Nos. 19-675 & 19-688

IN THE

Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

WELLS FARGO & CO. AND WELLS FARGO BANK, N.A.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Petitions of Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

ILYA SHAPIRO
Counsel of Record
TREVOR BURRUS
SAM SPIEGELMAN
CATO INSTITUTE
1000 Mass. Avenue, N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

December 20, 2019

QUESTIONS PRESENTED

In its prior decision in this case, this Court held that the Fair Housing Act requires proof of proximate cause in the same way as other federal statutes with common-law roots. Following the relevant "directness principles," the Court held, generally limits recovery to injury at the "first step" of the causal chain. *Bank of America v. City of Miami*, 137 S. Ct. 1296 (2017).

On remand, the Eleventh Circuit held that the governing "directness principles" do not limit the length of the causal chain, but instead require only some "logical bond" or "meaningful and logical continuity" between a statutory violation and the claimed injury. Miami alleges that the terms of loans made to individual borrowers led, through a lengthy causal chain, to lost tax revenue. The Eleventh Circuit held that claim sufficiently "direct."

The question presented by the cert petitions is:

1. Whether the FHA's proximate-cause element requires more than just some "logical bond" between a statutory violation and the claimed injury.

Amicus also addresses an additional question that the Court may need to resolve as it takes up the above, given that the Court also previously held that the FHA's "zone of interests" extended standing to sue to municipalities who claim a loss of tax revenue from banks' allegedly discriminatory and predatory mortgage lending:

2. Whether the Court in *Bank of America* was correct to find that Miami's alleged injuries place the city within the FHA's "zone of interests" for standing purposes.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

Among its many areas of focus, Cato spotlights government overreach through uncontrolled spending, including by state and local governments. This case typifies these concerns, while also twisting basic concepts of proximate cause and standing.

SUMMARY OF ARGUMENT

Instead of resolving its fiscal challenges by reducing spending or seeking residents' consent to increase local taxes, Miami looks to fund its budget at the expense of the petitioning banks through a creative litigation strategy involving allegations of highly attenuated economic harm. Lawsuits like this one are a growing phenomenon, particularly under the FHA. The temptation of local governments to pursue such tendentious litigation strategies threatens to diminish the freedom and power of citizens by separating local fiscal policy from the

---

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

healthy constraints of democracy. This temptation depends entirely on courts' willingness to ignore the substantive limitations Congress placed on private causes of action under statutes like the FHA.

Here, Miami's allegations of indirect harm to its fiscal interests are insufficient to support a cause of action against petitioners under the FHA. The Court should grant the petition for three reasons:

1. *Bank of America v. City of Miami*, 137 S. Ct. 1296 (2017), although leaving to the lower courts the task of defining FHA proximate cause, set forth the following "four guiding principles," as the Eleventh Circuit articulated them:

> We begin by considering (a) what falls within the first step of the causal chain, as we are aware of the general tendency in these cases . . . not to go beyond that first step. What falls within the first step will, we're told, depend on (b) the nature of the statutory cause of action, and (c) an assessment of what is administratively possible and convenient. Finally, since the common law is the basis for the direct relation requirement, we also look to (d) the FHA's common-law antecedents to the extent that we can.

City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1272–73 (11th Cir. 2019) (quoting *Bank of America*, 137 S. Ct. at 1306) (cleaned up). The purpose of these principles is to avoid the "massive and complex damages litigation" that could result if litigation related to the housing market, so "interconnected with economic and social life," were subject to a "proximate cause" formulation untethered to a

common-law standard arrived at through centuries of fine-tuning. *Bank of America*, 137 S. Ct. at 1306 (internal citations omitted). The "four guiding principles" ensure that liability only attaches to causes that bear "some direct relation" to the injuries alleged. *Id.* And this Court did not use "some direct relation" as a synecdoche for the dictionary definition of "relation." Instead, it used the term to ensure that lower courts did not ignore that for any "sufficiently close connection" to be found between a cause and its effect, there must be a direct and *unobstructed* line between the two. *Id.* This Court should thus reject the Eleventh Circuit's reformulation of FHA's "proximate cause" standard as inconsistent with the conditions imposed upon it in *Bank of America*.

