”); see also, *Dodaro v. Std. Pac. Corp.*, No. EDCV 09-01666-VAP (OPx), 2010 U.S. Dist. LEXIS 32136, at *11-12. (C.D. Cal. Apr. 1, 2010), *rev’d and remanded*, *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Tingley v. Beazer Homes Corp.*, No. 3:07cv176, 2008 U.S. Dist. LEXIS 34303 at *6 (W.D.N.C. Apr. 25, 2008) (concluding that when reviewing a 12(b)(1) motion to dismiss, “the Court must apply a standard similar to that applied in reviewing a *Rule 12(b)(6)* motion”).

Carefully separating the merits of the case from threshold jurisdictional issues, Judge Fletcher observed that:

Twombly and *Iqbal* are ill-suited to application in the constitutional standing context because in determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the merits of the plaintiff's case. But the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim. Rather, "[t]he jurisdictional question of standing precedes, and does not require, analysis of the merits." . . . This is not to say that plaintiff may rely on a bare legal conclusion to assert injury-in-fact, or engage in an "ingenious academic exercise in the inconceivable" to explain how defendants' actions caused his injury. We simply note that *Twombly* and *Iqbal* deal with a fundamentally different issue, and that the court's focus should be on the jurisprudence that deals with constitutional standing.¹⁰²

However, this doctrinal error has pervaded many of the district courts reviewing actions instituted by private homeowners for FHA violations, as well as those lawsuits involving municipalities suing to remedy urban blight generated by alleged reverse redlining. Until more appeals from dismissals of FHA complaints for lack of standing reach the appellate courts, prospective municipal plaintiffs will likely have to formulate their pleadings in such a way that complies with *Twombly* and *Iqbal*'s particularity requirements, in order to overcome the Article III standing requirement.

Before I move onto the FHA litigation, I emphasize that courts should not demand scientific precision in complaints by cities alleging the standing to sue.¹⁰³ As a jurisdictional doctrine that does not go to the merits of the complaint, the inquiry should be tantamount to a highly-reduced form of review for proximate causation, like that found in tort law. However, under this simplified standard, cities must still allege *something*, and even under this quasi-proximate causation review, I assert that cities cannot satisfy even this reduced burden.

C. *Injury-in-Fact*

"Sausalito and its citizens and employees would be harmed by implementation of the Fort Baker Plan and the 2,700 daily visitors it would

102. *Maya*, 658 F.3d at 1068 (citation omitted).

103. See *Friends of the Earth*, 204 F.3d at 162 (declining to "transform the 'fairly traceable' requirement into the kind of scientific inquiry that neither the Supreme Court nor Congress intended"); *Mayor of Baltimore*, 2011 U.S. Dist. LEXIS 44013, at *7.

unleash in numerous significant respects including . . . lost property and sales tax revenue due to impaired vehicular movement and commerce rendering Sausalito less attractive to business.”¹⁰⁴

Thus far, all of the complaints filed by municipalities have alleged two different categories of harm. The first is reduction in property tax receipts. The cities typically allege that “[w]hen homes became vacant, local government incurred a series of expenses for police calls, fire calls, boarding-up and cleaning properties.”¹⁰⁵ As a result, not only are precious municipal funds expended to prevent further deterioration of residential neighborhoods, but they must be diverted from cash-strapped city agencies, social insurance programs, and other important government projects. The second category of harms generally alleged by the municipalities in their pleadings includes depressed property tax receipts arising out of the reduced home values that tend to accompany abandoned and vacant homes due to mass foreclosures.

Over recent decades, the Supreme Court has repeatedly noted that erosion of the municipal tax base constitutes a cognizable injury-in-fact for standing purposes. One of the earliest instances of a city suing on this basis occurred in *Gladstone, Realtors v. Village of Bellwood*.¹⁰⁶ In this case, the Village commenced an action against local realtors under Title VIII of the FHA, alleging that the town suffered economic harm by “having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village”¹⁰⁷ The defendant-realtors moved to dismiss, arguing “that respondents had ‘no actionable claim or standing to sue’ under the statutes relied upon in the complaint”¹⁰⁸ Justice Powell reasoned that a “significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services.”¹⁰⁹ The *Gladstone* majority concluded that the village had alleged facts sufficient to provide Article III standing.¹¹⁰ The Supreme Court and the lower federal courts have repeatedly reinforced the intuition

104. *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1198 (9th Cir. 2004).

105. *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857-STA, 2011 U.S. Dist. LEXIS 48522, at *8 (W.D. Tenn. May 4, 2011).

106. 444 U.S. 91 (1979).

107. *Id.* at 95.

108. *Id.*

109. *Id.* at 110-11; *see also id.* at 115 (“[C]onvincing evidence that the economic value of one’s own home has declined as a result of the conduct of another certainly is sufficient under Art. III to allow standing to contest the legality of that conduct.”).

110. *Id.* at 115.

that economic harm is a cognizable injury-in-fact in a number of cases.¹¹¹ More specifically, conduct producing a drain on the plaintiff-organization's finite financial resources can imbue standing to sue in federal court.¹¹² At least one court of appeals has elected to extend this principle to actions under the FHA.¹¹³

Given the abundant case law on the subject, it is uncontroversial to posit that cities can successfully and easily allege cognizable injuries-in-fact in the form of diminished property tax bases, along with increased expenditures on public welfare programs as a result of mass displacement of minority communities in urban areas. The "fairly traceable" element is where the fundamental and incurable defect in the cities' FHA complaints arises.

D. Injury "Fairly Traceable" to the Defendant's Conduct

111. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (clarifying that "the interest alleged to have been injured 'may reflect aesthetic, conservational, and recreational as well as economic values'" (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* *Fairview Twp. v. EPA*, 773 F.3d 517 (3d Cir. 1985); *Maya v. Centex Corp.*, 658 F.3d 1060, 1069 (9th Cir. 2011) (agreeing with plaintiffs that purchases of homes at inflated prices were "actual and concrete economic injuries"); *Equity Lifestyle Props., Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1189 (9th Cir. 2008) (recognizing previous statements that pecuniary injury creates sufficient basis for standing); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2003) ("[E]conomic . . . harms constitute injury to Sausalito's 'proprietary' interests as a municipal entity."); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) ("Economic injury is clearly a sufficient basis for standing.").

112. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that racial steering practices which impaired an organization's ability to assist low-income home-seekers drained the organization's financial resources, producing cognizable injury-in-fact and giving the organization standing in its own right); *Nat'l Cmty. Reinvestment Coal.*, 573 F. Supp. 2d 70, 75 (D.D.C. 2008) (denying motion to dismiss for lack of standing because "plaintiff's statement [that] they have expended resources on counteracting defendants' policies are sufficient to state an injury in fact caused by defendant's conduct"). In the tort law context, then-Judge Kennedy adopted the position that expenses associated with the provision of police and fire services are "to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry.*, 719 F.2d 322, 323 (9th Cir. 1983). However, no other federal court seems to have assumed this posture toward municipal expenditures since.

113. *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) ("Expenditures to reach out to potential home buyers or renters [injured by discriminatory advertising] . . . are sufficiently tangible to satisfy Article III's injury-in-fact requirement."); *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co.*, 208 F. Supp. 2d 46, 54 (D.D.C. 2002) ("[T]he Fair Housing Group plaintiffs have sufficiently alleged an injury in fact caused by defendant's conduct, [because the] . . . injury lies in their expenditure of scarce resources on identifying and counteracting discrimination.").

However, alleging the infliction of some tangible injury-in-fact is insufficient to successfully allege Article III standing. Plaintiffs must also allege facts that show “a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”¹¹⁴ It is the second element of the constitutional standing analysis that comprises the crux of my analysis. Here, I argue that the district courts which have concluded that Baltimore’s and Memphis’ complaints alleged conduct fairly traceable to the lenders’ conduct fail to apply decades of Supreme Court precedent on this issue. I start with a brief discussion of what the standing inquiry demands from those plaintiffs who were not the direct victims of the defendants’ conduct. Next, I illustrate the structural infirmities in the cities’ complaints by drawing comparisons to the illegal handgun and tobacco litigation of the late twentieth century, along with more recent private actions instituted by borrowers purportedly duped into purchasing residential properties at inflated prices by homebuilders.

E. Harm As an Indirect Result of Defendant’s Conduct

Where the harm to plaintiff resulted as an indirect consequence of the defendant’s conduct, which “does not in itself preclude standing.”¹¹⁵ However, satisfying the “fairly traceable” element of standing may become much more difficult when “the plaintiff is not himself the object of the [defendant’s] action or inaction he challenges.”¹¹⁶ The indirectness of the

114. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

115. *Hope, Inc. v. Cnty. of DuPage*, 738 F.2d 797, 807 (7th Cir. 1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 504 (1975)). It is not uncommon for plaintiffs to maintain actions in federal court despite suffering harms entirely collateral to a more direct victim of the defendant’s actions. *See, e.g., Meese v. Keene*, 481 U.S. 465, 472-77 (1987) (holding that plaintiff has standing to challenge Justice Department’s designation of films as propaganda, given that it would damage his public reputation and make it more difficult to run for office); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-90 (1973) (finding that environmental group had standing to challenge Interstate Commerce Commission over rate increase expected to decrease recycling, which in turn would impact forests and streams enjoyed by plaintiffs).

116. *Lujan*, 504 U.S. at 562; *see also Simon*, 426 U.S. at 45 (recognizing that indirectness of injury makes it more difficult to show that “the asserted injury was the consequence of the defendants’ actions, or that prospective relief will remove the harm”); *Warth*, 422 U.S. at 505 (“[I]ndirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights But it may make it substantially more difficult . . . to establish that, in fact, the asserted injury was the consequence of the defendants’ actions . . .”).

harm does not absolve the plaintiff from alleging “facts establishing that all links in the causal chain are satisfied.”¹¹⁷ Any missing link in the causal chain, or severing of that connection due to some third party’s intervention, will likely result in a finding by the court that the plaintiff is not the proper party to bring suit against the defendant.¹¹⁸

While the “fairly traceable” requirement demands some connection between the plaintiff’s harm and defendant’s conduct, the causal link does not need to be articulated with such scientific precision that the complaint is *Twombly-Iqbal* proof.¹¹⁹ However, to avoid the evisceration of that element and to avert dilution of the standing doctrine that prevents courts from being transformed into vehicles for the promotion of litigants’ value judgments, overly attenuated theories of liability will not survive motions to dismiss for lack of standing. Before I turn to the immediate FHA litigation, I describe in some detail the handgun and tobacco litigation of the late 1990s and early 2000s, to provide context for my argument that cities lack constitutional standing to sue under the FHA.

