

BANK OF AMERICA CORPORATION V. CITY OF MIAMI

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Bank of America Corporation v. City of Miami
137 S. Ct. 1296 (2017)

I. INTRODUCTION

“Housing is the linchpin to civil rights.”¹ When enacting the Fair Housing Act (FHA), Congress declared that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”² Despite the legislative branch’s attempts, racial discrimination in housing continues to plague the people of this nation.³ When introducing amendments to the FHA in 1988, Senator Edward Kennedy stated that in some ways, “housing discrimination is the most invidious form of bigotry” because “[i]t isolates racial and ethnic minorities and perpetuates the ignorance that is the core of bigotry.”⁴

The Fair Housing Act prohibits “discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling” on the basis of race and a number of other characteristics.⁵ It also makes it unlawful for “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction” due to race.⁶

The FHA was originally enacted in 1968 but has been amended many times.⁷ Initially, it “prohibited discrimination in residential ‘dwellings’ on the basis of race, color, national origin, and religion.”⁸ “In 1974, the [FHA] was amended to include sex and, in 1988, to include handicap. . . and familial status[.]”⁹ Today, the FHA carries with it one of the broadest assortments of remedies available under any federal civil rights statute.¹⁰

There are conflicting standards for what, or who, is considered a proper FHA plaintiff.¹¹ Those standards are the “Article III” interpretation and the

1. Michael P. Seng & F. Willis Caruso, *Forty Years of Fair Housing: Where Do We Go From Here?*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L 235, 242 (Winter 2009).

2. 42 U.S.C. § 3601 (2012).

3. See, e.g., Erwin Chemerinsky, *Standing to Enforce the Fair Housing Act*, ACSBLOG (Oct. 28, 2016), <https://www.acslaw.org/acsblog/standing-to-enforce-the-fair-housing-act>.

4. Seng & Caruso, *supra* note 1, at 236.

5. 42 U.S.C. § 3604(b) (2012).

6. 42 U.S.C. § 3605(a) (2012).

7. D. BENJAMIN BARROS & ANNA P. HEMINGWAY, PROPERTY LAW 290 (2015).

8. Seng & Caruso, *supra* note 1, at 235.

9. *Id.*

10. *Id.*

11. Christopher M. Wildenhain, *U.S. Supreme Court to Decide Scope of Right to Sue under Federal Fair Housing Act*, (Oct. 26, 2016), <https://www.americanbar.org/publications/litigation-committees/commercial-business/practice/2016/scotus-decide-scope-of-right-to-sue-under-fha.html>.

“zone of interests” interpretation.¹² To have Article III standing, a plaintiff, at minimum, needs to allege that he or she has been injured, that the defendant caused the injury, and that a favorable judicial decision would likely redress the injury.¹³ In addition, the injury alleged by the plaintiff must be “concrete and particularized.”¹⁴ On the other hand, the zone of interests interpretation limits standing to sue under federal statutes to only those persons who Congress sought to protect by passing the law.¹⁵ This test is more challenging to pass.¹⁶

Under the FHA, “person” includes one or more individuals, corporations, partnerships, associations, and a number of other entities.¹⁷ Furthermore, the FHA broadly defines an “aggrieved person” as any person who “claims to have been injured by a discriminatory housing practice” or “believes that such person will be injured by a discriminatory housing practice that is about to occur.”¹⁸ The FHA provides that an aggrieved person may file a complaint with the Secretary of Housing and Urban Development¹⁹ or may commence a civil action in an appropriate court.²⁰

In *Bank of Am. Corp. v. City of Miami*,²¹ the Supreme Court had the chance to enlarge the scope of standing under the FHA by deciding whether municipalities may have standing to sue as an aggrieved person.²² The justices were tasked with determining whether the City of Miami’s (hereinafter “City”) alleged injuries fell within the zone of interests and proximate cause requirements of the FHA.²³ The case was remanded for further proceedings after the Court held that the City of Miami’s claimed injuries fell within the zone of interests arguably protected by the FHA and developed the applicable test for proximate cause, which it left to the court of appeals to apply.²⁴ After examining the facts and the majority and dissenting opinions, this analysis will focus on the most significant impacts that this holding will have on the communities within the City of Miami, the lending industry, and the concern regarding the Court’s broad interpretation of the zone of interests under the FHA.²⁵

12. *Id.*

13. *Id.* (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

14. *Spokeo*, at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

15. Wildenhain, *supra* note 11.

16. *Id.*

17. 42 U.S.C. § 3602(d) (2012).

18. 42 U.S.C. § 3602(i).

19. 42 U.S.C. § 3610(a)(1)(A)(i).

20. 42 U.S.C. § 3613(a)(1)(A).

21. 137 S. Ct. 1296 (2017).

22. *Id.* at 1301-1302.

23. *Id.* at 1301.

24. *Id.* at 1305-06.

25. *See infra* Parts IV.B.1-3.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

“In 2013, the City of Miami brought lawsuits in federal court against two banks, Bank of America and Wells Fargo.”²⁶ The City’s complaints alleged that the banks discriminatorily imposed more burdensome, and “predatory,” conditions on loans issued to minority borrowers than to similarly situated nonminority borrowers.²⁷ “Those ‘predatory’ practices included, among others, excessively high interest rates, unjustified fees, teaser low-rate loans that overstated refinancing opportunities, large prepayment penalties, and - when default loomed - unjustified refusals to refinance or modify the loans.”²⁸

The City of Miami alleged that due to the discriminatory nature of the banks’ practices, the rates of default and foreclosure among minority borrowers were higher than among otherwise similar white borrowers and were concentrated in minority neighborhoods.²⁹ Furthermore, the City alleged that those higher foreclosure rates lowered property values and diminished property tax revenue.³⁰ The City then claimed that those higher foreclosure rates, especially when paired with the resulting vacancies, increased demand for municipal services, such as police, fire, and building and code enforcement services, all of which were necessary to remedy the blight and unsafe and dangerous conditions generated by the foreclosures and vacancies.³¹ The City’s complaints described statistical analyses that traced its’ financial losses to the banks’ discriminatory practices.³²

Aside from economic injuries, the City of Miami claimed that the banks’ discriminatory conduct adversely impacted the racial composition of the City, impaired the City’s goals to assure racial integration and desegregation, and frustrated the City’s longstanding and active interest in promoting fair housing and securing the benefits of an integrated community.³³

The District Court dismissed the City’s complaints for three reasons.³⁴ First, the court reasoned that the harms alleged, being economic rather than discriminatory, fell outside the zone of interests the FHA protects.³⁵ Second, “the complaints fail[ed] to show a sufficient causal connection

26. *Bank of Am. Corp.*, 137 S. Ct. at 1301.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1301-02.

31. *Bank of Am. Corp.*, 137 S. Ct. at 1302.

32. *Id.*

33. *Id.* at 1301.

34. *Id.* at 1302.