2. In *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Court made clear that to allow a civil action under a federal statute, a court must first determine "whether a plaintiff comes within" the law's "zone of interests." This, in turn, requires that a court "determine, using traditional statutory-interpretation tools, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 119. The Court in *Bank of America* held that Miami indeed falls within the FHA's "zone of interests." The Court should reevaluate that finding, as the dissent made a compelling case that the alleged harms to Miami are similar in nature to the indirect consequential losses that the Court in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) concluded fall outside the scope of the similar Title VII "zone of interests."

3. The failure of the court below to properly apply the *Bank of America* conditions invites the trouble-

some and potentially abusive phenomenon exemplified by this lawsuit and a growing wave of others, the proliferation of which will lead to a circuit split. Local governments will be tempted to partner with plaintiffs' lawyers to pursue creative litigation theories of fiscal harm under federal statutes as a means to meet their local budget needs. Such suits harm the banking industry and let governments avoid having to reduce spending or seek their residents' consent for a tax increase. In other words, they circumvent the usual constraints of democracy that are the primary guarantors of the people's liberty.

ARGUMENT

The Court should review the Eleventh Circuit's reformulation of FHA's "proximate cause" standard against *Bank of America*'s "four guiding principles" for making this determination and reconsider *Bank of America*'s "zone of interests" finding in line with the dissent's view. To let the ruling below stand would be to invite a flood of litigation that would cause "ripples to flow" across the national economy.

I. THE LOWER COURT'S REFORMULATION OF "PROXIMATE CAUSE" UNDER THE FHA MISINTERPRETS *BANK OF AMERICA*'S "FOUR GUIDING PRINCIPLES"

Although the Court in *Bank of America* declined to set the boundaries of FHA "proximate cause" itself, its remand of that task to the lower courts included certain indispensable conditions. The Eleventh Circuit properly articulated these conditions as *Bank of America*'s "four guiding principles":

> We begin by considering (a) what falls within the first step of the causal chain, as we are aware of the general tendency in these cases . . . not to go beyond that first step. What falls within the first step will, we're told, depend on (b) the nature of the statutory cause of action, and (c) an assessment of what is administratively possible and convenient. Finally, since the common law is the basis for the direct relation requirement, we also look to (d) the FHA's common-law antecedents to the extent that we can.

City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1272–73 (11th Cir. 2019) (quoting *Bank of America*, 137 S. Ct. at 1306) (cleaned up). The purpose of these principles is to prevent the "massive and complex damages litigation" that could result from such a broad scope of liability. *Bank of America*, 137 S. Ct. at 1306. This is especially true with respect to liability in the housing market, where "a violation of the FHA may . . . 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct." *Id.* (quoting *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 534, 545 (1983)). Although the Eleventh Circuit endeavored to adhere to these principles, its reading of each is ultimately incorrect.

A. The First-Step Principle

With respect to the "first step/general tendency" principle, the court below found that "an intervening step does not vitiate proximate cause." *Wells Fargo*, 923 F.3d at 1273. While this statement is true in some contexts, it is incorrect here—and the court's own reasoning elucidates its error. First, the court avers,

"Supreme Court precedent makes crystal clear that an intervening step does not necessarily mean proximate cause has not been plausibly alleged." *Id*. Second, "[p]roceeding beyond a first step here is consistent with the instruction that we stop at the first step only as a 'general tendency.'" *Id*. at 1276.

In reaching its first rationale, the court leans heavily on *Lexmark*, which held that proximate-cause liability "requir[es] 'economic or reputational injury flowing directly from the [defendant's] deception." *Lexmark*, 572 U.S. at 133–34. A "requirement [that] would not be met 'when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff.'" *Wells Fargo*, 923 F.3d at 1234 (quoting *Lexmark*, 572 U.S. at 133–134). The court understands this to mean "that a competitor whose business failed because of false advertising could sue the false advertiser, but that competitor's landlord could not sue the false advertiser for the value of rent payments he could no longer collect." *Id*. at 1274.