F. Past Is Prologue: Other State- and City-Sponsored Attempts at Seeking Judicial Remedies to Combat Mass Social Ills

The ongoing foreclosure crisis is not the first urban epidemic that has triggered a flight to the courts. In the late twentieth century, cities were overwhelmed by a deluge of illegal firearms and the inevitable gun violence accompanying it. In response, they sued several prominent gun makers in an attempt to find monetary compensation for the bloodshed enabled by Beretta, Smith & Wesson and others. Similarly, state and local pension funds, staring down the prospect of insolvency as their beneficiaries developed a laundry list of costly-to-treat smoking-related diseases, instituted litigation against Phillip Morris and other purveyors of nicotine products to seek damages for higher medical costs. In both episodes, the federal courts generally dismissed plaintiffs’ claims for lack

117. *Garelick v. Sullivan*, 987 F.2d 913, 919 (2d Cir. 1993).

118. *See id.* (finding a “missing link” in the chain of events causing plaintiffs’ injuries when affirming district court’s dismissal for lack of standing).

119. *Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (explaining that the “fairly traceable” requirement “does not mean that plaintiffs must show to a scientific certainty” that defendant’s behavior “caused the precise harm suffered by the plaintiffs The ‘fairly traceable’ requirement . . . is not equivalent to a requirement of tort causation.”). Admittedly, the “fairly traceable” step of the standing inquiry bears more than a passing resemblance to the concept of proximate causation in tort. Both demand some showing of a substantial causal link between the defendant’s conduct and plaintiff’s harm. But it is important to remain clear that standing is a *jurisdictional* inquiry, where the issue of proximate causation addresses the *merits* of the tort claim.

of standing, due to highly attenuated causal theories. The factual resemblance between the handgun and tobacco litigation and the present FHA actions is imperfect but substantial. Relying on the analytical framework espoused by the courts in those cases, I extend it to the present cases to argue that the cities lack Article III standing to sue under the FHA.

i. Tobacco Litigation

*“When smokers changed to Philip Morris, every case of irritation of nose or throat—due to smoking—either cleared up completely or definitely improved! That is from the findings of distinguished doctors in clinical tests of actual smokers – reported in an authoritative medical journal.”*¹²⁰

In the late 1990s and early 2000s, a cluster of civil RICO actions arrived in the federal courts, targeting the major tobacco companies, particularly Philip Morris.¹²¹ The primary agitators were pension funds and medical providers faced with large and increasing medical outlays due to beneficiaries’ smoking-related illnesses.

The theory of liability typically went as follows: In the 1950s, scientific studies arose, which found an indisputable link between smoking and various health risks.¹²² In response, the defendant tobacco companies embarked on a public relations blitzkrieg to persuade a credulous public that the tobacco industry would research the possible links between smoking and poor health, and disclose the results.¹²³ “Defendants, however, entered into a conspiracy to do just the opposite.”¹²⁴ The tobacco companies purportedly went one step further, and agreed to also “forgo development of safer tobacco products.”¹²⁵ As a result of the tobacco companies’ alleged suppression of the scientific studies, the pension funds

120. *Johnny Calls for Philip Morris*, STANFORD RESEARCH INTO THE IMPACT OF TOBACCO ADVER., http://med.stanford.edu/ohns/tobacco_ads/images/for_your_throat/heres_johnny/large/morris_01.jpg (last visited Nov. 30, 2012).

121. See, e.g., *SEIU Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610 (W.D. Pa. 1999), *aff’d*, 228 F.3d 429 (3d Cir. 2000); *Laborers Local 17*, 191 F.3d; *Or. Laborers-Emp’rs Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *Conn. Pipe Trades Health Fund v. Philip Morris, Inc.*, 153 F. Supp. 2d 101 (D. Conn. 2001); *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219 (W.D. Wash. 1999); *Ark. Carpenters’ Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936 (E.D. Ark. 1999); *Perry v. Am. Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488 (6th Cir. 1999).

122. *Or. Laborers*, 185 F.3d at 961.

123. *Id.*

124. *Id.*

125. *R.I. Laborers*, 99 F. Supp. 2d at 180.

were blocked from receiving accurate information about the true dangers of smoking.¹²⁶ Were the pension funds able to access the scientific studies, so the theory goes, they would have taken action “to reduce smoking rates among their participants. This reduction in smoking rates would have led to a reduction in smoking-related disease among the funds’ participants which would have in turn led to lowering plaintiffs’ expenditures.”¹²⁷ As to damages, the funds and providers alleged they were entitled to “monies spent to reimburse [their] participants for their medical care due to smoking related illnesses.”¹²⁸

Like the mortgage lenders in the municipalities’ now-pending FHA actions, the tobacco companies pounced on the providers’ and pension funds’ derivative theory of liability, pointing to the attenuated causal links between the beneficiaries’ smoking and subsequent uptick in plaintiffs’ medical expenses years later.¹²⁹ And like the current FHA actions, the federal courts were receptive to that argument. By and large, the funds’ and providers’ RICO complaints were dismissed due to proximate causation and/or standing problems.¹³⁰ The federal courts used a three-factor remoteness test for RICO actions from *Holmes v. Security Investor Protection Corp.* to gauge the plaintiffs’ standing:

(1) [W]hether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of plaintiff’s damages attributable to defendant’s wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.¹³¹

126. *Or. Laborers*, 185 F.3d at 962.

127. *Id.*

128. *R.I. Laborers’*, 99 F. Supp. 2d at 186.

129. *See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999) (recognizing defendants’ argument that because “plaintiffs’ alleged injuries . . . flow from the misfortunes visited upon third persons . . . plaintiffs therefore stand at too remote a distance to recover”); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610,612 (W.D. Pa. 1999) (registering defendant’s argument that plaintiff’s “injuries are too remote as a matter of law for them to have standing to sue the Defendants”), *aff’d*, 228 F.3d 429 (3d Cir. 2000).

130. *See Perry v. Am. Tobacco Co.*, 324 F.3d 845, 849 (6th Cir. 2003) (listing cases from eight different circuits to show that “other federal circuit courts . . . uniformly have concluded that such claims must fail because the alleged injuries are too remote”); *R.I. Laborers*, 99 F. Supp. at 182-83 (referencing “at least eleven federal district courts and three circuit courts . . . that concluded that those claims should be dismissed on grounds of proximate cause and/or standing”).

131. *Or. Laborers*, 185 F.3d at 963. Other federal courts followed in the footsteps of *Or. Laborers*, using the same test from *Holmes*. *See SEIU Health & Welfare Fund v. Phillip*

Regarding the first “direct victim” element of the *Holmes* test, the Ninth Circuit found that the smokers, as “more direct victims of the alleged wrongful conduct and who can be counted on to vindicate the injury caused by defendants’ alleged wrongful conduct, weighs heavily in favor of barring plaintiffs’ actions.”¹³² By the plaintiffs’ own theories of liability, the funds’ and hospitals’ claims were “derivative of the injuries suffered by the smoker patients.”¹³³ For the spike in tobacco-related medical costs to impact the providers and pension funds, an injury to smokers must first have occurred before the plaintiffs could incur increased expenses to pay for those smokers’ medical costs.¹³⁴ Even ignoring the secondhand nature of the funds’ injuries and conceding the existence of a sinister tobacco conspiracy, “the agency of the individual smokers in deciding whether, and how frequently, to smoke” was the ultimate determinant of the funds’ ultimate medical expenditures.¹³⁵ In contrast, “there are injured persons, i.e., the smokers, capable and motivated to bring suit, thus ‘promot[ing] the general interest in deterring injurious conduct.’”¹³⁶ The circuit courts seized on this lengthy causal chain to conclude that “[t]here is therefore no direct link between the alleged misconduct of the tobacco companies and

Morris, Inc., 249 F.3d 1068, 1074 (D.C. Cir. 2001) (holding that “harms alleged by the funds and nations are too remote from the defendants’ alleged wrongdoing to provide antitrust or RICO standing”); *Laborers Local 17*, 191 F.3d at 236-37 (applying same test drawn from *Holmes* for standing in RICO actions); *R.I. Laborers*, 99 F. Supp. 2d at 185-87 (using the *Holmes* factors to evaluate a motion to dismiss); *see also* *Ark. Carpenters’ Health & Welfare Fund v. Philip Morris, Inc.*, 75 F. Supp. 2d 936, 942 (E.D. Ark. 1999) (following *Or. Laborers* in applying the three-pronged *Holmes* test for standing in tobacco RICO and antitrust actions).

132. *Or. Laborers*, 185 F.3d at 964. *But see* *Ark. Carpenters*, 75 F. Supp. 2d at 943 (reciting the *Or. Laborers* Court’s use of the *Holmes* test to decide “that the RICO and antitrust claims in the case at bar should be dismissed as well”).

133. *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219, 1223 (W.D. Wash. 1999); *see Laborers Local 17*, 191 F.3d at 239 (explaining that damages “are entirely derivative of the harm suffered by plan participants as a result of using tobacco products,” deciding that the injuries were indirect and “purely contingent on harm to third parties” and noting that the plaintiffs would have to prove “(1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies’ direct fraud would have had on the smokers . . . and (3) other reasons why individual smokers would continue smoking”); *see also* *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69 (1992) (stating that “a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant’s acts was generally said to stand at too remote a distance to recover”); *Allegheny Gen. Hosp.*, 116 F. Supp. 2d at 616 (concluding that “to the extent that the Plaintiffs’ claims are based simply on indirect cost increases from smoking-related injuries, said injuries are not ‘direct’”).