35. *Id.*

between the City's injuries and the Banks' discriminatory conduct."³⁶ Third, the complaints failed to allege unlawful activity occurring within the FHA's two-year statute of limitations.³⁷ The City then filed amended complaints, the ones viewed by the Supreme Court, and sought reconsideration.³⁸ The District Court held that the amended complaints only answered the statute of limitations problem and consequently declined to reconsider the dismissals.³⁹

The Eleventh Circuit Court of Appeals reversed the district court's decision.⁴⁰ It held that the City's injuries fell within the "zone of interests" that the FHA protects.⁴¹ It added that the City's complaints sufficiently alleged proximate cause.⁴² The court of appeals then remanded the cases and ordered the District Court to accept the City's amended complaints.⁴³ The banks filed petitions for certiorari, which the Supreme Court granted.⁴⁴

III. COURT'S DECISION AND RATIONALE

A. Majority Opinion by Justice Breyer

Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Kagan.⁴⁵ Justice Gorsuch did not participate in the consideration or decision of the case.⁴⁶

In Part II, Justice Breyer began by discussing standing under the Constitution.⁴⁷ Article III of the Constitution restricts the Supreme Court's jurisdiction to "[c]ases" and "[c]ontroversies."⁴⁸ To satisfy this restriction, a plaintiff must show an "injury in fact" that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'⁴⁹

Justice Breyer then brought up the concept of "prudential" or "statutory" standing.⁵⁰ When discussing this form of standing, the Court explained,

36. *Bank of Am. Corp.*, 137 S. Ct. at 1302.

37. *Id.*

38. *Id.*

39. *Id.* at 1302.

40. *Id.*

41. *Bank of Am. Corp.*, 137 S. Ct. at 1302 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1300.

46. *Bank of Am. Corp.*, 137 S. Ct. at 1300.

47. *Id.* at 1302.

48. U.S. CONST. art. III, § 2.

49. *Bank of Am. Corp.*, 137 S. Ct. at 1302. (quoting *Spokeo*, at 1547).

50. *Id.*

“prudential standing” was misleading, for the requirement at issue is in reality tied to a particular statute. The question is whether the statute grants the plaintiff the cause of action that he asserts. In answering that question, we presume that a statute ordinarily provides a cause of action “only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.”⁵¹

The Court has “added that ‘[w]hether a plaintiff comes within the ‘zone of interests’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”⁵²

At this point, the majority concluded that the City of Miami’s financial injuries, specifically its lost tax revenue and extra municipal expenses, satisfied the “prudential standing” requirement.⁵³ “[T]he City’s claims of injury it suffered as a result of the statutory violations [were], at the least, ‘arguably within the zone of interests’ that the FHA protects.”⁵⁴

After reiterating the Fair Housing Act’s definition of “aggrieved person,” Justice Breyer discussed the Court’s previous interpretations of that phrase.⁵⁵ “This Court has repeatedly written that the FHA’s definition of person ‘aggrieved’ reflects a congressional intent to confer standing broadly.”⁵⁶ The definition of “person aggrieved” in the original version of the FHA “showed ‘a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.’”⁵⁷

The majority opinion then went on to introduce the most relevant precedent to the case at hand.⁵⁸ First, in *Trafficante v. Metro. Life Ins. Co.*,⁵⁹ one black tenant and one white tenant alleged that the owner of their apartment complex had discriminated against non-whites on the basis of race in the rental of apartments within the complex in violation of the FHA.⁶⁰ The Supreme Court held that the FHA permits suits by white

51. *Id.* (quoting *Lexmark Int’l*, 134 S. Ct. at 1387-88) (internal quotation marks omitted).

52. *Id.* at 1302-03. (quoting *Lexmark*, 134 S. Ct. at 1387) (some internal quotation marks omitted).

53. *Id.* at 1303.

54. *Bank of Am. Corp.*, 137 S. Ct. at 1303 (quoting *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

55. *Id.*

56. *Id.*

57. *Id.* (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 375-76 (1982); *Thompson v. North American Stainless, LP*, 562 U.S. 170, 176 (2011); *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997)).

58. *Id.* at 1303.

59. 409 U.S. 205 (1972).

60. *Id.* at 206-07.

tenants alleging that they were deprived benefits from interracial associations when discriminatory rental practices kept minorities out of their apartment complex.⁶¹

Then, in *Gladstone, Realtors v. Vill. of Bellwood*,⁶² a village alleged that it lost tax income and had the racial equilibrium of its community upset by racial-steering practices.⁶³ The Supreme Court held that if Gladstone's sales conduct had actually begun to rob the village of its racial balance and stability, the village had standing to challenge the legality of that practice.⁶⁴

Lastly, in *Havens Realty Corp. v. Coleman*,⁶⁵ three individual plaintiffs and a nonprofit corporation known as HOME filed suit against Havens Realty and one of its employees.⁶⁶ The individual plaintiffs alleged that they had been injured by the discriminatory acts of Havens by being deprived of the numerous benefits that arise from living in integrated communities.⁶⁷ HOME alleged injury in that the steering practices of Havens had frustrated its counseling and referral services, thereby draining its resources.⁶⁸ The Court held that the nonprofit organization did have standing to sue because it had spent money to combat housing discrimination.⁶⁹

The Supreme Court has held that the FHA allows suits by a wide variety of plaintiffs.⁷⁰ Justice Breyer emphasized that contrary to the dissent's view, the three main precedent cases did more than suggest that plaintiffs in similar circumstances to the City of Miami had a cause of action under the FHA; the cases held as much.⁷¹ To support this proposition, Justice Breyer recited the important holdings of the three cases just mentioned, wherein the Court held that the FHA "allows suits by white tenants claiming that they were deprived of benefits [arising] from interracial associations when discriminatory rental practices kept minorities out of their apartment complex" in *Trafficante*; "a village alleging that it lost tax revenue and had the racial balance of its community undermined by racial-steering practices" in *Gladstone*; and a nonprofit organization that expended funds to combat housing discrimination in *Havens Realty*.⁷²

61. *Bank of Am. Corp.*, 137 S. Ct. at 1303 (citing *Trafficante*, 409 U.S. at 209-12).

62. 441 U.S. 91 (1979).

63. *Bank of Am. Corp.*, 137 S. Ct. at 1303 (citing *Gladstone*, 441 U.S. at 110-11).

64. *Gladstone*, 441 U.S. at 111.

65. 455 U.S. 363 (1982).

66. *Id.* at 367-68.

67. *Id.* at 369.

68. *Id.*

69. *Bank of Am. Corp.*, 137 S. Ct. at 1303.

70. *Id.*

71. *Id.*

72. *Id.*

Justice Breyer then moved on to discuss Congress' ratification of the Court's broad construction of the "person aggrieved" language.⁷³ When Congress amended the FHA in 1988, it retained without noteworthy change the definition of "person aggrieved" that the Court had adopted, which was that that language reflected a congressional intent to confer standing broadly.⁷⁴ Certainly, Congress "was aware of" the Court's precedent and "made a considered judgment to retain the relevant statutory text."⁷⁵ By not changing the language or statutory definition of "person aggrieved," Congress signaled approval of the Court's generous interpretation.⁷⁶

Next, the Court discussed the banks' arguments in regard to the broad reach of the words "aggrieved person" as defined in the FHA.⁷⁷ The banks' main concern was that providing everyone with constitutional standing under the FHA would lead to farfetched results.⁷⁸ For example, if restaurants, plumbers, utility companies, or any other participants in the economy of the City could sue to recover business lost when people had to leave the neighborhood as a result of the banks' alleged discriminatory lending practices, a legal anomaly would occur.⁷⁹

The majority nonetheless determined that the City's financial injuries fell within the zone of interests protected by the FHA, and this conclusion was amply supported by case law.⁸⁰ The Court specifically referred to *Gladstone*, wherein a village alleged that it was "injured by having [its] housing market. . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village."⁸¹ In *Gladstone*, the Court held that the village could bring suit because the circumstances that resulted from the manipulation of the village's housing market produced a "significant reduction in property values [that] directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."⁸² That situation was remarkably similar to the one faced by the City of Miami—therefore, principles of *stare decisis* compelled the Court's adherence to that precedent.⁸³

73. *Id.*

74. *Bank of Am. Corp.*, 137 S. Ct. at 1303.

