Nos. 15-1111 & 15-1112

In The
Supreme Court of the United States

BANK OF AMERICA CORPORATION, *et al.*,

Petitioners,

v.

CITY OF MIAMI, FLORIDA,

Respondent.

WELLS FARGO & CO., *et al.*,

Petitioners,

v.

CITY OF MIAMI, FLORIDA,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL FAIR HOUSING ALLIANCE, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT THE CITY OF MIAMI

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INTEREST OF *AMICI CURIAE*[1]

The National Fair Housing Alliance, Inc. ("NFHA") is a non-profit corporation that represents approximately 75 private, non-profit fair housing organizations throughout the country. Through education, outreach, policy initiatives, advocacy, and enforcement, NFHA promotes equal housing, lending, and insurance opportunities. Relying on the Fair Housing Act ("The Act"), NFHA and its members undertake important enforcement initiatives in cities, including the City of Miami, and states across the country.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a non-profit civil rights organization founded in 1963 by the leaders of the American Bar, at the request of President John F. Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee and its affiliates have litigated numerous claims under the Fair Housing Act. They have seen firsthand how cases brought pursuant to the Fair Housing Act are essential to meeting the Act's central goal of integrating American communities.

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[1] Pursuant to Rule 37.7, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed with the Clerk letters granting blanket consent to the filing of *amicus* briefs.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The American Civil Liberties Union of Florida is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and *amicus curiae*. It engages in a nationwide program of litigation and advocacy on behalf of people who have been historically denied their constitutional and civil rights in housing and other areas.

The National Consumer Law Center, Inc. ("NCLC") is a national, non-profit Massachusetts corporation specializing in consumer law, with historical emphasis on consumer credit. NCLC is recognized nationally as an expert in consumer credit issues, including equal access to credit, and has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts for over 47 years. NCLC is the author of the Consumer Credit and Sales Legal Practice Series, consisting of twenty practice treatises and annual supplements. One volume, Credit Discrimination, (6th ed. 2013), *updated at* www.nclc.org/library, is a standard resource on issues of credit discrimination under the Fair Housing Act.

The Poverty & Race Research Action Council ("PRRAC") is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long term consequences of segregation for low income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities.

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957, including the Fair Housing Act. Its sister organization, The Leadership Conference Education Fund, was a founding member of the National Commission on Fair Housing and Equal Opportunity, a bipartisan commission created in 2008 to examine the nature and extent of illegal housing discrimination, its origins, its connection with government policy and practice, and its effect on communities across the nation. The Leadership Conference believes that it is crucial to fully address the continuing problem of housing discrimination in the United States in order to become a nation as good as its ideals.

Impact Fund is a non-profit legal foundation that provides strategic leadership and support for litigation to achieve economic and social justice. It provides funding, training, and co-counsel services to public interest lawyers across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases challenging lack of access for those with disabilities, wage-and-hour violations, employment discrimination, and violations of fair housing laws.

SUMMARY OF ARGUMENT

As this Court's longstanding jurisprudence confirms, Congress did not intend to limit the protections of the 1968 Fair Housing Act only to those who are the direct targets of housing discrimination. Instead, Congress also sought to protect those collaterally harmed by the discriminatory practices that the Act prohibits. As a result, individuals deprived of the opportunity to live within an integrated community are protected by the Act. *Trafficante v. Metro. Life Ins.*, 409 U.S. 205, 209-10 (1972). Likewise, the Act protects non-profit organizations that show their missions are undermined by housing discrimination in the communities they serve. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). And, as is the case here, the Act protects municipalities harmed by racial steering that jeopardizes their integrated communities and the tax base on which they depend to fund services for their residents. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 110-11 (1979). There should be no question, therefore, that the Act permits the City of Miami and other municipalities to recover for the financial impacts caused by the predatory and discriminatory subprime loans the banks have extended to their residents. The Petitioners' arguments to the contrary ignore the intent of Congress in enacting the Fair Housing Act and more than three decades of jurisprudence from this Court.