134. *Ass’n of Wash.*, 79 F. Supp. 2d at 1224.

135. *Laborers Local 17*, 191 F.3d at 240.

136. *R.I. Laborers*, 99 F. Supp. at 185.

the claimed damage to plaintiffs.”¹³⁷

The difficulty in estimating the damages caused by the tobacco companies’ alleged conspiracy also proved fatal to the providers’ and funds’ complaints, per the second *Holmes* element. “[C]onsiderable speculation would be involved in identifying the costs that have caused the alleged financial instability of the funds”¹³⁸ As noted in *SEIU*, “it is difficult to know how smokers might have behaved with more complete information”¹³⁹ Even when the plaintiffs offered statistical analysis to quantify the precise harms resulting from the tobacco companies’ purported campaign of deception, “the speculative nature of the claimed damages” remained an obstacle to any finding of standing to maintain a RICO action.¹⁴⁰ The *Laborers Local 17* Court pointedly observed that this species of lawsuit “seems to present precisely the type of large, complicated damage claims that *Holmes* . . . sought to avoid.”¹⁴¹ Judge Janet Arterton, in the District of Connecticut, cited to *Holmes* for the proposition that “the more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff’s damages attributable to the wrongdoing as opposed to other, independent factors.”¹⁴² The high number of separate behavioral decisions independently made by each smoker combined with the prospect of endless counterfactuals about cancer-free union workers necessary to put a dollar figure on the damages claims led most courts to throw up their hands in exasperation, resolving the second *Holmes* element in favor of the tobacco companies.¹⁴³

The secondhand nature of the harms sustained by the pension funds fed into the third element of the *Holmes* inquiry, which also militated against a finding of standing for the funds and providers. The possibility that the smokers themselves could sue the tobacco companies (though not

137. *Ass’n of Wash.*, 79 F. Supp. 2d at 1224 (quoting *Or. Laborers*, 185 F.3d at 964).

138. *SEIU Health & Welfare Fund v. Phillip Morris, Inc.*, 249 F.3d 1068, 1074 (D.C. Cir. 2001).

139. *Id.*

140. *Id.*

141. *Laborers Local 17*, 191 F.3d at 240.

142. *Conn. Pipe Trades Health Fund v. Philip Morris, Inc.*, 153 F. Supp. 2d 101, 105 (D. Conn. 2001) (citing *Holmes*, 503 U.S. at 269-70).

143. *See R.I. Laborers’ Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 178 (D.R.I. 2000) (noting the difficulty of predicting damages with any specificity because “ascertaining damages would require layers of hypothetical models speculating as to the actions of the Fund, the smokers, and the interplay between the actions of both”); *Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 79 F. Supp. 2d 1219, 1224 (W.D. Wash. 1999) (considering “how many smokers would have stopped smoking with more information, how many would have smoked less dangerous products, how much healthier these hypothetical reformed smokers would have been, and how much less unreimbursed care and services would have been incurred by the plaintiffs”).

under state or federal RICO statutes) counseled against finding that the pension funds had standing, because “the courts would be forced ‘to adopt complicated rules apportioning damages among plaintiffs at different levels of injury from the violative acts, to obviate the risk of multiple recoveries.’”¹⁴⁴ Individual plaintiffs targeting the tobacco companies with civil suits sought “the same recovery as the Fund[s], i.e., their medical expenses, among their other claims for damages.”¹⁴⁵ The *Laborers Local 17* Court noted that under New York law, “the smokers are prohibited from recovering medical costs paid to them by insurers.”¹⁴⁶ Nonetheless, the potential for litigious employers to also go after the tobacco companies, combined with the headaches produced by federal ERISA law and the single satisfaction rule, lead that court to find that *Holmes*’ third prong pointed toward granting the companies’ motions to dismiss. Similarly, the *Rhode Island Laborers’ Health & Welfare Fund* Court perceived the risk of double recoveries to be too great. Rhode Island’s collateral source rule meant that a plaintiff’s damages could not be reduced to the extent plaintiffs had received prior reimbursement for medical expenses.¹⁴⁷ Combined with the risk of employer-instituted litigation to retrieve increased health insurance contributions, that court also held that *Holmes* commanded the dismissal of the suit.¹⁴⁸

At least two circuit courts in the tobacco litigation also relied on a six-part test articulated in *Associated General Contractors, Inc. v. Cal. State Council of Carpenters*, to assess the funds’ and providers’ antitrust claims:¹⁴⁹

- (1) [T]he casual connection between defendant’s wrongdoing and plaintiff’s harm;
- (2) the specific intent of defendant to harm plaintiff;
- (3) the nature of plaintiff’s alleged injury (and whether

144. *Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 966 (9th Cir. 1999) (quoting *Holmes*, 503 U.S. at 269); see also *SEIU*, 249 F.3d at 1075 (determining that plaintiff failed the “risk of double recovery” element of the *Holmes* test because “individual smokers may seek recoveries for the same alleged conduct under state law theories and . . . other similar potential plaintiffs might also pursue similar antitrust and RICO claims against the tobacco industry, double recovery could occur”).

145. *R.I. Laborers*, 99 F. Supp. 2d at 186.

146. *Laborers Local 17*, 191 F.3d at 240.

147. *R.I. Laborers*, 99 F. Supp. 2d at 186.

148. *Id.* at 190.

149. Like many of the other cases referenced in this Comment, *Associated General*’s test blurs the line between the tort element of proximate causation and constitutional standing. See *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 438 (3d Cir. 2000) (noting that *Associated General* “outlined six factors for determining proximate cause and standing”); see also *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 929 (3d Cir. 1999) (summarizing application of *Associated General* six-part test to determine that funds lack standing to pursue antitrust claims against tobacco companies).

it relates to the purposes of the antitrust laws, i.e., ensuring competition within economic markets); (4) “the directness or indirectness of the asserted injury”; (5) whether the “damages claim is . . . highly speculative”; and (6) “keeping the scope of complex antitrust trials within judicially manageable limits,” i.e., “avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.”¹⁵⁰

Although this test has more parts than the one in *Holmes*, the inquiry is essentially the same, albeit dealing with an antitrust action. Within the context of the *Associated General* test, the *Allegheny* Court came out the same way, despite resolving several of the elements of the antitrust test in favor of plaintiff-hospitals. The Third Circuit conceded that the alleged conspiracy to mask the health risks of smoking would form a but-for causal connection between the tobacco companies and the medical providers’ injuries, that the tobacco companies’ conspiracy was borne out of a desire to “shift the costs of the nonpaying patients’ tobacco-related illnesses to the Hospitals,” and that the hospitals’ claims were of the general type intended to be remedied by federal antitrust laws.¹⁵¹ Furthermore, the court, in affirming the district court on its determination that “the Hospitals seem like the appropriate party,” acknowledged that “nonpaying patients in the present case, while more directly injured, may be unwilling to sue the Tobacco Companies for antitrust violations.”¹⁵²

Yet like those courts, which opted to apply the *Holmes* test, the plaintiff-hospitals stumbled over the “directness of injury” hurdle. The Third Circuit noted that the hospitals’ injuries were entirely derivative of nonpaying patients’ injuries.¹⁵³ As a result, those harms were “too remotely connected in the causal chain from wrongdoing on the part of Tobacco Companies; thus, the Hospitals’ injuries do not satisfy the directness of

150. *Allegheny*, 228 F.3d at 438 (quoting *Steamfitters*, 171 F.3d at 924).

151. *Id.* at 439; *see also Steamfitters*, 171 F.3d at 929-30 (noting a genuine causal connection “between the conduct of the tobacco companies and the injury suffered by the plaintiff Funds” and finding that plaintiffs successfully alleged that defendants’ conspiracy specifically targeted them and admitting that plaintiffs’ “inability to obtain and use information on the dangers of smoking or on smoking-cessation methods—may be of the type that the antitrust laws are intended to prevent”).

152. *Allegheny*, 228 F.3d at 440; *see also Steamfitters*, 171 F.3d at 930 (recognizing unlikelihood that smokers would bring their own antitrust claims).

153. *Allegheny*, 228 F.3d at 440; *see also Steamfitters*, 171 F.3d at 930 (stating that the “sheer number of links in the chain of causation that connect the defendants’ suppression of information on the dangers of their products . . . to the Funds’ increased expenditures are greater than in any case we can find in which this court or the Supreme Court has found antitrust standing”).

injury factor.”¹⁵⁴ The court found that the high number of links in the causal chain created “vast uncertainty about the Hospitals’ damages.”¹⁵⁵ The *Allegheny* Court, skeptical of the ability of statistical modeling to estimate damages, determined that any damages would be highly speculative.¹⁵⁶

Ultimately, the *Associated General* test incorporated a number of factors that militated in favor of finding that the plaintiff-hospitals had standing to sue under the antitrust laws. However, those factors were “outweighed . . . by the sheer remoteness of the Hospitals’ injuries from the alleged conspiracy,” which in turn manifested itself in “the highly speculative nature of the Hospitals’ damages claims . . . [and] in the directness of the Hospitals’ injuries.”¹⁵⁷

ii. Handgun Litigation

*“Introducing the Beretta Model 86, the only .380 automatic pistol with a tip-up barrel for easy and rapid loading If you’re considering a handgun for personal protection, here’s one that offers it all.”*¹⁵⁸

Like the tobacco companies, handgun makers were also caught in the torrential downpour of state and local government-sponsored litigation in the late twentieth and early twenty-first century. From 2000 to 2003, several municipalities filed civil complaints in state and federal court against various gun makers, relying on state product liability statutes and common law claims of public nuisance.¹⁵⁹ Unlike the tobacco litigation,

154. *Allegheny*, 228 F.3d at 441; *see also Steamfitters* 171 F.3d at 925 (doubting “whether there exists a causal connection (proximate or otherwise) between any *antitrust* wrongdoing on the part of the defendants and the Funds’ alleged injuries of increased health care expenditures”).

155. *Allegheny*, 228 F.3d at 441; *see also Steamfitters*, 171 F.3d at 929-30 (noting that calculating damages through statistical models can be more difficult than proponents suggest).