The Eleventh Circuit is correct that *Lexmark* shows "intervening steps in a causal chain cannot automatically and invariably end the analysis." *Id*. But the logic underlying the *Lexmark* example it cites, applied to this case, makes the first causal step the end of the analysis. Because stopping there prevents municipalities from suing as surely as it does utilities companies that also lost profits as a result of the foreclosures. In both cases, these are plaintiffs *in turn* affected by earlier direct injuries.

While this case deals with foreclosed-upon residential borrowers and not commercial actors, the directness presumption underlying proximate-cause

analysis remains the same: foreseeability, continuity, *and* direct harm. Otherwise, there can be no end to liability. "Life is too short to pursue every human act at its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes v. Sec. Investor. Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring). Whatever the purpose of the FHA, it cannot overcome the inherent thrust of "proximate" causation to cauterize rather than metastasize liability.

As for its second rationale, the Eleventh Circuit misinterprets what this Court meant by the "general tendency" of analogous cases "not to go beyond [that] first step." *Bank of America*, 137 S. Ct. at 1306. The court treats this reference as *guidance* on how to proceed, instead of a *description* of the frequency with which the application of the common-law principle of directness (as the Court has interpreted it) ends proximate-cause analysis at the first step.

In his famous *Palsgraf* dissent, Judge William Andrews of the New York Court of Appeals opined, "What we . . . mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 352 (1928) (Andrews, J., dissenting). Although Judge Benjamin Cardozo's "foreseeability" standard prevailed in that time-honored case, it did not have the final word. Indeed, Judge Andrews's reasoning appears to have become the keystone of this Court's recent proximate-cause analysis. Besides specifically rejecting the Eleventh

Circuit's foreseeability-alone theory, the Court has "within a span of only three years, from 2011 to 2014 . . . described the concept of proximate cause as:

> shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes, as "serv[ing] . . . to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity," and as reflective of "[t]he difficulty that can arise when a court attempts to ascertain the damages caused by some remote action."

Nicole Summers, "Setting the Standard for Proximate Cause in the Wake of *Bank of America Corp. v. City of Miami*," 97 N.C. L. Rev. 529, 544–45 (2019) (quoting *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011); *Paroline v. United States*, 572 U.S. 434, 445 (2014); and *Lexmark*, 572 U.S. at 135). Thus the "general tendency"—at least where this Court is concerned—is toward a proximate-cause theory far closer to Judge Andrews's public-policy focus on social economy, which leads to the essentially moral choice of drawing the liability circle closer to the seismic center of activity rather than further afield.

B. The Nature of the Statutory Cause of Action

Bank of America offered that "the question [the nature of the statutory cause of action] presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Bank of America*, 137 S. Ct. at 1305 (quoting *Lexmark*, 572 U.S. at 133). The Eleventh Circuit answered that "the

text and history of the FHA suggest a far-reaching statute." *Wells Fargo*, 923 F.3d at 1278. But just because the FHA is generally far-reaching does not mean that every one of its elements—including its "what" (purpose), "how" (enforcement), and "who" (plaintiffs)—must also be far-reaching. Indeed, *Bank of America* suggests that the FHA's far-reaching purpose cuts *against* an expansive proximate-cause standard—that a "violation of the FHA may . . . be expected to cause ripples of harm to flow far beyond the defendant's misconduct," and that, concordantly, "nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel." *Bank of America*, 137 U.S. at 1306 (cleaned up). This Court provided, therefore, that there must be a "sufficiently close connection" between the harm and the injury alleged. *Id.* at 1305. And this is no mere recommendation. It ensures the directness element discussed in Part I.A, *supra*.

This Court well understands that the FHA's broad purpose can only be achieved if plaintiffs seek, or at least threaten, damages sufficiently high to correct or deter harmful behavior. And since the FHA targets one of the most pervasive market activities in the country—housing—this purpose can likely only be achieved if those who are harmed directly can *aggregately* correct or deter discriminatory lending practices through thousands of individual lawsuits (perhaps consolidated into class actions). *Amicus* does not doubt that this is a tall order, and that perhaps government-led lawsuits such as this one would have a greater corrective or deterrent effect. But the failure of lawmakers to fashion a statute to its underlying purposes does not license courts to reassemble the law

into a leaner and meaner machine. The FHA, like any law, comes before the court pre-fabricated.