The Petitioners' arguments fail to account for the long history of residential segregation and urban blight that to a significant degree was the result of widespread discriminatory mortgage lending practices by the federal government and private institutions earlier in the 20th century and which the Fair Housing Act was intended to remedy. Petitioners' arguments also ignore Congressional intent recognized by this Court's jurisprudence that municipalities are crucial in addressing the harms of this segregation and protecting fair housing, a bedrock civil rights protection central to our nation's core value of equal opportunity for all and to our nation's success. *Village of Bellwood*, 441 U.S. at 110-11. The Act's historical context, recognized recently by this Court in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2515-16 (2015), makes plain that the Act was enacted to address widespread segregation and the systemic harms it causes, including harms to municipalities.

The predatory lending practices challenged in this litigation are simply the modern-day manifestation of the discriminatory lending practices that the Act sought to combat. In the years leading up to the foreclosure crisis of 2008, financial institutions targeted communities of color for predatory and discriminatory subprime mortgage loans that perpetuated and exacerbated the harms from the residential segregation caused by historical housing and lending discrimination. Extensive economic and statistical research, including in the City of Miami, has shown that African American and other minority borrowers received higher-cost loans than similarly-situated Whites, making it more likely that their homes would be foreclosed upon. Discriminatory subprime lending, combined with the expansion of a secondary market for these high-cost mortgages, gave rise to devastating consequences disproportionately visited on minorities. Widespread foreclosures in communities of color resulted in the loss of significant wealth in home equity as well as broader disinvestment in those communities, perpetuating and exacerbating the harms from existing residential segregation and reducing the ability of people of color to exercise the choice to move into safer neighborhoods with better schools and public services.

The long history of housing and lending discrimination demonstrates precisely how cities are harmed by the banks' discriminatory targeting of minority communities for predatory loans, the very conduct at issue in these actions. Viewing Petitioners' exploitation of vulnerable minorities in the context of this history further illustrates its impact on segregation and disparities in wealth and access to credit. These are precisely the types of harms the Fair Housing Act was enacted to alleviate, and that this Court addressed in *Village of Bellwood*, 441 U.S. at 110-11, when it held that municipalities have standing under the Act. The chain of causation tying discriminatory lending to disproportionate rates of foreclosure and the resulting harm to minority communities is starkly apparent and tightly linked. Petitioners' discriminatory lending in Miami is a straightforward example of this pattern and caused significant harm to the City.

This Court's prior holdings have roots in the history of housing and lending segregation—a history that has repeated itself into the present day—and recognize that municipalities and organizations that combat segregation and provide services to victims of discrimination have standing to bring suit under the Fair Housing Act. Accordingly, this Court should confirm its prior jurisprudence finding that the Fair Housing Act recognizes the injury that Petitioners caused and giving municipalities like the City of Miami standing to sue under the Act.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT STANDING UNDER THE FAIR HOUSING ACT EXTENDS TO MUNICIPALITIES AND OTHERS NOT DIRECTLY TARGETED BY DISCRIMINATION

Starting shortly after the passage of the Fair Housing Act in 1968, this Court recognized its broad reach, which was both intended and necessary to address the problems segregation caused in the nation's residential communities. Three seminal decisions, decided from 1972 to 1982, interpreted standing under the Act and made clear that claims can be brought not only by those who are direct targets of discriminatory housing practices, but also by municipalities, organizations and individuals who are indirectly harmed by discriminatory practices that perpetuate and exacerbate segregation.

First, in *Trafficante v. Metropolitan Life Insurance*, 409 U.S. 205 (1972), the Court held that a White tenant had standing to bring a Fair Housing Act claim alleging discrimination by a landlord, as "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." *Id*. at 209-10. The Court observed that the language of the Fair Housing Act is "broad and inclusive," *id*. at 209, and must be given "a generous construction," *id*. at 212. Importantly, the Court took special note that the proponents of the Act "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Id*. at 210. The Act was meant to protect any "victim of discriminatory housing practices," which may include "'*the whole community.*'" *Id*. at 211 (quoting 114 Cong. Rec. 2706 (1968)) (emphasis added). The Court therefore recognized that segregation injures not only the direct targets of discriminatory practices but also communities and neighborhoods.