156. *Allegheny*, 228 F.3d at 433; *see also Steamfitters*, 171 F.3d at 929 (“It is apparent why the Funds argue they can demonstrate all of this through aggregation and statistical modeling: it would be impossible for them to do so otherwise.”).

157. *Allegheny*, 228 F.3d at 443.

158. *Women and Guns*, VIRGINIA COMMONWEALTH UNIVERSITY, <http://www.womenandguns.vcu.edu> (last visited Dec. 6, 2012).

159. *See, e.g.*, Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D.N.J. 2000); White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000); Ganim v. Smith & Wesson Corp., 780 A.2d 98 (Conn. 2001); City of Boston v. Smith & Wesson Corp., No. 1999-02590, 2000 Mass. Super. Ct. LEXIS 352 (July 13, 2000); James v. Arms Tech., Inc., 820 A.2d 27 (N.J. Super. Ct. App. Div. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136 (Ohio 2002).

which culminated in an ugly wave of dismissals for lack of standing, several of the cities' lawsuits against the handgun manufacturers survived the motion to dismiss stage.¹⁶⁰

In this batch of cases, the cities typically alleged that the gun makers "created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market."¹⁶¹ It was the gun makers' alleged knowing support for the illegal secondary firearms market that created the nuisance causing the municipalities' injuries, *not* the use of the guns themselves.¹⁶² On the product liability side, the cities also alleged negligently defective design of the handguns, failure to include adequate safety warnings or features that would inhibit unlawful access or transfer by unauthorized handgun users.¹⁶³ Like the tobacco companies, the gun makers focused on the cities' highly attenuated theory of liability to attack their standing to pursue these state law claims.

Importantly for the purposes of this Comment, the municipalities filed direct suits—not on behalf of resident taxpayers, but in their own capacities as private litigants.¹⁶⁴ The cities' claims were "not based on the rights of others, but rather the rights of the City to sue for the harm and economic losses it ha[d] incurred, as well as their claims of unjust enrichment and

160. *Compare Camden Cnty.*, 123 F. Supp. at 245 (granting 12(b)(6) motion to dismiss for lack of standing), *and* *District of Columbia v. Beretta, U.S.A. Corp.*, 847 A.2d 1127 (D.C. 2004) (affirming trial court's decision that plaintiff has not stated a public nuisance claim), *and* *In re Firearm Cases*, 24 Cal. Rptr. 3d 659, 663 (Ct. App. 2005) (affirming grant of summary judgment for defendant gunmakers due to plaintiffs' failure to establish causal connection between unfair practices and harm), *and* *Ganim*, 780 A.2d 98 (affirming dismissal for lack of standing), *and* *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1148 (Ill. 2004) (reversing appellate court and dismissing city's public nuisance complaint), *and* *New York v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 194-195 (N.Y. App. Div. 2003) (affirming motion court's dismissal of state's complaint due to proximate causation issues), *with* *White*, 97 F. Supp. 2d 816 (denying gun makers' 12(b)(1) motion to dismiss), *and* *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1249 (Ind. 2004) (holding that city may proceed with its public nuisance claim), *and* *City of Boston*, 2000 Mass. Super. LEXIS 352 (denying motion to dismiss for lack of standing), *and* *James*, 820 A.2d 27 (affirming denial of motion to dismiss); *and* *City of Cincinnati*, 768 N.E.2d 1136 (reversing and finding that city had standing to pursue its product liability and nuisance claims).

161. *City of Cincinnati*, 768 N.E.2d at 1143; *see also* *City of Boston*, 2000 Mass. Super. LEXIS 352 at *7-8 (offering additional arguments in the handguns line of cases).

162. *Camden Cnty.*, 123 F. Supp. 2d at 250-52 (summarizing plaintiff's claims that "defendants allegedly produce, market and distribute substantially more handguns than they reasonably expect to sell to law-abiding purchasers").

163. *Ganim*, 780 A.2d at 108; *City of Boston*, 2000 Mass. Super. LEXIS 352 at *9-10; *James*, 820 A.2d at 34; *City of Cincinnati*, 768 N.E.2d at 1145.

164. *Ganim*, 780 A.2d at 117-18; *James*, 820 A.2d at 45; *White*, 97 F. Supp. 2d at 825.

nuisance abatement.”¹⁶⁵

Addressing the threshold jurisdictional issue of standing, the courts generally concluded that the fiscal costs of weathering the violent crime induced by an influx of illegal handguns constituted an injury-in-fact. The *Cincinnati* court separated the economic losses sustained by the city into two parts: the increased expenses of remedying violent crime and reduced tax receipts arising from lowered property values.¹⁶⁶ Both the *Cincinnati* and *Camden* courts took care to note that the alleged injuries were distinct from those of city taxpayers.¹⁶⁷ In particular, “the County’s alleged injury is distinguishable from that of its citizens,” because “[t]he alleged costs of combating illegal gun possession do not flow solely from harm visited upon a third party; they are alleged to exist as a result of separate and direct harm defendants have visited upon the County itself.”¹⁶⁸ Thus, *Cincinnati* and *Camden* County successfully alleged a cognizable injury-in-fact, surmounting the first hurdle in the standing inquiry.¹⁶⁹

The *Cincinnati* Court applied the *Holmes* test to conclude that the City itself had standing to pursue its claims against the gun makers. Ignoring any analysis that actually focused on whether the City’s fiscal damages were “fairly traceable” to the defendant-gun makers’ conduct, the Ohio Supreme Court examined only the difficulty of proving damages, the probability of double recovery by both the City and some other hypothetical plaintiff and whether requiring more directly injured victims to bring suit would better serve the interest of deterring gun makers’ harmful conduct. Notably, this logic is devoid of any scrutiny of *Cincinnati*’s theory of liability. Nothing in the majority opinion speaks to whether the gun makers’ conduct could fairly be seen to have resulted in the City’s harms. Chief Justice Moyer in dissent did not overlook this gaping hole in the majority’s analysis. Relying on *Ganim*, he recited the numerous links in the causal chain required to connect the gun makers’ conduct and *Cincinnati*’s harms:

[M]anufacturers sell handguns to distributors or wholesalers
Next, retailers sell the guns legally either to authorized buyers,
i.e., legitimate consumers, or to unauthorized buyers Next,
the illegally acquired guns enter a black market, eventually
finding their way to unauthorized users. At this point, either
authorized buyers misuse the handguns by not taking proper

165. *White*, 97 F. Supp. 2d at 825. *E.g.*, *Camden Cnty.*, 123 F. Supp. 2d at 256 (suing to recover “the institutional costs of combating the flow of illegal handguns into the County”).

166. *City of Cincinnati*, 768 N.E.2d at 1148.

167. *Id.*

168. *Camden Cnty.*, 123 F. Supp. 2d at 256.

169. *Id.*

storage or other unwarned or uninstructed precautions, or unauthorized buyers misuse the guns to commit crimes or other harmful acts. The city then incurs expenses for various municipal necessities, including crime investigation, emergency and other medical services for the injured, or similar expenses. Finally, the city may suffer financial consequences, including increased costs for municipal services . . . [and] reduced property values . . .¹⁷⁰

Drawing on comparisons between the present appeal and *Ganim*, along with the ill-fated tobacco litigation, the dissent found “the number of links in this factual chain was in and of itself strongly suggestive of remoteness.”¹⁷¹ Chief Justice Moyer was careful to separate the question of whether the city could prove that it sustained some cognizable injury from whether the city could show “that those damages are attributable to the wrongdoing of the gun manufacturers *as opposed to other, independent factors*.”¹⁷² Similarly, the *White* Court reduced the “fairly traceable” component to a paragraph. While concluding that the City of Cleveland alleged “a causal connection between the Plaintiffs’ injuries and the conduct complained of,” it declined to clarify its ruling that the City had pleaded sufficient facts to satisfy the second component of the standing inquiry.¹⁷³ Despite acknowledging that a finding of standing would be weakened considerably, were the City’s injuries “the result of the independent action of some third party,” the district court allowed the suit to proceed as having successfully invoked federal jurisdiction.¹⁷⁴ Likewise, the *Arms Technology* Court reduced the standing test to a one-stage inquiry into the nature of the injury suffered by the plaintiff.¹⁷⁵ The bulk of the analysis concentrated on the merits of the City of Newark’s tort action and the issue of proximate causation. The New Jersey court extended the application of *Associated General Contractor*’s remoteness analysis in the antitrust context to the immediate case. It acknowledged “the fact that there may be . . . multiple links between defendants’ conduct and the ultimate harm suffered by the City”¹⁷⁶ Nonetheless, the court opted to “fold into a single link” the numerous steps in the City’s theory of

170. *City of Cincinnati*, 768 N.E.2d at 1152-53 (Moyer, C.J., dissenting) (quoting *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 98 (Conn. 2001)).

171. *Id.* at 1153 (quoting *Ganim*, 780 A.2d at 98).

172. *Id.* at 1154 (emphasis added) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992)).

173. *White v. Smith & Wesson Corp.*, 97 F. Supp. 2d 816, 825 (N.D. Ohio 2000).

174. *Id.*

175. *James v. Arms Tech. Inc.*, 820 A.2d 27, 44-46 (N.J. Sup. Ct. App. Div. 2003).

176. *Id.* at 39.

liability.¹⁷⁷ Turning to *Holmes*, the court quickly determined that the harms suffered by the City as a consequence of any alleged flooding of local markets with cheap handguns were not too derivative of harms suffered by victimized taxpayers.¹⁷⁸ It concluded by distinguishing *Holmes* from the case before it, stating that policy reasons justified allowing the City to reach discovery in order to establish that its damages were attributable to the defendants.¹⁷⁹

For those cities whose complaints did not survive the gun makers' motions to dismiss, the "fairly traceable" element of standing proved to be the plaintiffs' downfall. Drawing on the six-part test for proximate causation in *Associated General Contractors*, the *Camden County* Court determined that of the six *Associated General* factors for standing in an antitrust suit, only the "causal connection" and "general aims advanced" factors were satisfied.¹⁸⁰ While allegations of an extremely attenuated causal connection linked the gun companies' conduct to the County's harms, and allowing the County to maintain its tort action would have advanced "the general aims of New Jersey tort law," the "sheer remoteness" of the alleged injuries overcame all else.¹⁸¹ The highly attenuated causal theory combined with the highly speculative nature of damages to create a jurist's nightmare in producing a dollar figure for a damages award and apportioning it among multiple defendants.¹⁸²

iii. Private Homeowners' Actions Against Homebuilders

In 2008, seven separate class actions hit the Central District of California, along with two class actions filed in the District of South Carolina and Western District of North Carolina.¹⁸³ Plaintiffs' theories of

177. *Id.*

178. *Id.* at 53.