Just as common-law principles impose a "directness" requirement on any proximate-cause analysis, so too does it control how far a court may go in reading the scope of a statutory cause of action. "The judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Assoc. Gen. Contractors*, 459 U.S. at 536. "Congress, we assume, is familiar with the common-law rule and does not mean to displace it *sub silentio*. We have thus construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation." *Lexmark*, 572 U.S. at 132. *Lexmark* thus clarified that the proximate-cause rule is a species of common law, unless Congress says otherwise for a specific law.

There is nothing in the FHA's text or history to suggest that its version of "proximate cause" is any different than the garden-variety kind that the Court has previously read into other federal laws. "A claim for damages under the FHA—which is akin to a tort action, is no exception to this traditional requirement" that "'in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" *Bank of America*, 137 U.S. 1305 (cleaned up). The import of the majority's views on common-law proximate cause in general, and as applied to the FHA specifically, could not be clearer: "[T]he majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts and leaves to the Court of Appeals to apply." *Id*. at 1311 (Thomas, J., concurring in part, dissenting in part).

C. What Is Administratively Possible and Convenient

A crucial step in measuring the scope of liability in any context is the feasibility of determining damages. Here, if the banks are indeed liable for Miami's injuries, the city's "Hedonic regression" method could conceivably be used to determine precise damages. The Eleventh Circuit, relying heavily on *Holmes v. Sec. Investor. Prot. Corp.*, 503 U.S. 258 (1992), found that "tracing causation here is not administratively infeasible" for Miami's tax-revenue injury (even though it is infeasible for its municipal-expenditures injury). *Wells Fargo*, 923 F.3d at 1281. But the question of what is administratively possible and convenient is not limited to the damages that could be rewarded in one case. Instead, the issue extends to the costs and complexities that could result from pending and potential litigation if this Court were to approve the lower court's reformulation. To see why, *amicus* draws the Court's attention to the Eleventh Circuit's answer to two questions from *Holmes*.

The court below considered whether "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts." *Wells Fargo*, 923 F.3d at 1286 (quoting *Holmes*, 503 U.S. at 269). The court answers that "no such problem is presented in this case" because "the injuries to the City's treasury are not shared by any other possible plaintiff." *Id.* at 1287. That simply isn't true. While lost revenues from foreclosures within Miami are unique to Miami, this hardly means that "its injuries are unique." *Id.*

Indeed, towns and cities across the country have already begun to follow Miami's example.

> At the time of Bank of America's previous petition for certiorari, twelve local governments had brought suits similar to Miami's. Four additional local governments have since filed suits—including Philadelphia and Oakland—bringing the total number of government plaintiffs to *sixteen*. The vast majority of these governments have sued multiple lenders.

Pet. for Cert. 15 & n.4, *Bank of America v. City of Miami* (19-675) (Nov. 25, 2019) (emphasis original).

When this Court spoke of "massive and complex damages litigation" that could ensue if the courts read the FHA's "proximate cause" standard too broadly, it wasn't just worried about Miami. The national costs—the "ripples" and how far they might travel—would be massive. *Bank of America*, 137 U.S. at 1306.

What begins with Miami and 16 other local governments today could very well spread to nearly every county and municipality with the resources to sue. The costs to banks, big and small, passed on to their customers and then to the national (and eventually global) economy would be significant. And so, while individual municipalities could likely use "Hedonic regression" to cabin the damages they themselves are owed, that sort of case-specific focus ignores the forest for the trees. It doesn't account for the excessive *aggregate* costs, of the sort Judge Andrews's analysis in *Palsgraf* warned against.