Then, in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Court made explicit that a municipality has standing under the Fair Housing Act to challenge housing discrimination within its borders, even if the municipality is not discriminated against and does not suffer a direct injury. The Court held that the defendant realty company's racial steering had injured the Village by "manipulat[ing] the housing market," which led to a "significant reduction in property values," thereby "diminishing its tax base, [and] threatening its ability to bear the costs of local government and to provide services." *Id*. at 109-11. The Court also recognized "[o]ther harms flowing from the realities of a racially segregated community," including school segregation. *Id*. at 111 n.24. "[T]here can be no question about the importance to a community of promoting stable, racially integrated housing." *Id*. at 111 (citation and internal quotation marks omitted). Because the petitioner realty company's practices had "begun to rob Bellwood of its racial balance and stability," the Village had standing under the Fair Housing Act. *Id*. Thus, the Court was "clear as a bell" that municipalities are injured and have standing to sue when discriminatory housing practices diminish their ability to provide resources and support to combat the harms of residential segregation and to further racial integration and stability. *City of Miami v. Bank of Am. Corp*., 800 F.3d 1262, 1277 (11th Cir. 2015).

Finally, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court held that a non-profit corporation, whose purpose was "to make equal opportunity in housing a reality" in its community, had standing under the Fair Housing Act to file a lawsuit against a realty firm for racial steering. Cementing the principle previously established in *Trafficante* and *Village of Bellwood*, the Court in *Havens* specifically instructed that any distinction between indirect ("third-party") and direct ("first-party") harms was "of little significance in deciding" whether a plaintiff could sue under the Act. *Id*. at 375.

Thus, this Court has already held that the Fair Housing Act was designed to address the widespread harms caused by discriminatory housing and lending practices, and to grant standing to those not directly targeted by discrimination but nonetheless harmed by the adverse impact of segregation on minority communities and the cost of providing essential services to those who have been targeted.[2] "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

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[2] Nothing in the Court's recent decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377 (2014) affects these holdings. *Lexmark* requires courts to determine the meaning of a statute when considering whether it authorizes suit. *Id*. at 1388. *Trafficante*, *Village of Bellwood* and *Havens* all examined the Fair Housing Act in depth and recognized that its text, legislative history and purpose permit broad standing.

Lest there be any doubt as to the correctness of this Court's holding in *Village of Bellwood* that Congress intended municipalities to have standing under the Fair Housing Act, Congress "reaffirm[ed] the broad holding of these cases" with its passage of the 1988 Fair Housing Amendments Act. U.S. House of Representatives Committee on the Judiciary, Report 100-711: the Fair Housing Amendments Act of 1988 23, 100th Cong., 2d Sess. (1988); *see also* 1988 U.S. Code Congressional and Administrative News 2173-2230 (1988). This Court noted recently that Congress' decision in 1988 to keep intact unanimous holdings of nine Courts of Appeals concerning disparate impact liability was "convincing support for the conclusion that Congress accepted and ratified" these holdings. *Tex. Dep't of Hous. and Comty. Affairs*, 135 S. Ct. at 2520. Congress' explicit decision to retain the relevant standing language in 1988 must similarly be read as a ratification of this Court's three standing cases.

While the Court may overrule its prior decisions when necessary, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction" than it is with respect to a constitutional question. *Patterson*, 491 U.S. at 172-73. *See also Payne v. Tennessee*, 501 U.S. 808, 842 (1991) ("[E]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.' "). It is abundantly clear that

Petitioners cannot meet this high standard here. Accordingly, the City of Miami, like the Village of Bellwood, has standing under the Fair Housing Act.

II. RACIALLY DISCRIMINATORY LENDING PRACTICES ARE A MAJOR CAUSE OF THIS COUNTRY'S RESIDENTIAL SEGREGATION

The history of lending discrimination and its role in facilitating and perpetuating residential segregation is central to understanding the goal of the Fair Housing Act and supports the Court's interpretation of standing under the Fair Housing Act in *Trafficante*, *Village of Bellwood* and *Havens*. In *Texas Department of Housing and Community Affairs*, 135 S. Ct. at 2515-16, this Court recognized that one of the primary practices that "precluded minority families from buying homes in affluent areas," resulting in segregated housing patterns in the mid-20th century, were discriminatory lending practices, "often referred to as redlining." Residential segregation was not an accidental by-product of race-neutral processes in the country's housing market. Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in *Segregation: The Rising Costs for America* 39 (James H. Carr & Nandinee K. Kutty eds. 2008). Rather, at critical points during the period of rapid urbanization in the half century before passage of the Fair Housing Act, deliberate lending policies, spearheaded by the federal government, strengthened the walls of segregation. *Id.*

A. The Government Role in Redlining Maintained and Enforced Color Lines

The federal government deliberately facilitated segregation. Starting in the 1930s, the federal government's mortgage underwriting and appraisal guidelines explicitly deemed African American neighborhoods and integrated neighborhoods to be high lending risks. This practice promoted residential segregation and left minority neighborhoods starved for mainstream credit. Charles L. Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact Upon African American Wealth Accumulation*, 11 U. Pa. J. & Soc. Change 131, 175-185, 194 (2007).