179. *Id.* at 42-43.

180. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 264 (D.N.J. 2000).

181. *Id.*

182. *Id.*

183. *Dodaro v. Std. Pac. Corp.*, No. EDCV 09-01666-VAP (OPx), 2010 U.S. Dist. LEXIS (C.D. Cal. Apr. 1, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Kelly v. Beazer Homes USA, Inc.*, No. EDCV 09-01674 VAP(DTBx), 2010 U.S. Dist. LEXIS (C.D. Cal. Mar. 31, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Lumalu v. M.D.C. Holdings, Inc.*, No. EDCV 09-01669 VAP(OPx), 2010 U.S. Dist. LEXIS 44797 (C.D. Cal. Mar. 31, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Maya v. Centex Corp.*, No. EDCV 09-01671 VAP(OPx), 2010 U.S. Dist. LEXIS (C.D. Ca. Mar. 31, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Nielson v. Shea Homes, Inc.*, No. EDCV 09-01673 VAP(DTBx), 2010 U.S. Dist. LEXIS (C.D. Ca. Mar. 31, 2010), *overruled by* *Maya v.*

liability in each case were largely identical: Defendant homebuilders duped them into buying residential properties in ostensibly stable and family-oriented communities. The homebuilders represented to the plaintiff-buyers that they were selling homes to buyers who had the financial means to afford the houses and who would be good neighbors.¹⁸⁴ Meanwhile, the defendants marketed unsold houses in the same communities to unqualified and high-foreclosure-risk buyers and to those who possessed no intent of occupying the properties to increase sales and profits per housing unit sold.¹⁸⁵ Defendants purportedly were aware that this could have significant negative consequences on the overall desirability of living and owning properties in these residential neighborhoods.¹⁸⁶ The harms alleged were twofold. First, plaintiffs claimed that they bought into the housing market at an inflated price, thanks to defendants' machinations to artificially boost the local real estate market and willful failure to disclose the true nature of the high-risk buyers.¹⁸⁷ Second, once the housing bubble deflated and unqualified buyers in the neighborhood defaulted en masse, subsequent foreclosure proceedings wiped out the accrued value in plaintiffs' residences and sparked development of suburban blight in plaintiffs' neighborhoods.¹⁸⁸

In granting the homebuilder's 12(b)(1) motion, the *Beazer* Court pointed to the innumerable intervening factors that could potentially have driven the jump in foreclosures that reduced the fair market value of plaintiffs' real estate holdings:

[I]t does not necessarily follow from this allegation that these third party home buyers subsequently defaulted on their mortgages due to the Defendants' conduct rather than those buyers having failed to make their mortgage payments as a result of other factors, such as unemployment, health problems, a general weakening in the economy, or other financial conditions. In addition to the failure of these mortgagors to make their

Centex Corp., 658 F.3d 1060 (9th Cir. 2011); *Oneto v. Ryland Grp., Inc.* No. EDCV 09-01670 VAP(DTBx), 2010 U.S. Dist. LEXIS 44792 (C.D. Ca. Mar. 31, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011); *Stephens v. Lennar Corp.*, No. EDCV 09-01668 VAP (DTBx), 2010 U.S. Dist. LEXIS 32111 (C.D. Ca. Mar. 31, 2010), *overruled by* *Maya v. Centex Corp.*, 658 F.3d 1060 (9th Cir. 2011). *See also* *Tingley v. Beazer Homes Corp.*, No. 3:07cv176, 2008 U.S. Dist. LEXIS 34303 (W.D.N.C. Apr. 25, 2008) (dismissing class action brought against homebuilders); *Green v. Beazer Homes Corp.*, No. 3:07-109-CMC, 2007 U.S. Dist. LEXIS 66887 (D.S.C., Sept. 10, 2007) (dismissing a class action brought against homebuilders).

184. *Dodaro*, 2010 U.S. Dist. LEXIS 32136 at *4.

185. *Id.* at *4-5.

186. *Id.* at *5.

187. *Id.* at *6.

188. *Id.*

payments, there is the issue of the intervening decisions by the mortgage assignees to foreclose the defaulted mortgages rather than to restructure the loans, which may have been done for reasons totally apart from the alleged fraud. Further, it is quite speculative that the depreciation in value of the Plaintiffs' property was caused by the foreclosures of these third party properties rather than as a result of a myriad of other factors, such as rising unemployment in the region, changes in the housing market, or other economic conditions. It is just as plausible that any of these other factors caused any reduction in the Plaintiffs' property value.¹⁸⁹

Judge Virginia Phillips, granting the homebuilders' 12(b)(1) motions with respect to all seven class actions in the Central District, drew on *Beazer's* rationale to determine that the beleaguered homeowners' pleadings satisfied neither the injury-in-fact nor the fairly-traceable prongs of the standing test. One of the incurable flaws in their complaints, she reasoned, was that "[p]laintiff's theory is premised upon a chain of causation that is affected by general economic factors," including "collapse of financial institutions, changes in the credit market, and rising unemployment, which by themselves or in combination affect the housing market."¹⁹⁰ Each of these factors comprised "independent forces and individual decisions of 'some third part[ies] not before the court.'"¹⁹¹ Similarly, the *Green* Court dismissed plaintiff's RICO claims on a 12(b)(1) motion due to "difficulties as to the second (causation) and third (redressability) prongs."¹⁹² Noting that "the alleged wrongs relate to actions directed toward other homeowners or their lenders," the court found that, the plaintiff, having "at most, suffered collateral injury as a result of a generalized market impact of wrongs directed toward others" was insufficient to confer Article III standing.¹⁹³

On appeal, the Ninth Circuit reversed the Central District of California

189. *Tingley v. Beazer Homes Corp.*, No. 3:07cv176, 2008 U.S. Dist. LEXIS 34303, at *11-12 (W.D.N.C. Apr. 25, 2008).

190. *Dodaro*, 2010 U.S. Dist. LEXIS 32136, at *27-28.

191. *Id.* (alteration in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

192. *Green v. Beazer Homes Corp.*, No. 3:07-1098-CMC, 2007 U.S. Dist. LEXIS 66887, at *7 (D.S.C. Sept. 10, 2007).

193. *Id.* Concededly, *Beazer's* analysis was performed in the context of *Twombly/Iqbal* "plausibility" scrutiny for a 12(b)(6) motion, rather than a less-stringent mode of analysis. As I argued earlier, demanding a certain level of plausibility or factual particularity from the plaintiff to survive a 12(b)(1) motion gets the standard of review for Article III standing wrong. However, there remains an important kernel of truth in the district court's analysis: Far too many external forces operate upon the housing market at the same time for a court to competently parse the direction and magnitude of the impact on house prices.

with respect to the grant of the 12(b)(1) motions for the seven class actions, choosing to find that although “plaintiffs have not established how defendants actions’ *necessarily* result in foreclosure, nor do plaintiffs’ complaints allege that the decreased value is caused by the *risk* posed by their neighbors (even absent foreclosures),” they deserved permission to amend their complaint to cure the causal defects blocking a proper finding of Article III standing.¹⁹⁴ The Ninth Circuit remanded to the district court, in order to allow the plaintiffs to include expert testimony that could establish a sufficient link between the homebuilders’ actions and decreased home value. This constituted an explicit recognition of the fundamental defect in the private homeowners’ theory of liability.

IV. WHY CITIES LACK ARTICLE III STANDING TO SUE UNDER THE FHA

The municipality-sponsored FHA litigation that is the impetus for this Comment should be uniformly dismissed for lack of subject-matter jurisdiction. First, the judicially formulated tests for statutory standing in the antitrust and RICO contexts should be imported into the Article III “fairly traceable” test when facing FHA actions alleging economic losses. Those multipronged inquiries were formed to determine whether the plaintiff, suffering pecuniary harms arising from a series of interconnected events, is the proper party to commence litigation. Although this would necessitate an insertion of common law from antitrust and RICO litigation into the FHA context, it is appropriate here, given the daisy chain theory of liability relied on by the cities in their claims arising from wholly pecuniary harms inflicted by the defendant-lenders. The courts resolving the handgun and tobacco litigation opted to apply the antitrust and RICO causation tests in their own analyses for proximate causation and constitutional standing.¹⁹⁵ The application of those tests militates toward a finding that

194. *Maya v. Centex Corp.*, 658 F.3d 1060, 1072 (9th Cir. 2011).

195. *See, e.g., Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 121 (Conn. 2001) (applying the standing analysis used by Second Circuit in *Laborers Local 17* and *Holmes*); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *17 (Mass. July 13, 2000) (explaining and applying the *Holmes* direct injury test); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 n.8 (D.N.J. 2000) (describing the *Associated General* test as not appropriate in all causation analyses but “useful in this particular case alleging economic harm due to the actions or omissions of remote actors in the marketplace”); *see also Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999) (applying the *Associated General* six-factor test to grant a motion to dismiss). The *Ameriquest* Court took note of the *City of Cincinnati* Court’s use of *Holmes* in the firearms litigation context and extended it to the proximate causation analysis at issue in Cleveland’s public nuisance claim against

the cities have failed to allege injuries “fairly traceable” to the defendants’ conduct. Thus, Baltimore and Memphis should be found to have failed to properly allege constitutional standing, by virtue of the dubious causal theory intended to satisfy the second element of this test for subject-matter jurisdiction.