This Court has in recent cases reflected Judge Andrews's wisdom. *See supra*, Argument I.A. And it

should continue to do so here. "An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say the fire started by the lantern causing its destruction." *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting). However, Andrews offered, this lantern is a "cause," not "*the* proximate cause." And the line at which a cause ceases to be "proximate" to a harm is to be drawn, ultimately, "arbitrarily." *Id.* This sort of line-drawing ensures that the entirety, or virtual entirety, of damages falls upon those liable for the harm, and does not extend to the broader society (beyond those transferred costs that are impossible to avoid). Again, "[t]his is not logic. It is practical politics." *Id.*

Second, the Eleventh Circuit regarded the *Holmes* proviso to limit recovery to "directly injured victims" who "can generally be counted on to vindicate the law" as impertinent to cases such as this one, wherein the collective power of individual borrowers is not so easily summoned. *Wells Fargo*, 923 F.3d at 1287 (quoting *Holmes*, 503 U.S. at 269) (cleaned up). But again, this is not a problem for the courts to solve. Laws come before the courts prepackaged. And although judges might disagree as to a law's correct interpretation, all should agree that only one interpretation is correct. In this case, the obstacles individual borrowers face in taking collective action to aggregately vindicate the law cannot justify a court's eroding the directness requirement at the heart of *Bank of America*'s "four guiding principles."

D. The FHA's Common-Law Antecedents

The Eleventh Circuit was not impressed with the FHA's "common-law antecedents." The court

admitted that these antecedents "are the basis for imposing the requirement" of directness. *Wells Fargo*, 923 F.3d at 1294. It chose, however, to ignore common-law principles and morph the definition of "some direct relation"—which conspicuously ignores the word "direct"—into requiring only a "logical and direct bond" between a cause and an effect. A "bond" that implies, simply, "no *discontinuity* between the violation and the harm." *Id*. (emphasis added).

But the FHA's "common-law antecedents" show that the lower court's focus on the seeming inherent logic of continuity is not the end of the story. That ancient common-law principles still apply to the FHA, as they did to statutes in two of the analogous cases *Bank of America* referenced. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974) ("A damages action under the statute sounds basically in tort . . . this cause of action is analogous to a number of tort actions recognized at common law."); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) ("The *Holmes* Court turned to the common-law foundations of the proximate cause requirement . . . conclud[ing] that even if [the plaintiff] were subrogated to the rights of certain aggrieved customers, the RICO claims could not satisfy this requirement of directness.").

Indeed, "continuity," however logical a bond it creates between a cause and an effect, is no better than "foreseeability" alone, and may well be worse. It stretches the universe of liability at least as thin as foreseeability does but without the proper moral limitations that foreseeability imposes. Whatever can be "logically" bonded to an FHA violation through the lens of continuity alone likely includes a myriad of

harms that are not foreseeable from the outset. For obvious reasons, no examples come to mind.

The Eleventh Circuit continued:

> We lack any clear indication that Congress had these common-law claims in mind when drafting the FHA, and so we are reluctant [to] draw too much from them beyond the "some direct relation" requirement. For one thing, we would not know which common-law claim to begin with, since we do not see the obvious correspondence to the common law the Court has identified elsewhere.

Wells Fargo, 923 F.3d at 1292.

But this Court's recent precedents "read a proximate cause requirement into statutes" ranging from employment-protection statutes to the Lanham Act, the main federal trademark law. As one post-*Bank of America* commenter put it:

> These statutes do not facially refer to proximate cause, but the Court has reasoned that the statutes' structural resemblance to a common law tort, combined with the use of general causal language in the statutory text, indicate Congress's intent to impose some limitation on the 'ripples of harm' that are recoverable.

Summers, *supra*, at 532. The court below was wrong to overlook the importance of that principle. It is no real excuse that "it would not know which" analogous "common-law claim to begin with." *Wells Fargo*, 923 F.3d at 1292.

II. THE COURT SHOULD RECONSIDER *BANK OF AMERICA*'S "ZONE OF INTERESTS" FINDING

This Court's recent decisions establish that plaintiffs seeking to pursue causes of action created by a federal statute must show that their claims fall within the "zone of interests" protected by the statute. The *Bank of America* majority found that Miami's allegations, taken as true, place it within the FHA's "zone of interests." "We have said that the definition of 'aggrieved person' 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." *Bank of America*, 137 U.S. at 1303 (quoting *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972)) (other citations omitted).