75. *Id.* at 1303-04 (quoting *Texas Dep't of Hous. And Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2519 (2015)).

76. *See id.*

77. *Id.* at 1304.

78. *Bank of Am. Corp.*, 137 S. Ct. at 1304.

79. *Id.*

80. *Id.*

81. *Id.* (quoting *Gladstone*, 441 U.S. at 95).

82. *Id.* at 1304-05 (quoting *Gladstone*, 441 U.S. at 110-11).

83. *Bank of Am. Corp.*, 137 S. Ct. at 1305.

After holding that the City's injuries arguably fell within the zone of interests protected by the FHA, the majority began its discussion of proximate cause.⁸⁴ The question considered by the Court was whether the banks' allegedly discriminatory lending practices proximately caused the City to lose property tax revenue and spend more on municipal services.⁸⁵ Unlike the Eleventh Circuit, the Supreme Court concluded that foreseeability alone was insufficient to establish proximate cause under the FHA.⁸⁶

“Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”⁸⁷ Because a claim for damages under the FHA is akin to a “tort action,”⁸⁸ it is no exception to the traditional requirement that in “all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.”⁸⁹

The Court then explained that in this case, the conduct the statute prohibits consists of deliberately lending to minority borrowers on more inferior terms than similarly situated and equally creditworthy nonminority borrowers and bringing about defaults by failing to extend refinancing and loan modifications to minority borrowers on fair terms.⁹⁰ By way of establishing proximate cause, the City claimed that the banks' misconduct led to a disproportionate number of foreclosures and vacancies in certain neighborhoods.⁹¹ These foreclosures and vacancies allegedly injured the City, which lost property tax revenue when the values of the properties in those areas decreased and the City was forced to spend more on municipal services in those areas.⁹²

The Supreme Court stated that the Eleventh Circuit erred in holding that foreseeability alone is sufficient to establish proximate cause under the FHA.⁹³ Within the confines of the FHA, “foreseeability alone does not ensure the close connection that proximate cause requires.”⁹⁴ The majority noted that the housing market is interconnected with economic and social life; therefore, a violation of the FHA may “be expected to cause ripples of

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1305 (quoting *Lexmark*, 134 S. Ct. at 1390).

88. *Bank of Am. Corp.*, 137 S. Ct. at 1305 (quoting *Meyer v. Holley*, 537 U.S. 280, 285 (2003)).

89. *Id.* (quoting *Lexmark*, 134 S. Ct. at 1390).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Bank of Am. Corp.*, 137 S. Ct. at 1306.

94. *Id.*

harm to flow” far beyond the defendant’s alleged misconduct.⁹⁵ Furthermore, entertaining lawsuits to recuperate damages for any foreseeable consequence of an FHA violation would risk “massive and complex damages litigation.”⁹⁶

The majority then reined in the contours of proximate cause under the FHA by holding that it requires “some direct relation between the injury asserted and the injurious conduct alleged.”⁹⁷ Since an action under the FHA “is analogous to a number of tort actions recognized at common law,”⁹⁸ directness principles are applied.⁹⁹

Although both parties asked the Court to draw clear-cut boundaries of proximate cause under the FHA and to determine on which side the City’s financial injuries lay, the Court declined to do so.¹⁰⁰ The majority asked the lower courts to decide the contours of proximate cause under the FHA and apply that standard to the City’s claims of lost property tax revenue and increased municipal expenses.¹⁰¹ However, because the Court laid out its idea of proximate cause under the FHA, the lower courts are obliged to follow it, or at the very least, to use it as a starting point on remand.¹⁰²

B. Dissenting Opinion by Justice Thomas

Justice Thomas, with whom Justice Kennedy and Justice Alito joined, delivered the minority opinion, both concurring in part and dissenting in part.¹⁰³ The dissent began by emphasizing its opinion of the weaknesses of the City of Miami’s claims.¹⁰⁴ The City did not allege that any defendant discriminated against it within the meaning of the FHA; neither was the City endeavoring to bring suit on behalf of its residents against whom the banks allegedly discriminated.¹⁰⁵ Instead, the dissent explained, the City’s theory was that between 2004 and 2012, the banks’ “allegedly discriminatory mortgage-lending practices led to defaulted loans, which led to foreclosures, which led to vacant houses, which led to decreased property

95. *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)).

96. *Id.* (quoting *Associated General*, 459 U.S. at 545).

97. *Id.* (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)).

98. *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

99. *Id.* (citing *Anza v. Ideal Steal Supply Corp.*, 547 U.S. 451 (2006)).

100. *Id.*

101. *Id.*

102. *See id.* at 1311 (Thomas, J., dissenting) (stating that the majority opinion left little doubt that Miami could satisfy the rigorous standard for proximate cause that the majority adopted and left to the Court of Appeals to apply).

103. *Bank of Am. Corp.*, 137 S. Ct. at 1306 (Thomas, J., dissenting).

104. *Id.* at 1307.

105. *Id.*

values, which led to reduced property taxes and urban blight.”¹⁰⁶ This attenuated chain of causation foreshadowed the dissent’s view on proximate cause under the FHA.

Before diving deeply into his reasoning, Justice Thomas briefly stated that he would hold that the City’s injuries fall outside the FHA’s zone of interests and that in any event, the City’s alleged injuries are too remote to satisfy the FHA’s proximate cause requirement.¹⁰⁷

The dissent began its reasoning by noting, similarly to the majority, that the zone of interests requirement is “‘root[ed]’ in the ‘common-law rule’” which provides:

that a plaintiff may “recover under the law of negligence for injuries caused by a violation of a statute” only if “the statute ‘is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.’”¹⁰⁸

To justify its opinion that the City’s alleged injuries fall outside the zone of interests protected by the FHA, the dissent examined the text of the statute itself.¹⁰⁹ There is no indication in the text of the FHA that suggests that Congress intended to deviate from the zone of interests limitation.¹¹⁰ The statute’s private enforcement mechanism, by which an aggrieved person may sue, did not hint, much less expressly provide, that Congress sought to depart from the common-law rule.¹¹¹

The dissent then brings up cases in which the same conclusion was reached with regard to similar language in other statutes.¹¹² In *Thompson v. North Am. Stainless, LP*,¹¹³ the Court considered Title VII’s private-enforcement mechanism, which provides that “‘a person claiming to be aggrieved’” may file an employment discrimination charge with the EEOC.¹¹⁴ The Court unanimously concluded that Congress did not deviate from the zone of interests limitation in Title VII by using that language.¹¹⁵ However, as the majority pointed out, the language examined in *Thompson*

106. *Id.*

107. *Id.*

108. *Bank of Am. Corp.*, 137 S. Ct. at 1307. (Thomas, J., dissenting) (quoting *Lexmark*, 134 S. Ct. at 1389 n.5; W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS § 36 (5th ed. 1984)).