I begin with the *Holmes* test, and a reemphasis of its three prongs: (1) whether more direct victims of the defendant’s wrongful conduct can be counted on to act as private attorneys general, (2) whether estimating plaintiff’s damages will be a strenuous affair and (3) whether complicated apportionment of damages will be in order to obviate the risk of multiple recoveries.¹⁹⁶

To start, there are thousands of more direct victims of the lenders’ reverse redlining—the foreclosed-upon homeowners themselves.¹⁹⁷ A private class action under the FHA would encompass a theory of liability significantly less attenuated than the one currently advanced by Baltimore and Memphis: By targeting urban minority borrowers with subprime products on the basis of race, the borrowers were harmed by paying significantly more than they would have otherwise, had they received the prime loans to which they may have been entitled. Additionally, those homeowners that defaulted on their mortgages due to the onerous terms and conditions of those subprime loans and were subsequently foreclosed upon can allege that but-for the reverse redlining to which they were subjected, they would have neither paid significantly more for their homes, nor suffered the emotional and financial trauma of foreclosure and eviction. This theory of liability implicates much fewer of the innumerable economic variables that Baltimore and Memphis’ complaints do.¹⁹⁸ Separately, with regard to directness of injury, Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.* made the following observation: “The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a

subprime mortgage securitizers.

196. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269-70 (1992).

197. *Cf. Tingley v. Beazer Homes Corp.*, No. 3:07cv176, 2008 U.S. Dist. LEXIS 34303, at *11 (W.D.N.C. Apr. 25, 2008) (stating that “the persons who were deceived by the wrongful acts of the Defendants were not the Plaintiffs or proposed class members, but rather the purchasers whose loan applications were falsified”).

198. *See, e.g., Barrett v. H&R Block, Inc.*, No. 08-10157-RWZ, 2011 U.S. Dist. LEXIS 30713 (D. Mass. Mar. 21, 2011) (certifying class of African American borrowers suing H&R Block for lending and fair housing violations); *Guerra v. GMAC LLC*, No. 2:08-cv-01297-LDD, 2009 U.S. Dist. LEXIS 13776 (E.D. Pa. Feb. 20, 2009) (denying GMAC’s motion to dismiss proposed class action alleging fair housing violations); *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008) (denying Countrywide’s 12(b)(6) motion to dismiss suit alleging racially motivated lending practices).

defendant so it holds him liable if proximately the plaintiff has suffered a loss.¹⁹⁹ This restrictive rule remains good law, with circuit courts referencing and applying it in various opinions within the RICO context.²⁰⁰ The wholly derivative nature of the municipalities' injuries pushes toward the conclusion that their harms, while real, fall into that category of indirect injuries, which push toward a finding that standing is lacking.

As stated by the *Baltimore*, *Birmingham* and *Cleveland* courts, innumerable causal factors stand between the loan officer's initial decision to target an African American borrower with a subprime loan, and the city comptroller's final report of significantly lowered property tax receipts.²⁰¹ First, a foreclosure on the residential property must occur. This requires the borrower to default, a decision that could occur for any number of reasons independent of Wells Fargo's reverse redlining, including illness in the household, a layoff or the borrower's voluntary default due to significant negative equity in the property.²⁰² Next, the bank must elect to foreclose on the property.²⁰³ While that in and of itself may be sufficient to

199. *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918).

200. *E.g.*, *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (ruling that city failed to allege RICO violation because defendant's purported mail and wire fraud scheme was not direct cause of city's lost tax revenue); *Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir. 1994) (citing *Holmes* for proposition that a RICO action to recover from derivative injuries is barred by remoteness principles); *Adams-Lundy v. Ass'n of Prof'l Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988) (dismissing plaintiffs' RICO claims for failure to allege anything but indirect injuries); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987) (dismissing derivative company stockholder's derivative RICO claim); *Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985) ("Justice Holmes's 'tendency'—that the indirectly injured party may not sue—is equally well-established."); *Grip-Pak, Inc. v. Ill. Tool Works, Inc.*, 694 F.2d 466, 473-74 (7th Cir. 1982) (discussing tort principle of remoteness in the context of antitrust law); *Nat'l Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339, 343 (6th Cir. 1978) (referencing *Darnell-Taenzer* in negligent tort context); *Drug Mart Pharmacy v. Am. Home Prods.*, 296 F. Supp. 2d 423, 425 (E.D.N.Y. 2003) (referencing *Holmes* in granting motion for partial summary judgment); *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, No. 92 C 2379, 1993 U.S. Dist. LEXIS 6141, at *7 (N.D. Ill. May 10, 1993) (stating that a plaintiff who complains of injury derivative of third person's harm suffered by defendant "generally stands at too remote a distance to recover"); *Milwaukee v. Universal Mortg. Corp.*, 692 F. Supp. 992 (E.D. Wis. 1988) (dismissing state RICO complaints because city did not suffer sufficiently direct injury at hands of mortgage companies).

201. *E.g.*, *City of Birmingham v. Citigroup, Inc.*, No. CV-09-BE-467-S, 2009 U.S. Dist. LEXIS 123123 at *12 (N.D. Ala. Aug. 19, 2009) (stating that "a series of speculative inferences must be drawn to connect the injuries asserted with the alleged wrongful conduct").

202. *See Tingley*, 2008 U.S. Dist. LEXIS 34303 at *11-12 (noting that borrowers could have defaulted on their mortgages due to "unemployment, health problems, a general weakening in the economy, or other financial conditions").

203. *Id.* at *12 (emphasizing that a bank must make a conscious decision to foreclose on the property, rather than attempt to restructure the loan).

force prices downward on that property and surrounding properties, the effect of reverse redlining on real estate values is inseparable from the other economic forces acting simultaneously on local real estate markets. During the years in which Wells Fargo engaged in reverse redlining, a financial maelstrom swept the country. A financial crisis triggered broader macroeconomic declines that worked to push house prices down across the country. The spillover into the labor market impacted household purchasing power, further crimping aggregate demand for real estate. The grinding, decades-long deindustrialization of major American cities, including Baltimore, did nothing to slow the free fall of real estate values. This is to say nothing of the existing inner city decay that already wracked these metropolitan areas, pushing more and more Americans into poverty. With this many forces working to lower house prices, it becomes impossible to say with any degree of certainty that a lender's alleged reverse redlining was even a partial contributor to the municipalities' woes.²⁰⁴

Yet even once the last homeowner has been evicted and the "For Sale" signs have been planted in the front yard, the banks were still not responsible for the criminal actors who moved to exploit the new dead zones that arose in the wake of the U.S. housing bubble. Squatters, of their own volition, chose to move into properties. The drug dealers were the ones who capitalized on abandoned properties to erect new open-air drug markets.²⁰⁵ These are yet more links and independent actors in the causal chain that produced the fiscal harms sued upon by Baltimore and Memphis.²⁰⁶ By itself, the sheer indirectness of the cities' injuries should suffice to support a finding that they lack the standing to pursue FHA claims against the lenders under the common law tests for antitrust and

204. See *Mayor of Baltimore v. Wells Fargo Bank, N.A.*, 677 F. Supp. 2d 847, 850 (D. Md. 2009) (noting complaint's implausibility when considered "against the background of other factors leading to the deterioration of the inner city, such as extensive unemployment, lack of educational opportunity and choice, irresponsible parenting, disrespect for the law, widespread drug use, and violence"); see also *Kaing v. Pulte Homes, Inc.*, No. 09-5057 SC, 2010 U.S. Dist. LEXIS 21320, at *17-18 (N.D. Cal. Feb. 18, 2010) ("Plaintiff's theory . . . depends upon a chain of causation that is dependent upon many factors, 'such as unemployment, health problems, a general weakening economy, or other financial conditions,'" and that "[a]ny injury suffered by Plaintiff . . . necessarily depends upon a causal chain that includes numerous individual decisions of 'some third part[ies] not before the court.'") (alteration in original) (quoting *Tingley*, 2008 U.S. Dist. LEXIS 34303 at *11-12, and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

205. See *City of Birmingham*, 2009 U.S. Dist. LEXIS 123123, at *13 ("The loss of tax revenue from property taxes and the increase in spending, like the depreciation in home values, could have been caused by any number of factors having nothing to do with the Defendants' alleged 'reverse redlining.'").

206. See *id.*

RICO standing. The similarities between the plaintiffs' causal theory in these FHA cases and those in the firearm and tobacco litigation are simply too great to ignore.²⁰⁷ A district court would be well within established standing law to grant lenders' 12(b)(1) motions, based on the sheer indirectness of the cities' theories of liability. However, for the sake of completeness, I engage the rest of the *Holmes* and *Associated General* tests.

As for the second element of the *Holmes* test, the estimated damages sustained by Baltimore and Memphis are speculative at best and unknowable at worst. The municipalities would have to demonstrate: (1) how many minority borrowers would have taken out non-subprime loans (or not taken out home loans at all) or chosen to refinance existing mortgages, (2) whether those homeowners would still be in their homes in the face of an array of wildly-fluctuating macroeconomic variables during a global economic meltdown, and (3) whether the lenders' alleged reverse redlining practices were the primary culprits behind the foreclosures.²⁰⁸ The cities would have to estimate some realistic baseline scenario consisting of what property tax receipts and municipal expenditures on the relevant properties may have been in a world devoid of reverse redlining to provide the courts with even an approximate sense of the damages. The current complaints fail to supply any rough estimations of what savings would have accrued to the cities were they not forced to expend sums of money on maintaining and patrolling abandoned residential units. While the *Baltimore* and *Memphis* complaints go into great detail about the specific residential properties impacted by Wells Fargo's alleged reverse redlining and the municipal services extended to limit the urban fallout, neither complaint provides a rough approximation of the savings that would have accrued to the public fisc were the foreclosure wave averted.²⁰⁹ Although this kind of alternative financial scenario projection has never been held necessary to show standing in an antitrust or RICO context, it only solidifies the impression of "vast uncertainty" regarding the cities' damages.²¹⁰ Those who would argue that the cities have standing would

207. See *supra* note 131; see also *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1151-56 (Ohio 2002) (Moyer, C.J., dissenting) (applying *Holmes* to conclude that the issue of directness should preclude the court from finding that the city had standing to sue Beretta).