Redlining began initially through the policies of the Home Owners' Loan Corporation ("HOLC"), created by the federal government in the 1930s. NCLC, 7.1 *Introduction and History of Redlining*, published on NCLC Digital Library, https://library.nclc.org (citing Charles L. Nier III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. Marshall L. Rev. 617 (1999)). The HOLC's lending standards were designed to deny minorities the ability to obtain a mortgage to purchase a home in certain neighborhoods. *Id*. The HOLC did not invent these racial standards in real estate—they were already well-established by the 1920s—but it standardized them and applied them on an unprecedented scale. Massey, *supra*, at 70. It provided the force and support of the federal government to systematic racial discrimination in housing. *Id.*; Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 195-203 (1985).

The HOLC rating system influenced the underwriting practices of the Federal Housing Administration ("FHA") and the Veterans Administration ("VA") in the 1930s and 1940s. Massey, *supra*, at 70. The FHA, established in 1934, developed criteria that attributed stability in neighborhoods to racial homogeneity, at least in part. Jackson, *supra*, at 206-15. For example, a 1935 FHA manual for agency underwriters stated that acceptable ratings would depend on neighborhoods being protected against "the occurrence or development of unfavorable influences" such as the "infiltration of inharmonious racial or nationality groups." John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. Rev. 1487, 1511 (1993) (citing Citizens' Comm'n On Civil Rights, *A Decent Home: A Report on the Continuing Failure of the Federal Government to Provide Equal Housing Opportunity* 7 (1983)). Like the HOLC, the FHA compiled maps and charts showing the location and movement of African American families, and it frequently updated versions of the HOLC Residential Security Maps to determine the suitability of neighborhoods for FHA loans. Massey, *supra*, at 72.

In the post-war era, the distinguishing feature of urban and suburban expansion was the unprecedented role that the government played in maintaining and reinforcing the color line. Loans made by the FHA and

VA were a major impetus for the rapid post-war suburbanization of American cities. *Id*. at 71. As a result of these segregationist policies, the vast majority of FHA and VA loans went to White middle-class suburbs, while few went to African American homeseekers living in central cities. *Id*. at 72. The lack of mortgage capital flowing into minority areas made it extremely difficult for owners to sell their homes, leading to steep declines in property values and a self-perpetuating cycle of disrepair, deterioration and abandonment. *Id.*; William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 Am. Soc. Rev. 425 (1979).

B. Influenced by Federal Government Practices, Banks and Realtors Engaged in Systematic Racial Discrimination in Housing

In the post-war era, banking institutions and private realtors adopted government-sponsored discriminatory housing practices, reinforcing the patterns of segregation the government had initiated. Private banks relied heavily on the HOLC system to make their own lending decisions, and the HOLC's residential appraisal maps were widely circulated throughout the mortgage industry, thereby institutionalizing the practice of redlining. Massey, *supra*, at 70. Banks also adopted the HOLC's procedures in constructing their own maps and ratings. *Id.* The HOLC's influence over the home lending industry ensured that racial redlining and segregation were the norm.

Real estate agents and companies followed suit. One comprehensive study of real estate companies in the 1950s revealed that even though the Supreme Court had held racially restrictive covenants unenforceable in 1948, a pervasive pattern and practice of discrimination against African Americans persisted in most American cities. Rose Helper, *Racial Policies and Practices of Real Estate Brokers* (1969). Research also uncovered considerable evidence of discrimination by banks and savings institutions denying loans to African American homeseekers. Among realtors willing to provide information, over half of the agents confirmed that banks would not make loans to areas that were African American or threatened with the possibility of African American entry. *Id*. at 170-71, 337.