109. *Id.*

110. *Id.*

111. *Id.* at 1307-08.

112. *Id.* at 1308.

113. 562 U.S. 170 (2011).

114. *Bank of Am. Corp.*, 137 S. Ct. at 1308 (Thomas, J., dissenting) (quoting *Thompson*, 562 U.S. at 173).

115. *Id.* (quoting *Thomspon*, 562 U.S. at 175-78).

addressed who may sue under Title VII, the employment discrimination statute, not under the FHA.¹¹⁶

The dissent proceeded by mentioning that the language in *Trafficante*, *Gladstone*, and *Havens* which stated that the FHA's zone of interests extends to the limits of Article III was "ill-considered dictum" leading to "absurd consequences."¹¹⁷ Justice Thomas stated that the Court has observed that the holdings of those cases are compatible with the zone of interests limitation described in *Thompson*.¹¹⁸ That limitation states that a plaintiff may not sue when his or her "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit."¹¹⁹ Plaintiffs who may technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions are thus excluded.¹²⁰ However, again, the statutory language the dissent was referring to here was found not in the FHA, but in the employment discrimination statute.¹²¹

In Justice Thomas' view, the injuries asserted by the City were "so marginally related to or inconsistent with the purposes' of the FHA that they fell outside the applicable zone of interests."¹²² The City's asserted injuries were not arguably related to the interests the statute protects, according to the dissent.¹²³ The dissent supported this by arguing that "nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about the strains on municipal budgets that might follow."¹²⁴

The dissent then contended that the City of Miami's interests were markedly distinct from the interests confronted by the Court in *Trafficante*, *Gladstone*, and *Havens*.¹²⁵ The City's asserted injuries implicated none of the interests that were present in those three cases.¹²⁶ The City did not assert that it was injured based on efforts by the banks to steer certain residents into one neighborhood rather than another, nor did the City allege that it was injured because its neighborhoods were segregated.¹²⁷

116. *Id.* at 1303.

117. *Id.* at 1308 (Thomas, J., dissenting) (quoting *Thompson*, 562 U.S. at 176).

118. *Id.*

119. *Bank of Am. Corp.*, 137 S. Ct. at 1308 (Thomas, J., dissenting) (quoting *Thompson*, 562 U.S. at 178).

120. *Id.*

121. *Id.* at 1303.

122. *Id.* at 1308 (Thomas, J., dissenting).

123. *Id.* at 1309.

124. *Bank of Am. Corp.*, 137 S. Ct. at 1309 (Thomas, J., dissenting).

125. *Id.*

126. *Id.* at 1310.

127. *Id.*

The dissent concluded its zone of interests discussion by stating that the City of Miami was not similarly situated to the plaintiffs in *Trafficante*, *Gladstone*, and *Havens*.¹²⁸ Instead, Miami claimed injuries resulted from foreclosed-upon and then vacant homes, which the FHA's zone of interests is not expansive enough to cover.¹²⁹

In addition, the dissent responds to the majority's reliance on a brief mention of budget-related injury in *Gladstone*.¹³⁰ Justice Thomas stated that "[t]he fact that the village plaintiff asserted a budget-related injury *in addition to* its racial-steering injury does not mean that a city alleging *only* a budget-related injury is allowed to sue."¹³¹

Justice Thomas went on to address what he considered to be weaknesses in the majority opinion.¹³² He pointed out that the Court did not reaffirm the broad language in *Trafficante*, *Gladstone*, and *Havens* which suggested that Congress intended to permit any person with Article III standing to sue under the FHA.¹³³ Second, the majority did not reject the banks' arguments about other kinds of injuries that fall outside the FHA's zone of interests.¹³⁴ The majority decided that it need not discuss the floodgates argument brought up by the banks because precedent compelled the conclusion that the City could sue.¹³⁵ The dissent disagreed and said that the majority opinion should not be read to allow suits by local businesses alleging similar injuries to those alleged by the City.¹³⁶

Justice Thomas then transitioned to the issue of proximate cause.¹³⁷ He agreed with the majority on this issue by stating that the Court correctly held that foreseeability alone is insufficient to establish proximate cause under the FHA and that the statute requires "some direct relation between the injury asserted and the injurious conduct alleged."¹³⁸

In contrast with the majority, the dissent noted that this case came to the Court on a motion to dismiss, so the court of appeals had no advantage over the justices in evaluating the complaint's theory of proximate cause.¹³⁹ Justice Thomas boldly argued that the majority opinion left little doubt that neither the City nor any plaintiff alleging similar injuries could satisfy the

128. *Id.*

129. *Bank of Am. Corp.*, 137 S. Ct. at 1310 (Thomas, J., dissenting).

130. *Id.*

131. *Id.* (emphasis in original).

132. *Id.*

133. *Id.*

134. *Bank of Am. Corp.*, 137 S. Ct. at 1310 (Thomas, J., dissenting).

135. *Id.* at 1311.

136. *Id.*

137. *Id.*

138. *Id.* (quoting *Holmes*, 503 U.S. at 268).

139. *Bank of Am. Corp.*, 137 S. Ct. at 1311 (Thomas, J., dissenting).

rigorous standard for proximate cause that the Court adopted and left to the court of appeals to apply.¹⁴⁰

The dissent then illustrated the City's own account of causation which it believed showed that the link between the alleged FHA violation and its asserted injuries was extremely attenuated.¹⁴¹ Furthermore, the dissent confidently stated that the court of appeals would "not need to look far to discern other, independent events that might well have caused the injuries" alleged by the City of Miami.¹⁴²

In light of this attenuated chain of causation, the dissent believed that the City's alleged injuries were too remote from the injurious conduct it alleged.¹⁴³ The dissent would have held that the City failed to adequately plead proximate cause under the FHA.¹⁴⁴

IV. ANALYSIS

A. Introduction

The FHA was first enacted in the midst of racial turmoil and was meant to assist in reversing the trend of segregation,¹⁴⁵ but cases just like *Bank of Am. Corp.* illustrate that the FHA has not worked perfectly.¹⁴⁶ The statute has had many successes, including the enjoinder of land use policies that restrict housing for classes protected under it and the enjoinder of property insurers from redlining minority neighborhoods,¹⁴⁷ but clearly, some predatory lenders are still attempting to bypass some of the provisions of the FHA.¹⁴⁸

The Court's decision in this case will have an impact on the communities within the City of Miami as well as a possible impact on predatory lending practices, but the most obvious result of this case is a widening of the scope of standing under the FHA.¹⁴⁹

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1311-12.

144. *Bank of Am. Corp.*, 137 S. Ct. at 1312 (Thomas, J., dissenting).

145. Seng & Caruso, *supra* note 1, at 235.

146. *See Bank of Am. Corp.*, 137 S. Ct. at 1301. (arguing that the FHA has not worked perfectly because the City of Miami suffered injuries as a result of discriminatory lenders not abiding by the statute.)

147. Seng & Caruso, *supra* note 1, at 239.

148. *See Bank of Am. Corp.*, 137 S. Ct. at 1301. (the City of Miami alleging that the Banks discriminatorily imposed more predatory conditions on loans made to minority borrowers than to nonminority borrowers, in violation of the FHA).

149. *See infra* Parts IV.B.1-3.