In *Thompson v. N. Am. Stainless, LP*, the Court held that the term "aggrieved" must be read to incorporate the "zone of interests" test, which precludes suits by plaintiffs whose claims are "so marginally related to … the purposes implicit in the statute" as to fall outside the sphere "arguably [sought] to be protected" by the law. 562 U.S. 1701, 178 (2011) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 (1987)). The question here is whether *Thompson*, which applies to Title VII of the Civil Rights Act, relates any new "zone of interests," test to the Title VIII (FHA) standing analysis developed in *Trafficante* and similar cases.

On this, the majority and dissent in *Bank of America* disagree. And their disagreement turns on polarized readings of this passage from *Thompson*:

> In deciding [*Trafficante*], we relied upon, and cited with approval, a Third Circuit opinion involving Title VII, which, we said, "concluded that the words used showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" We think that dictum regarding Title VII was too expansive. Indeed, the *Trafficante* opinion did not adhere to it in expressing its Title VIII holding that residents of an apartment complex could sue the owner for his racial discrimination against prospective tenants. The opinion said that the "person aggrieved" of Title VIII was coextensive with Article III "*insofar as tenants of the same housing unit that is charged with discrimination are concerned*." Later opinions, we must acknowledge, reiterate that the term "aggrieved" in Title VIII reaches as far as Article III permits. . . . We now find that this dictum was ill-considered, and we decline to follow it. If any person injured in the Article III sense by a Title VII violation could sue, absurd consequences would follow.

Thompson, 562 U.S. at 176–77 (emphasis original) (internal citations omitted). *Thompson* thus construed "aggrieved" in Title VII "more narrowly than the outer boundaries of Article III." *Id*. at 177. The dissent in *Bank of America* urges that the same narrow reading be applied to Title VIII. *Bank of America*, 137 U.S. 1307–11 (Thomas, J., concurring in part and dissenting in part). After all, *Thompson* narrowed Title VIII's "zone of interests" to something less than Article III standing, emphasizing that *Trafficante* held Title VIII and Article III standing to

be co-extensive only "insofar" as the case-specific facts "are concerned." *Thompson*, 562 U.S. at 176 (quoting *Trafficante*, 409 U.S. at 209). Otherwise, *Thompson* read precedential language finding a "congressional intention to define" Title VIII and Article III standing as co-terminus to be "ill-considered" "dictum." *Id.*

The *Bank of America* majority, on the other hand, held that "[t]he 'dictum' we cast doubt on in *Thompson* addressed who may sue under Title VII, the employment discrimination statute, not under the FHA." *Bank of America*, 137 U.S. at 1303. That conclusion is inapposite to the dissent's view that the "ill-considered" "dictum" to which *Thompson* referred regarded "some language in our older precedents suggest[ing] that the FHA's zone of interests extends to the limits of Article III." *Id.* at 1304 (Thomas, J., concurring in part and dissenting in part).

The dissent's view should carry the day, especially since the *Thompson* majority reasoned that limiting Title VII's "zone of interests" to something less than Article III standing properly "exclud[es] plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions." *Thompson*, 562 U.S. at 178. And so, to the extent *Trafficante* and similar cases can be read to suggest that the FHA's private right of action is co-extensive with Article III standing, the dissent in *Bank of America* makes clear that *Thompson* disavowed those suggestions as "ill-considered dictum" and should no longer be followed.

III. FAILURE TO REVIEW THE LOWER COURT'S "PROXIMATE CAUSE" FORMULATION AND RECONSIDER *BANK OF AMERICA*'S "ZONE OF INTERESTS" FINDING THREATENS "MASSIVE AND COMPLEX DAMAGES LITIGATION," AND A CIRCUIT SPLIT

If courts construe the FHA to authorize suits to the full extent of Article III standing, then any type of consequential economic loss, no matter how far detached from the social ills Congress sought to redress, can give rise to a claim under the statute. The loss would need only some "logical bond" to alleged housing or lending discrimination.

The economic loss claimed here is the ultimate in consequential damages: the impact of urban blight on Miami's property-tax base. It invites just the sort of "massive and complex damages litigation" that longstanding proximate-cause jurisprudence aims to avoid. While the history of proximate-cause analysis is jumbled and often incoherent, inherent to all its iterations is an adherence to economic feasibility.