208. See *Tingley*, 2008 U.S. Dist. LEXIS 34303, at *11-12 (listing economic variables that could plausibly have reduced the value of plaintiffs' homes, including mortgagors' default, banks' decision to foreclose rather than restructure and deterioration of the regional labor market).

209. See *Baltimore* 3d Complaint, *supra* note 4 (describing the city's expenditures on preserving vacant housing units).

210. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 441 (3d Cir. 2000).

likely cite the hedonic regressions offered by the city-plaintiffs in these cases as sufficient to remove the uncertainty that shrouds the damages alleged by plaintiffs. As this Comment later discusses, empirical estimates, while helpful, should not be allowed to usurp the role reserved for judicial intuition in gauging whether cities are the proper parties to bring suit.

Finally, the risk of double recoveries against the lenders is eminent here. I concede that the damages sought by the cities here are proprietary in nature: Foregone property tax receipts and the expenditures required to keep large swathes of the cities from falling into disrepair. By definition, the interests to be vindicated in these lawsuits are specific to the cities and not to the now-foreclosed-upon homeowners.²¹¹ However, any damages awarded to the cities for lost property tax receipts or forced municipal expenditures would be necessarily contingent on calculations derived from homeowners' damages and reductions in the residential properties' historical real estate value as impacted by the lenders' reverse redlining practices. Thus, "duplicate recoveries and apportionment are a real concern."²¹² Any recovery for the cities would necessarily be a result of "complex rules for apportioning damages because there would be multiple levels of injured plaintiffs."²¹³ Additionally, any damages inflicted by Wells Fargo would have to be considered alongside potential reverse redlining of other mortgage lenders doing business within city limits.²¹⁴ Other lenders' practices that resulted in foreclosure on residential units adjacent to homes purchased with Wells Fargo loans could easily impact the appraisal value of those properties, thus reducing the property tax receipts received by cities on these Wells Fargo units. The lenders do not operate in a vacuum; rather, their separate contributions to the housing market bust would have to be carefully parsed and allocated simply to prevent a double recovery for the same harm, but also for other lenders' conduct, whether they were party to the litigation or not. Under the *Holmes*

The *R.I. Laborers* court noted the risks involved in holding that the plaintiff-fund had standing: "Allowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation . . .'" *R.I. Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 179 (D.R.I. 2000) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 274 (1992)).

211. See *Engel*, *supra* note 41, at 361 (stating that when cities "bring suits for damages in their proprietary capacities, cities are acting to protect their own interests and must meet the traditional Article III and prudential standing requirements") (citing *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982)).

212. *Allegheny*, 228 F.3d at 442.

213. *R.I. Laborers*, 99 F. Supp. 2d at 179.

214. *Cf. Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 263-264 (D.N.J. 2000) ("[L]ogistical problems involved in apportioning damages between the very distinct groups of defendants . . . tilts against a finding proximate cause.").

test, this militates against a finding of standing for the cities.

The cities fare no better under the six-pronged *Associated General* test for antitrust standing. The first, fourth and fifth elements of the test, focusing on the causal link between the lenders' wrongdoing and plaintiffs' harm and the speculative nature of damages, are replicated by the first and second elements of the *Holmes* test. The second element of the *Associated General* test, addressing defendants' intent to harm the plaintiff, would likely resolve in favor of the lenders.²¹⁵ Even assuming that the banks waged a systematic campaign to manipulate large segments of the African American communities of Baltimore and Memphis into accepting subprime loans, it is doubtful that the defendants did so with the specific goal of injuring the municipal entities governing the cities. The third element asks whether the injury sued upon relates to the congressional goals behind the statute providing the cause of action.²¹⁶ It is reasonable to presume that suing to recover from economic losses sustained by race-based lending lies within the realm of harms envisioned by the fair-lending laws. The sixth and final elements are functionally identical to the third component of the *Holmes* inquiry, and they resolve in the same manner.

Under either the antitrust or civil RICO test for standing, a court would be hard-pressed to conclude that Baltimore's and Memphis' complaints, as currently formed, allege injuries "fairly traceable" to the lenders' conduct. Thus, I conclude that the cities should be found to lack Article III standing to pursue their FHA claims against the lenders.

A. Response to Critics: If Cities Have Standing to Sue Under the FHA, What Are the Limits?

My position on municipalities' capacity to sue under the FHA could be fairly construed as a narrow interpretation of existing standing law.²¹⁷ However, if cities can be said to have Article III standing to sue under the FHA for economic losses sustained due to lenders' reverse redlining, who is not amenable to FHA suits every time a municipality sustains a monetary loss, any portion of which could conceivably be traced back to an action

215. See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 924 (3d Cir. 1999) (describing the second element of *Associated General* as "the specific intent of defendant to harm plaintiff").

216. See *id.* (describing the third element of *Associated General* as "the nature of plaintiff's alleged injury . . . and whether it relates to the purpose of the antitrust laws").

217. See discussion *supra* Part II (summarizing Engel's and Brescia's broad views of standing and the latter's argument that cities possess constitutional standing to sue under the Fair Housing Act based on a generous standard of causation for municipality-sponsored lawsuits).

performed at any point in time by the defendant? I pose a few hypotheticals to show the flaws inherent in this position.

Under the more liberal benchmark for Article III standing on FHA claims espoused by the existing literature, the city of New York could sue Wall Street investment banks for recklessly financing the subprime mortgage markets after their shortsighted behavior resulted in economic collapse, which in turn led to mass downsizing in the U.S. financial sector, resulting in less taxable income, thereby forcing the city to scale back its provision of essential services to residents.²¹⁸ Like the local governments at issue in this Comment, the City of New York would constitute an aggrieved person under the FHA, because it was injured by statutory violations.²¹⁹ Thus, the city would be entitled to sue on this Rube Goldberg-esque theory of liability, regardless of the number of links in the causal chain. Any city that sustained a loss of tax revenue that could theoretically be traced back to the bursting of the housing bubble would be entitled to gain access to the federal courts through a direct suit against financial institutions.

The converse of the immediate FHA litigation would also survive a 12(b)(1) motion under this generous standard for federal jurisdiction. Where conventional redlining prevented otherwise qualified African American borrowers from borrowing to purchase homes, city governments would have lost a highly lucrative opportunity to benefit from the residential real estate boom years of the early first decade of the twenty-first century. By being denied the opportunity to partake in the frenzied bubble years, cities were prevented from realizing increased property tax revenues on properties subject to inflated prices. Similarly, sales tax receipts were depressed as city residents were prevented from drawing on the equity in their homes to fund consumption of household goods and consumer durables. As a result, lenders' redlining would have blocked cities from funding expanded access to education for city residents, increased police patrols through troubled neighborhoods, and improved public infrastructure. Where the theory of liability is permitted to be stretched to the breaking point and injuries are allowed to be calculated using the help of economic counterfactuals, this level of permissiveness in the pleadings means that the plaintiff's ability to access the federal courthouse is limited only by the attorney's imagination.

There is no principled reason to limit the extreme flexibility of this

218. See Brescia, *supra* note 57, at 42 (“According to black letter law, when the appropriate governmental body is seeking relief from a public nuisance, it need not plead and prove special injury; rather, harm to the community is all it must show.”).

219. See 42 U.S.C. § 3602(i)(1) (2012) (defining an “[a]ggrieved person” as anyone who “claims to have been injured by a discriminatory housing practice”).

perspective on constitutional standing to suits by public entities. For example, real estate developers would conceivably have a viable cause of action against lenders under the existing literature's approach. After the banks engaged in reverse redlining while issuing subprime loans, foreclosure waves wracked every major U.S. city. The subsequent erasure of household net worth at the macro level put the realistic possibility of homeownership beyond the reach of many Americans. As a result, real estate developers realized reduced profits over the short and medium-run due to lenders' FHA violations.

The purpose of this exercise is to demonstrate the infinitely elastic nature of such an overly generous interpretation of standing jurisprudence. Failing to set boundaries on standing would result in any municipality gaining access to the courts merely by alleging economic loss that could conceivably be traced back to an FHA violation, no matter how implausible the theory or the number of intervening actors. Endorsement of such a view on standing would leave the doctrine a hollow shell devoid of any substance.

One response to this critique, as offered by the plaintiffs in *Baltimore* and *Memphis*, is to employ statistical analysis to parse and quantify the financial harm to the cities that could be directly attributable to reverse redlining.²²⁰ Using econometric analysis, the plaintiffs can produce precise estimations of the pecuniary damage created by the defendant lenders' conduct. In the next section, I dispute the notion that regression analysis is sufficient to cure this defect in the cities' complaints.

B. Hedonic Regressions: Gutting the "Fairly Traceable" Analysis

For decades, the economics discipline has relied on complex econometric analysis to conduct empirical research. Regression analysis is the Swiss Army knife of modern economic research, allowing the user to sift reams of data and piece together causal links between two or more variables. The city-plaintiffs in *Baltimore* and *Memphis*, in fine-tuning their pleadings to surmount the "fairly traceable" element of the standing analysis, offered to present the results of hedonic regressions.²²¹ They

220. See, e.g., *Memphis* Complaint, *supra* note 3, ¶ 201 ("Using a well-established statistical regression technique that focuses on effects on neighboring properties, the City and County have isolated the lost property value attributable to each individual foreclosure or vacancy from losses attributable to other causes, such as neighborhood conditions.")