*B. Discussion**1. The Impact on Affordable Housing in the City's Communities*

This case was not the first time Florida has had problems with Bank of America.¹⁵⁰ A newspaper article published in August of 2014 detailed the circumstances of a \$1 billion settlement between 17,000 Floridians and Bank of America.¹⁵¹

Bank of America Corp. agreed to pay \$16.65 billion to end federal, Florida, and other state investigations into the sale of toxic mortgage securities during the subprime housing boom.¹⁵² The settlement include[d] \$9.65 billion in fines and \$7 billion in aid to communities and homeowners hit hard by the housing market crash that triggered the Great Recession.¹⁵³

Then-Attorney General Eric H. Holder, Jr. described Bank of America's acts as "pervasive schemes to defraud financial institutions and other investors."¹⁵⁴ At the time the article was published, details were still being decided in regards to who in Florida would receive the aid and how much.¹⁵⁵ Programs were set up to include principal reduction and forgiveness, loan modifications, and new loans to credit-worthy borrowers struggling to get a loan, according to Attorney General Spokesman Whitney Ray.¹⁵⁶ In addition, there would be financing for affordable rental housing and donations given to assist communities still in recovery from the financial crisis.¹⁵⁷

Overall, Florida would receive around one seventh of the settlement's \$7 billion in aid to communities and homeowners devastated by the housing market crash.¹⁵⁸ The majority of the toxic loans that backed the securities came from firms acquired by Bank of America in 2008, including Countrywide Financial Corporation of Calabasas and Merrill Lynch.¹⁵⁹ Bank of America sustained about \$60 billion in losses and legal settlements

150. See Donna Gehrke-White, *Florida to Get \$1 Billion From Bank of America Settlement*, SUN SENTINEL (Aug. 21, 2014), <http://www.sun-sentinel.com/business/fl-bank-of-america-settlement-florida-20140821-story.html>.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. Gehrke-White, *supra* note 150.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

from the acquisition of Countrywide, which during the housing boom of the mid-2000s, was one of the nation's largest subprime mortgage lenders.¹⁶⁰

Litigation in *Bank of Am. Corp.* began in 2013, before that settlement occurred.¹⁶¹ However, the bank's suspicious practices had apparently been going on for some time.¹⁶² The bank's alleged discriminatory lending practices that resulted in injuries to the City of Miami occurred between 2004 and 2012, according to the City.¹⁶³ The sale of toxic mortgage securities and the alleged discriminatory lending practices seemingly coincided.¹⁶⁴

Perhaps in response to the litigation, Bank of America announced a new mortgage program for low- and moderate-income borrowers in February of 2016.¹⁶⁵ One newspaper article stated that "[t]he bank [would] sell the loans, including the servicing rights, to Self-Help, a community development lender that provides financing to families, individuals, and businesses underserved by traditional financial institutions."¹⁶⁶ Self-Help would also offer post-closing counseling for borrowers who might be experiencing payment difficulties.¹⁶⁷

Freddie Mac worked together with Bank of America and Self-Help to delineate credit terms and approved Self-Help as a seller and servicer to facilitate the new program.¹⁶⁸ Freddie Mac purchased all of the qualified affordable mortgages originated through the Self-Help and Bank of America partnership.¹⁶⁹ This program was called the Affordable Loan Solution, and it would allow payments as low as three percent on the purchase of a primary, single-family residence.¹⁷⁰ "Loan amounts [would] be within conforming loan limits . . . and applicants' income [could not] exceed 100 percent of the HUD area median income."¹⁷¹

While this was a great start to aid in the struggle for affordable housing, it was more about repairing Bank of America's reputation, and it could not

160. Donna Gehrke-White, *supra* note 150.

161. *Bank of Am. Corp.*, 137 S. Ct. at 1301.

162. *See Bank of Am. Corp.*, 137 S. Ct. at 1307 (Thomas, J., dissenting) (noting that the City of Miami theorized that the Banks' allegedly discriminatory practices began in 2004.).

163. *Id.*

164. *See* Donna Gehrke-White, *supra* note 150; *Bank of Am. Corp.*, 137 S. Ct. at 1307 (Thomas, J., dissenting).

165. *Bank of America Announces Mortgages for Low- And Moderate-Income Borrowers*, SUN SENTINEL (Feb. 29, 2016), <http://www.sun-sentinel.com/business/fl-bank-of-america-mortgage-20160229-story.html> [hereinafter *BOA Announces*].

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *BOA Announces*, *supra* note 165.

171. *Id.*

erase the damage that was already done in places like the City of Miami.¹⁷² The people and families who lost their homes did not necessarily lose their homes because they could not afford their mortgage payments; they lost their homes because they were issued “riskier mortgages on less favorable terms” than were issued to similarly situated nonminority borrowers.¹⁷³ If the minority borrowers had been given the mortgages they were worthy of, perhaps the whole dispute could have been avoided. However, because the Supreme Court enlarged the scope of the standing, municipalities now have a higher likelihood of prevailing in suits under the FHA, which will be beneficial to those individuals and families who are harmed due to violations of the FHA that they cannot afford to legally pursue themselves.

Of course, the minority borrowers whose homes were foreclosed on were negatively affected by the banks’ alleged discriminatory conduct, but during oral arguments, Justice Elena Kagan emphasized the community harms the FHA focuses on.¹⁷⁴

But the FHA is a very peculiar and distinctive kind of anti-discrimination statute, which really is focusing on community harms . . . [s]o it’s not just individuals who are harmed; it’s communities who are harmed. And that’s the basic idea of the entire statute, why Congress passed it. And here the cities are standing up and saying, every time you do this redlining and this reverse redlining, essentially a community is becoming blighted. And who better than the City to recognize that interest and to assert it.¹⁷⁵

It could not easily be expected that the people who were dislocated as a result of losing their homes could assert their rights against the banks under the FHA.¹⁷⁶ Although the City did not bring suit directly on behalf of those people and it was asserting its own injuries, Justice Kagan spoke to the fact

172. See John Maxfield, *It’s Official: Bank of America Has the Worst Reputation in the Banking Industry*, THE MOTLEY FOOL (June 25, 2013, 12:00 AM), <https://www.fool.com/investing/general/2013/06/25/its-official-bank-of-america-has-the-worst-reputat.aspx> (stating that Bank of America’s reputation suffered after it allegedly systematically and unjustly denied mortgage modifications under a previous mortgage modification program); see also *Bank of Am. Corp.*, 137 S. Ct. at 1301-02 (stating that the discriminatory nature of the Bank’s practices caused default and foreclosure rates among minority borrowers to be higher than among otherwise similarly situated white borrowers, among other things).

173. *Bank of Am. Corp.*, 137 S. Ct. at 1301.