Ultimately, all things merge into one causal universe. "Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense that it is essential. But that is not what we mean by the word." *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting). We draw legal lines not only in pursuit of justice, but to allow economic actors some bright-line characterizations of the risks to which their activities expose them. To draw these lines too broadly threatens to massively chill economic activity. This case highlights the danger.

It seems the prospect that Miami can recoup its tax revenue losses by tapping into the resources of the nation's largest banks through the FHA is too tempting to pass up, national economic costs be damned. Most governments have an insatiable hunger for revenue, and plaintiffs' lawyers, who themselves stand to win sizable fee awards from these actions, have little trouble convincing local officials that FHA litigation or similar suits under other federal civil rights laws are the answer to their fiscal woes. These suits promise a new and potentially rich source of funding that does not require elected officials to secure the consent of voters or face the wrath of local property owners and other taxpayers.

This species of lawsuits is the latest wave in the troubling trend of regulation by litigation. It follows the pattern set by state attorneys general who have joined forces with contingency-fee lawyers to sue, for example, the tobacco industry for the states' share of healthcare costs attributable to smoking and the gun industry for the societal costs of gun violence—litigation models that have been criticized by legal commentators as unconstitutional, unethical, and inconsistent with democratic government.[2]

---

[2] *See* Martin H. Redish, "Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications," 18 S. Ct. Econ. Rev. 77, 80–81 (2010) (arguing that "[i]t is difficult to imagine an arrangement more rife with danger, cynicism and potential abuse than this one" and concluding that the "government's use of private contingent fee attorneys in civil litigation is (1) inconsistent with the nation's democratic tradition, (2) unethical, and (3) a violation of the Due Process Clause"); U.S. Chamber Inst. for Legal Reform, "Privatizing Public Enforcement: The Legal, Ethical and Due-Process Impli-

Should Miami prevail on the questions now before the Court, this litigation tide will be uncontainable. Cities and counties from coast to coast will have a potentially unlimited flow of revenue to fund their spending habits—an enticing source of new funds that is beyond the constraints of democracy and free of any need to secure the consent of the governed.

Further, upholding the Eleventh Circuit reformulation of FHA "proximate cause" threatens a circuit split sooner rather than later. Already, district courts are scrambling to discern *Bank of America*'s implications, with mixed results. Since 2017, one district court has held that lost tax revenues are outside this Court's FHA proximate-cause standard, to the extent *Bank of America* created one. *See Cty. of Cook v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950, 963–64 (N.D. Ill. 2018). One seems inclined to agree. *See City of Phila. v. Wells Fargo & Co.*, No. 17-cv-2203, 2018 WL 424451, at *6 (E.D. Pa. Jan 16, 2018). And two appear to be going in the same or a similar direction as the Eleventh Circuit. *See City of Sacramento v. Wells Fargo & Co.*, No. 18-cv-416, 2019 WL 3975590, at *6–*9 (E.D. Cal. Aug 22, 2019); *Montgomery Cty. v. Bank of America Corp.*, No. 18-cv-3575, 2019 WL 4805678 (D. Md. Sept. 30, 2019).

Amicus urges this Court to cabin FHA's proximate-cause standard within the tried-and-true confines of common-law precedents. Those precedents limit the scope of liability to the direct causes of harm to avoid a chill on economic activities. Judge Andrews's analysis in *Palsgraf*, reflected in this

---

cations of Contingency-Fee Arrangements in the Public Sector" (Sept. 2013), https://bit.ly/35ltmzk.

Court's recent proximate-cause caselaw and in *Bank of America*'s "four guiding principles," warns of the dangers of an overly broad definition of liability. Alas, the court below did not heed this warning.

CONCLUSION

For the foregoing reasons, the Court should grant the petitions and review both the Eleventh Circuit's reformulation of FHA "proximate cause" and its own "zone of interests" finding from *Bank of America*.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
TREVOR BURRUS
SAM SPIEGELMAN
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

December 20, 2019