221. See *id.*; see also *Baltimore* 3d Complaint, *supra* note 4, ¶ 325 ("The loss in assessed property value in the sub-neighborhoods caused by Wells Fargo's unlawful acts and consequent foreclosures can then be, and in significant measure has been, used to calculate the City's corresponding loss in property tax revenues.")

promised to separate with some degree of statistical certainty the precise dollar impact of Wells Fargo's purported reverse redlining practices.²²²

The cities' ability to provide statistical estimates of the damage inflicted by Wells Fargo and Citigroup's purported reverse redlining should trigger the same judicial skepticism that the pension funds and providers received in the tobacco litigation. There, one court rejected the proffered statistical modeling, saying that "we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the [*Associated General*] factor focusing on whether the 'damages claim . . . is highly speculative.'"²²³

While the econometric analysis may prove capable of estimating the fiscal effects of lenders' FHA violations on city property values, if we wish to keep standing doctrine alive, such analysis should be rejected by courts as unsatisfactory for the purpose of alleging harm "fairly traceable" to defendants' conduct. To do otherwise is to fling the courthouse doors open for any litigant who can afford the services of a halfway-competent statistician. Furthermore, introducing regression analysis as a condition to maintaining an FHA action effectively transforms the motion to dismiss stage into a battle of the econometricians, as plaintiff and defendant grapple over the robustness of plaintiff's econometric model, theoretical assumptions and the quality of empirical data. This would be tantamount to judicial ceding of the standing inquiry to the economists. Just as courts are cautioned to know the limits of judicial competence, so should they be aware of what lies well within the juridical domain.²²⁴ Courts should reject as inadequate the cities' furnishing of empirical data to satisfy the "fairly

222. See *Baltimore* 3d Complaint, *supra* note 4, ¶ 326 ("Application of hedonic regression to data regularly maintained by Baltimore permits precise quantification of the injury to the City caused by Defendants' discriminatory lending practices and resulting foreclosures in sub-neighborhoods where Wells Fargo foreclosures constitute at least one-third of all foreclosures.").

223. *R.I. Laborers' Health & Welfare Fund v. Philip Morris, Inc.*, 99 F. Supp. 2d 174, 186 (D.R.I. 1999) (alteration in original) (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*, 171 F.3d 912, 929 (3d Cir. 1999)); see also *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 442 (3d Cir. 2000) (rejecting plaintiff-hospitals' argument that the court "can calculate damages through aggregation and statistical modeling" because "speculative calculations create a vast uncertainty about the Hospitals' damages, and leads us to question whether a remediable injury exists").

224. Compare *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (applying a multifactor test to measure "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion" to hold that political gerrymandering was a political question, foreclosing the possibility of judicial intervention), with *Ungar v. PLO*, 402 F.3d 274 (1st Cir. 2005) (using *Baker v. Carr*'s multifactor test for justiciability to find that political question doctrine did not bar court from hearing case) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

traceable” component of the Article III standing inquiry.

V. WHERE DO WE GO FROM HERE? THE IMPLICATIONS OF CITIES’ LACK OF ARTICLE III STANDING TO SUE UNDER THE FHA

The result I reach is an unhappy one: Assuming the foregoing analysis is correct, who is left to seek judicial redress for the harms inflicted on cities and homeowners by mortgage lenders’ practices? Class actions on behalf of homeowners victimized by reverse redlining are a potential solution. However, the national mortgage settlement, as expected, largely absolves the mortgage providers from “certain violations of civil law based on the banks’ mortgage loan servicing activities”²²⁵ While individual litigants remain generally free to bring claims, the near-total release from civil liability as relating to enforcement actions brought by state attorneys general and federal regulators is staggering in its breadth.²²⁶ Depending on the vagaries of state law, cities may also be able to sue in their respective jurisdictions’ courts under state law causes of action.²²⁷ Article III’s standing requirements are limited to those plaintiffs that seek to invoke the federal judicial power.²²⁸

But make no mistake: I do not argue that the lenders were not largely responsible for much of the financial upheaval that has wracked the nation in the last several years. The housing boom provided us with no shortage of horror stories detailing the consequences of banks’ often times reckless, exploitative and illegal lending policies from the last several years.²²⁹ This

225. *Fact Sheet: Mortgage Servicing Agreement*, NATIONAL MORTGAGE SETTLEMENT, http://www.atg.wa.gov/uploadedFiles/Home/About_the_Office/Cases/National_Mortgage_Settlement/Mortgage_Servicing_Settlement_Fact_Sheet.pdf (last visited Nov. 30, 2012).

226. *Id.* at 4.

227. The likelihood of success on this approach is uncertain. *See Engel, supra* note 41, at 365 (“Only a handful of jurisdictions have reported decisions addressing municipal standing as quasi-sovereigns, leaving most cities in the dark about their ability to bring such claims.”).

228. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“The party invoking federal jurisdiction bears the burden of establishing these elements.”).

229. *E.g.*, Joshua Rhett Miller, *Bank of America to Pay Florida Couple in Mistaken Foreclosure Case*, FOX NEWS (June 6, 2011), <http://www.foxnews.com/us/2011/06/06/bank-america-pays-florida-couple-in-mistaken-foreclosure-case/> (“Bank of America mistakenly filed a foreclosure claim against the couple despite the absence of a mortgage, prompting the Nyergheses to take the matter to court. The couple eventually won, but then asked Bank of America to pay for \$2,534 in attorney fees. A Collier County judge ruled the bank should pay, but the bank never did.”); Franco Ordonez, *Major Banks Possibly Foreclosed Illegally on Military Personnel*, DENVER POST (Dec. 1, 2011, 1:00 AM), http://www.denverpost.com/business/ci_19444085.

is to say nothing of the array of other reprehensible activities that they have engaged in, wholly separate from predatory lending.²³⁰ This Comment addresses the *jurisdictional* barrier to cities' recovery, not the *merits* of their complaints. But even assuming that no one will be left to seek judicial redress for lenders' reverse redlining practices, that in itself does not justify a finding of municipal standing to sue, simply to "Make Everything Come Out Right."²³¹ Federal courts are courts of limited jurisdiction, and subject-matter jurisdiction is distinctive in that it is the only basis that courts can use to justify *sua sponte* dismissal of a case.²³² The paramount importance of preserving courts' traditional role in our representative democracy mandates deference to the historical standing doctrine, along with acknowledgment that cities' inability to sue lenders under the FHA is symptomatic of their marginal role in the federal system.²³³ Perhaps this is a feature, not a bug.

To reiterate, the standing inquiry exists to carefully circumscribe the court's role in a democratic society. To prevent the judiciary from falling into the habit of regularly issuing judgments on abstract questions of public policy, standing imposes upon plaintiffs the burden of demonstrating "a 'personal stake in the outcome' . . . to 'assure that concrete adverseness which sharpens the presentation of issues necessary for the proper

230. Jeff Horwitz, *Bank of America Sold Card Debts to Collectors Despite Faulty Records*, 177 AMERICAN BANKER 62 (Mar. 30, 2012) (detailing Bank of America's sale of credit card receivables, despite incomplete and inaccurate records documenting consumers' debts); Jeff Horwitz, *OCC Probing JPMorgan Chase Credit Card Collections*, 177 AM. BANKER 40 (Mar. 14, 2012) (describing "procedural shortcuts" and "faulty account records" used to sue thousands of delinquent credit card borrowers); William Selway & Martin Z. Braun, *Wells Fargo Pays \$148 Million to Settle Wachovia Muni Bid-Rigging Charges*, BLOOMBERG (Dec. 8, 2011, 5:24 PM), <http://www.bloomberg.com/news/2011-12-08/wells-fargo-pays-148-million-to-settle-wachovia-muni-bid-rigging-charges.html>; William Selway et al, *Jefferson County, Alabama, Votes to Declare Biggest Municipal Bankruptcy*, BLOOMBERG (Nov. 9, 2011, 6:49 PM), <http://www.bloomberg.com/news/2011-11-09/alabama-s-jefferson-county-votes-for-biggest-municipal-bankruptcy-in-u-s-.html> (describing "[t]wo former JPMorgan bankers [who] are fighting Securities and Exchange Commission charges that they made \$8 million in undisclosed payments to friends of commissioners to secure the bank's role" in interest rate swaps that moved against Jefferson County, resulting in the county's declaring Chapter 9 bankruptcy).

231. *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (2004) (Scalia, J., dissenting).

232. See *Gilmore v. Dir.*, U.S. Dep't of Labor, No. 11-12747, 2012 U.S. App. LEXIS 2237, at *2-3 (11th Cir. Feb. 6, 2012) (stating that federal courts are obligated to determine whether subject-matter jurisdiction exists, *sua sponte*); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005) (stating that "it is well settled that a federal court is obligated to inquire into the existence of subject matter jurisdiction"); see also FED. R. CIV. P. 12(h)(3) (mandating that federal courts dismiss any action where the court determines that subject-matter jurisdiction is lacking).

233. See Schragger, *supra* note 82, at 2576.

resolution of constitutional questions.”²³⁴ As Chief Justice Roberts observed in *Massachusetts v. EPA*, “standing jurisprudence simply recognizes that redress of [certain types of] grievances . . . ‘is the function of Congress and the Chief Executive,’ not the federal courts.”²³⁵ Standing evolved out of a need to prevent the federal courts from becoming the default mechanism by which public policy disputes were resolved, rather than the political branches.

The questions of how to resolve the financial crisis of the last few years, who to blame, and what types of punishments are to be meted out are best reserved to the executive and legislative branches. Those domains have, by their actions, made a conscious political decision to sanction the worst excesses of the boom years, including unethical, dangerous, and illegal activity at the highest echelons of Wall Street, to preserve financial stability and a still-ongoing economic recovery. The elected officials accountable to us have made this judgment call. As subordinate players in the federal system, cities should not be permitted to undermine that political decision, however flawed and shortsighted, by waging their own wars against the banks in the federal judiciary, whether on their own behalf or on behalf of resident taxpayers.

CONCLUSION

There is no serious dispute as to the culpability of banks, mortgage lenders and all other financial actors complicit in the largest financial crisis in the post-war era. Nonetheless, this does not absolve federal courts of the responsibility to ensure that jurisdictional requirements are satisfied before hearing disputes between two parties. “The constitutional role of the courts . . . is to decide concrete cases—not to serve as a convenient forum for policy debates.”²³⁶ The dilution or destruction of a longstanding judicial doctrine fashioned to preserve the constitutional separation of powers is too heavy a price to pay so that municipalities may make an end run around our non-functioning political branches. Allowing cities to wage a political battle in the judicial arena would only work to damage the integrity of the federal court system. Such an outcome would be infinitely more harmful in the long run than the urban blight sustained by those municipalities.

234. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

235. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992)).

236. *Id.* at 547 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).