174. Transcript of Oral Argument at 13, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

175. *Id.*

176. See Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 CONN. L. REV. 355, 391 (2006) (noting that many victimized borrowers are not well-equipped to protect themselves and are even more ill-equipped to pursue litigation).

that the people who were dealt unfavorable mortgages were not the only victims.¹⁷⁷ The entire City felt not only the racial impact of the banks' conduct but the economic impact as well, and the City was in a much better position to challenge the banks' practices.¹⁷⁸

The concern of what happened to the borrowers after they lost their homes is also present. The City of Miami is still plagued by the struggle for affordable housing, which could only have increased when so many people were forced to find elsewhere to live after their homes were foreclosed.¹⁷⁹ On August 1, 2017, an article about affordable housing was published in the Miami Today newspaper.¹⁸⁰ Mayor Carlos Giménez of Miami issued a report detailing affordable housing completions and listed projects "stuck in the pipeline" from April 1 to June 30.¹⁸¹ The report showed that the county provided financial aid to only one finished affordable housing development in those three months, adding up to eighty-four rental units at a cost from county funds of \$1.75 million.¹⁸²

Miami is experiencing a growing population with a large bulge at the lower end of the income scale, which only intensifies the need for affordable housing.¹⁸³ Only 400-500 housing units are expected to be finished yearly over a ten year period.¹⁸⁴ That pace is far too slow to keep up with the need for affordable housing.¹⁸⁵

A greater need for affordable housing is a predictable result of discriminatory lending practices.¹⁸⁶ This is because of the dire financial state the borrowers end up in after being issued unfavorable mortgages as well as the City's loss of property tax revenues, which could have been used to fund more affordable housing.¹⁸⁷ However unfortunate it is, the City of Miami is likely to continue to suffer from a lack of affordable housing in the

177. See Transcript of Oral Argument at 13, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

178. *Id.*

179. See Michael Lewis, *Why Does Our Approved Affordable Housing Take So Long?*, MIAMI TODAY (Aug. 1, 2017), <http://www.miamitodaynews.com/2017/08/01/approved-affordable-housing-take-long/>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Lewis, *supra* note 176.

185. *Id.*

186. See Richard Rothstein, *A Comment On Bank Of America/Countrywide's Discriminatory Mortgage Lending And Its Implications For Racial Segregation*, ECON. POLICY INST. (Jan. 23, 2012), <http://www.epi.org/publication/bp335-boa-countrywide-discriminatory-lending/> ("foreclosures stemming from reverse redlining have led to the displacement of many African-American and Hispanic families, leaving many of them few option but to go to . . . poorer ghettos.")

187. See *id.* (stating that minority neighborhoods with high proportions of subprime mortgages suffered an epidemic of foreclosures and in affected neighborhoods, city governments had to step in to provide extra services that abandoned properties require).

wake of *Bank of Am. Corp.*, unless the City is able to triumph on remand and recover a judgment that would enable it to gain funds to repair the state it is in. Justice Kagan described it this way:

Well, but [the City is] a person aggrieved under the – given Congress’ purposes in the Act, because [it is] saying, as you did this redlining, as you did this reverse redlining, our communities, the thing that makes us a city was becoming more and more blighted, and that’s what we are trying to recover for, the – the costs of responding to that, the – the costs of not having revenues in order to carry out our services for that community and for others. . . This is their own interest in maintaining their communities free of the kind of racial discrimination that the Act says causes neighborhood blight.¹⁸⁸

According to the dissent, the chain of causation is already attenuated,¹⁸⁹ but it can theoretically be taken further. The City claims that as a result of the banks’ discriminatory loan practices, minority borrowers were likely to default on their mortgages, leading to foreclosures.¹⁹⁰ The vacant houses then led to decreased property values for the surrounding homes.¹⁹¹ Those decreased property values led to homeowners paying lower property taxes to the city government.¹⁹² In addition, the foreclosed-upon and vacant homes led to criminal activity and threats to public health and safety, which the City had to address through the expenditure of municipal resources.¹⁹³

Hypothetically, those expenditures of municipal resources would take away from the funds available to the establishment of affordable housing, all while the need for that affordable housing rises because of the displaced borrowers who are now in a bad place financially. Unless the City of Miami is somehow able to recover the lost funds, hopefully from a judgment in its favor, it is likely to continue to suffer from the negative effects of the banks’ alleged discriminatory practices and a lack of affordable housing. That the City of Miami even had the courage to bring this suit sends a strong message to predatory lenders that their practices are not going unnoticed. If the City wins on remand, the injured people and families may not benefit directly, but at least the banks will be held accountable.

188. Transcript of Oral Argument at 13, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

189. *Bank of Am. Corp.*, 137 S. Ct. at 1311 (Thomas, J., dissenting).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

2. *A Warning Against Predatory Lending*

During oral arguments, Chief Justice Roberts asked Robert Peck, arguing on behalf of the City of Miami, about the difference between subprime loans and predatory loans.¹⁹⁴ Peck responded that:

predatory loans are used as sort of a generic term to talk about taking advantage of a borrower. Subprime loans are – are simply those loans that have interest rates that are so low that it looks like it’s a wonderful deal until, of course, you look at some of – some of the balloon payments¹⁹⁵

Banks have historically contributed to the problem of racial discrimination through their lending practices.¹⁹⁶ Predatory lending enters communities and leaves distressed properties and desperate people in its wake.¹⁹⁷ “The task of cleaning up falls to cities, yet predatory lending reduces the resources available for this clean up. Declining property values resulting from predatory lending mean reduced tax revenues just as abandoned buildings lead to increased demand for fire and police protection.”¹⁹⁸ This sounds extraordinarily parallel to the injuries alleged by the City of Miami.¹⁹⁹

Predatory lenders sometimes market to people who have little or no experience with mortgage loans and who do not have adequate skills to understand contractual terms or are able to engage in a meaningful valuation of their options.²⁰⁰ In the case of *Bank of Am. Corp.*, the lenders allegedly intentionally targeted African-American and Latino customers by issuing them mortgages with less favorable terms than similarly situated white customers.²⁰¹ Foreclosure occurred seven times more frequently for some minorities in the City than for non-minority borrowers.²⁰²

Eventually, those borrowers with predatory loans who fail to meet their repayment responsibilities lose their homes to foreclosure.²⁰³ Many researchers are finding that much of the dramatic rise in foreclosures that

194. Transcript of Oral Argument at 39, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

195. *Id.* at 39-40.

196. Chemerinsky, *supra* note 3.

197. Engel, *supra* note 176, at 355.

198. *Id.*

199. *Bank of Am. Corp.*, 137 S. Ct. at 1301-02.

200. Engel, *supra* note 176, at 356.

201. *Bank of Am. Corp.*, 137 S. Ct. at 1300-01.

202. Transcript of Oral Argument at 39, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

203. Engel, *supra* note 176, at 357.

took place in the mid-2000s was due to predatory lending.²⁰⁴ In addition, predatory lending causes cities to lose vital property tax revenues,²⁰⁵ while at the same time, experiencing greater demands for fire and police protection and city sanitation services.²⁰⁶ The ability of cities to recover the costs associated with predatory lending depends on whether they can establish standing before the courts.²⁰⁷

The City of Miami claimed that it experienced these exact effects as a result of the allegedly predatory lending tactics of the banks.²⁰⁸ Before the City of Miami brought its case, the cities of Memphis, Tennessee and Baltimore, Maryland both brought cases with identical types of allegations that ended up settling for less than \$10 million each.²⁰⁹ The City of Miami is not the first municipality to assert standing under the FHA and it certainly will not be the last, particularly now that the Supreme Court has given municipalities a chance.²¹⁰

Due to the Supreme Court's decision in *Bank of Am. Corp.*, municipalities are much more likely to assert claims against predatory lenders under the FHA. Because the City of Miami's claims are able to proceed, so might the allegations of a host of other entities who might claim harm from a foreclosure of a person denied a loan or given less favorable loan terms on account of alleged discrimination.²¹¹

This expansion of FHA standing would likely necessitate the lending industry to adjust its practices, including a possible tightening of credit.²¹² Because municipalities can now bring suit for lost property tax revenues and increased municipal expenditures due to vacant homes, so long as they can prove proximate cause, banks and lenders engaging in predatory and discriminatory lending are far more likely to get caught and be held accountable.²¹³ Much of this will depend on what the court of appeals has to say when it decides the proximate cause issue on remand, but just the fact

204. *Id.*

205. *Id.* at 359.

206. *Id.* at 358-59.

207. *Id.* at 360.

208. *Bank of Am. Corp.*, 137 S. Ct. at 1301-02.

209. Transcript of Oral Argument at 35, *Bank of America Corporation*, 137 S. Ct. 1296 (No. 15-1111).

210. *Id.* (stating that Memphis, Tennessee and Baltimore, Maryland brought cases with identical types of allegations); see *Bank of Am. Corp.*, 137 S. Ct. at 1303 (stating that the City's claims of financial injury satisfy the prudential standing requirement).

211. Wildenhain, *supra* note 11.

212. *Id.*

213. See *Bank of Am. Corp.*, 137 S. Ct. at 1303, 1309. (explaining that lost tax revenue and extra municipal expenses satisfy the prudential standing requirement and that proximate cause under the FHA requires a direct relation between the alleged injury and the injurious conduct alleged).

that municipalities now have standing to assert economic injuries should be considered a warning to all predatory and discriminatory lenders.²¹⁴

With the ability to pursue claims against predatory lenders, cities may now more effectively protect their citizens and recover damages for the harms imposed on the cities themselves.²¹⁵ “[L]awsuits [by municipalities] have the potential to force predatory lenders to internalize the externalities their lending creates, thereby reducing their incentives to engage in abusive lending practices.”²¹⁶ Municipalities around the nation now have a way to redress the negative financial effects of predatory and discriminatory lending.²¹⁷ Viewing this optimistically, this may decrease predatory lending practices, which will benefit communities and municipalities as well as individual borrowers²¹⁸.

3. *The Floodgates Issue and the Expansion of Standing*

The banks were very concerned that taking the Court’s previous words literally and allowing everyone with constitutional standing to bring a cause of action under the FHA “would produce a legal anomaly.”²¹⁹ They argued that allowing restaurants, plumbers, utility companies, or any other participant in the local economy to sue them to recover business they lost when people had to give up their homes and leave the neighborhood due to the banks’ allegedly discriminatory lending practices would produce farfetched results.²²⁰

The basis for this argument was the Court’s reasoning in *Thompson v. North Am. Stainless, LP*.²²¹ There, the Court held that the words “person claiming to be aggrieved” in Title VII of the Civil Rights Act, the employment discrimination statute, did not stretch that statute’s zone of

214. *See id.* at 1301 (stating that the City’s claimed injuries fall within the zone of interests arguably protected by the FHA and that proximate cause requires more than a showing that the alleged injuries foreseeably flowed from the alleged statutory violation. Because municipalities may now have standing, they become more likely to bring suit to redress their injuries).

215. Kathleen C. Engel, *supra* note 176, at 391.

216. *Id.*

217. *See Bank of Am. Corp.*, 137 S. Ct. at 1301 (stating that a municipality’s claims of financial injuries satisfy the prudential standing requirement and that to establish proximate cause under the FHA, a plaintiff must do more than show that its injuries resulted from the alleged statutory violation).

218. *See id.* at 1301, 1306 (stating that a municipality’s claims of financial injuries fall within the zone of interests arguably protected by the FHA and that to establish proximate cause under the FHA, a plaintiff must show more than that its injuries foreseeably flowed from the alleged statutory violations). Because municipalities may now have standing under the FHA, they are more likely bring suit to redress their injuries, therefore holding discriminatory lenders more accountable and hopefully reducing predatory lending practices. *Id.*

219. *Id.* at 1304.

220. *Bank of Am. Corp.*, 137 S. Ct. at 1304.

221. *Id.*

interest to the limits of Article III.²²² The Court reasoned that such an interpretation would lead to farfetched results.²²³ For example, a shareholder in a company could bring a Title VII suit against the company for discriminatorily terminating an employee.²²⁴ In relation to the FHA, the banks believed that a zone of interests that large could not have been the intent of Congress.²²⁵

The majority did not discuss this portion of the banks' argument at length because it found that the City's financial injuries fell within the zone of interests protected by the FHA.²²⁶ However, the Court vaguely addressed the possibility of an overly-broad interpretation of FHA standing in its discussion of proximate cause.²²⁷ While that may not have been the Court's intention, it is a possible effect. The majority stated that "[i]n the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires."²²⁸ Because the housing market is intertwined with economic and social life, a violation of the FHA may "be expected to cause ripples of harm to flow' far beyond the defendant's misconduct."²²⁹ Furthermore, the Court reasoned that nothing in the FHA suggested that Congress intended to provide a remedy wherever those ripples may travel, and considering suits to recover damages for any foreseeable result of an FHA violation would risk "massive and complex damages litigation."²³⁰

This could be viewed as the Court's way of limiting the pool of potential FHA plaintiffs. It is foreseeable that restaurants, plumbers, utility companies and numerous other entities could suffer financial losses as a result of having fewer customers when people are forced to leave the area when their homes are foreclosed, but by reeling in the standard for proximate cause under the FHA, the majority made sure that not just anyone who foreseeably experienced financial loss as a result of the banks' alleged misconduct could sue under the FHA.²³¹ Rather, potential plaintiffs are required to show "some direct relation between the injury asserted and the injurious conduct alleged."²³²

222. *Id.*

223. *Id.*

224. *Id.*

225. *Bank of Am. Corp.*, 137 S. Ct. at 1304.

226. *Id.*

227. *Id.* at 1306.

228. *Id.*

229. *Id.* (quoting *Associated General*, 459 U.S. at 534).

230. *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting *Associated General*, 459 U.S. at 545).

231. *See id.* at 1306 (stating that foreseeability alone is insufficient to establish proximate cause under the FHA because it does not ensure the close connection that proximate cause requires). Therefore, to satisfy proximate cause under the FHA, a plaintiff must show more than that its injuries were a foreseeable result of the alleged statutory violation. *Id.*

232. *Id.* (quoting *Holmes*, 503 U.S. at 268).

While the dissent disagreed with the majority's zone of interests holding, it did state that at least the Court's opinion was narrow.²³³ Moreover, the dissent explained that the majority opinion should not be read to authorize suits by local businesses alleging the same injuries that the City alleged.²³⁴ The dissent believed that the majority left little doubt that the City or any similarly situated plaintiff could satisfy the rigorous standard for proximate cause adopted by the Court²³⁵ and would have held that the City's alleged injuries were too remote to satisfy the FHA's proximate cause requirement.²³⁶

If the FHA had been interpreted to be as broad as Article III permits, absurd consequences could have followed.²³⁷ If the Court had held that the FHA requires only broad constitutional standing, a shareholder would be allowed to sue a real estate firm for the diminution of its stock if it occurred as a result of the firm's discriminatory [lending] practices.²³⁸ The Court was aware of potentially bizarre results such as this and adopted a more demanding test for proximate cause in order to prevent suits involving such remote grievances.²³⁹

Mr. Robert S. Peck, attorney for the City of Miami, discussed this issue as well.²⁴⁰ During oral arguments, he explained that the City had a special interest in fair housing and integrated communities which the FHA was designed to vindicate.²⁴¹ He further stated that the employer and the local dry cleaner do not possess that special interest, even though they have a relationship with the community and the residents and provide services to them.²⁴² This demonstrates that even the City of Miami recognized that it was possible for standing under the FHA to be interpreted too broadly, and the City did not argue that anyone and everyone should be able to bring suit under the FHA.²⁴³

Mr. Curtis E. Gannon, Assistant to the Solicitor General, argued as amicus curiae on behalf of the City of Miami.²⁴⁴ Using precedent as

233. *Id.* art 1311 (Thomas, J., dissenting).

234. *Bank of Am. Corp.*, 137 S. Ct. at 1311 (Thomas, J., dissenting).

235. *Id.*

236. *Id.* at 1307.

237. Eric Vanderhoef, *A House Built on Shifting Sands: Standing Under the Fair Housing Act After Thompson v. North American Stainless*, 12 DUKE J. CONST. LAW & PUB. POL'Y SIDEBAR 83, 93 (2017).

238. *Id.*

239. *See Bank of Am. Corp.*, 137 S. Ct. at 1306 (stating that foreseeability alone is insufficient to establish proximate cause under the FHA). This is more demanding than the foreseeability theory of proximate cause adopted by the Eleventh Circuit. *Id.*

240. Transcript of Oral Argument at 41, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 44.

support, he argued that businesses, to the extent that their property values are diminished, are situated like one of the neighbors in *Gladstone*.²⁴⁵ In *Gladstone*, the Court recognized injury to property values and said that both a city and the neighbors of the particular residents were directly injured by decreased property values.²⁴⁶ The neighbors whose property values decreased were able to recover.²⁴⁷ Gannon stated that harms that flow directly from changes in property value were contemplated by Congress²⁴⁸ and therefore, deserving of protection.

Gannon disclaimed the potential recovery of local businesses by saying that if the business is claiming lost profits or a utility company is complaining about lost customers, those injuries are further afield and not closely connected to the lenders' misconduct.²⁴⁹ He presumably meant that injuries which are such remote results of discriminatory lending practices are not actionable. Mr. Gannon further argued that Congress took account of property value, which was recognized in *Gladstone*.²⁵⁰ That is why entities such as a utility company are not covered.²⁵¹ Utility companies would not suffer injury from a decrease in property values but from a loss of customers, which was apparently not one of Congress' concerns when enacting the FHA.²⁵²

However, Mr. Gannon argued that real estate brokers who are involved in a transaction have an interest in the transaction, even if it is only an economic interest, so they are able to recover if the transaction fails to go through because of racial discrimination.²⁵³ This type of injury is more closely related to discriminatory conduct than a loss of profits or customers, and it would likely be less challenging to prove proximate cause for an injury such as this.²⁵⁴

Mr. Neal K. Katyal, arguing for the banks, had quite a different take.²⁵⁵ He contended that the City was borrowing someone else's anti-

245. Transcript of Oral Argument at 49-50, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111).

246. *Id.* at 49.

247. *Id.*

248. *Id.* at 52.

249. *Id.* at 49-50.

250. Transcript of Oral Argument at 52, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111).

251. *See id.* (stating that the harms that flow directly from changes in property value were what Congress contemplated). Because entities such as utility companies would suffer a loss of customers rather a decline in property values, Mr. Gannon opined that their injuries would not be covered by the FHA. *Id.*

252. *See id.* (stating that Congress contemplated harms that flow directly from changes in property value rather than a loss of customers).

253. *Id.* at 50-51.

254. *See id.* (stating that because real estate brokers have an interest in the transaction, they would be able to recover under the FHA).

255. Transcript of Oral Argument at 7, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111).

discrimination interests.²⁵⁶ He argued that the direct victims could obviously sue for discrimination, but the City could not because it was alleging downstream harm for tax revenues and similar things.²⁵⁷ Furthermore, he stated that the City did not identify an anti-discrimination harm to itself; it only identified economic harms, so the case was not within the zone of interests.²⁵⁸

Mr. Katyal focused very strongly on the idea that the City's injuries were economic, not anti-discrimination.²⁵⁹ He emphasized that the City was cutting and pasting the actual borrowers' injuries.²⁶⁰ He did state that if the City's complaint had been written to say that segregation caused blight, it would have been sufficient.²⁶¹ Mr. Gannon, on the other hand, argued that the City should not have to establish a change in the racial composition of a neighborhood in order to bring a suit because the FHA is intended to ban "discriminatory housing practices throughout the United States, and that includes segregated communities that are not changing if there is discrimination."²⁶²

The differences in opinion between the two sides were settled by the Court's decision. Although the Court did not state it outright, the proximate cause standard the Court adopted will serve to limit the group of persons who qualify to sue and the types of injuries for which recovery will be available under the FHA.²⁶³ Requiring "some direct relation between the injury asserted and the injurious conduct alleged"²⁶⁴ rather than simple foreseeability alone will restrict who can recover under the FHA. As a result of this case, municipalities now have more of a chance to recuperate from the negative economic impacts they experience as a result of discriminatory lending.²⁶⁵

V. CONCLUSION

The holding in *Bank of Am. Corp.* enlarged, with limitations, the standing of municipalities under the Fair Housing Act.²⁶⁶ The Article III standing requirements of an "injury in fact" that is "fairly traceable" to the defendant's conduct and "that is likely to be redressed by a favorable

256. *Id.* at 7-8.

257. *Id.* at 8.

258. *Id.* at 9.

259. *Id.*

260. Transcript of Oral Argument at 8, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111).

261. *Id.* at 15.

262. *Id.* at 52-53.

263. *See Bank of Am. Corp.*, 137 S. Ct. at 1301-02.

264. *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting *Holmes*, 503 U.S. at 268).

265. *See Bank of Am. Corp.*, 137 S. Ct. at 1301-02 (stating that the City's financial injuries were arguably within the zone of interests protected by the FHA).

266. *See Bank of Am. Corp.*, 137 S. Ct. 1301.

judicial decision²⁶⁷ are still alive and well, and as long as a municipality can prove its injuries are within the zone of interests protected by the FHA and that its injuries were proximately caused by the defendant's actions, the municipality has an excellent chance at success. This decision was squarely in line with precedent²⁶⁸ and this holding was the inevitable next step in the course of developing standing under the FHA. Municipalities may now assert certain economic injuries as a result of alleged FHA violations.²⁶⁹

This decision will undoubtedly impact the City of Miami and the lending industry, and an opening of the floodgates with regard to potential plaintiffs is not something to worry too much about due to the Court's limitation on proximate cause. The United States of America is now one step closer to combatting the effects of and healing from the adverse consequences of predatory lending and discriminatory housing practices, which is likely to greatly aid in alleviating racial inequality as well.

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267. *Bank of Am. Corp.*, 137 S. Ct. at 1302 (quoting *Spokeo*, 136 S. Ct. at 1547).

268. *See Bank of Am. Corp.*, 137 S. Ct. 1303.

269. *See Bank of Am. Corp.*, 137 S. Ct. at 1301.