C. The Rise of Predatory Lending Practices Targeting Minorities

The logical extension of redlining and government-backed denial of home loans and housing to African Americans was the introduction of predatory lending practices during the pre-Fair Housing Act era. Since most banks did not make loans to African American applicants, realtors were able to augment their profits by acting as bankers as well as sales agents, and were able to charge exorbitant interest rates and demand down payments much larger than those paid by Whites. Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending*, in *Segregation: The Rising Costs for America* 81-82 (James H. Carr & Nandinee K. Kutty eds. 2008). Contract sales were widespread in minority communities. As both seller and lender, the agent would collect a cash advance and several months of mortgage payments before the buyer defaulted; when the family defaulted, it was evicted, the house was sold to another family under similar terms, and the buyer would lose any equity in the house. Massey, *supra*, at 58. Agents could sell a home several times in the course of a year and generate extra profits. *Id.* These contract sales practices also led to the rapid deterioration of the physical condition of homes as African American families were compelled to subdivide dwellings into multiple units in order to meet onerous loan repayment terms, accelerating patterns of racial succession and segregation. *Id.*

By 1968, segregation in housing was a fixture of American cities. It carried with it profound harms for cities and their residents. The stage for the passage of the Fair Housing Act was set.

III. THE FAIR HOUSING ACT WAS DESIGNED TO ADDRESS THE SYSTEMIC PROBLEMS ASSOCIATED WITH RESIDENTIAL SEGREGATION AND TO PERMIT CITIES TO SEEK REDRESS FOR INJURIES TO THEM CAUSED BY DISCRIMINATORY PRACTICES

In the first half of the 20th century, housing and lending discrimination and the resulting residential segregation wreaked havoc on the social, economic, and civic welfare of the nation's urban minority communities. Congress passed the Fair Housing Act in order to address the effects of this discrimination and segregation not only at the individual level, but through community organizations and municipalities who were best positioned to systematically address residential segregation and its harms to minority neighborhoods.

The economic deprivation and social isolation produced by decades of segregation bore bitter fruit in a series of urban civil disorders during the 1960s. The conflict began in Birmingham, Alabama in the summer of 1963 and was followed by the more serious 1965 riot in Los Angeles, which did $35 million worth of damage, left hundreds injured and 34 dead. Nat'l Advisory Comm'n on Civil Disorders, *Report of the Nat'l Advisory Comm'n on Civil Disorders* 35, 38 (1968). After sporadic uprisings in Chicago and Cleveland during the summer of 1966, a wave of disorder erupted during July and August of 1967, when African American neighborhoods in 60 U.S. cities exploded in an upheaval of frustration and anger. Massey, *supra*, at 77.

As noted by this Court in *Texas Department of Housing and Community Affairs*, 135 S. Ct. at 2516, in early 1968, President Johnson created the National Advisory Commission on Civil Disorders (the so-called "Kerner Commission") to examine the causes of the civil disorders. Robert G. Schwemm, *Housing Discrimination Law and Litigation* § 5:2 (August 2016 Update); *see also Laufman v. Oakley Bldg. & Loan Co*., 408 F. Supp. 489, 496 (S.D. Ohio 1976) (recounting history of passage of the Fair Housing Act). The Kerner Commission's report was released on February 29, 1968, and concluded unequivocally that the uprisings stemmed from the simple fact that "our nation is moving toward two societies, one black, one white—separate and unequal." Nat'l Advisory Comm'n on Civil Disorders, *supra*, at 1. Growing inequality was attributed to the persistence of discrimination in employment, education and welfare, but segregation in housing was identified as underlying all other social and economic problems. Massey, *supra*, at 77. To overcome "the prevailing pattern of racial segregation," the Commission urged that the federal government "enact a comprehensive and enforceable open housing law to cover the sale or rental of all housing," and that it "reorient federal housing programs to place more low and moderate income housing outside of ghetto areas." Nat'l Advisory Comm'n on Civil Disorders, *supra*, at 28-29.

Just over one month from the release of the Kerner Commission's report and only ten days after

Dr. King's assassination, the nation was moving decisively toward the implementation of these recommendations as it considered passage of the Fair Housing Act. Massey, *supra*, at 77. Senator Mondale, the Fair Housing Act's chief sponsor, relied upon the Kerner Commission's findings during floor debate in support of the need for the passage of the Act and in explaining the purpose of the Act. He stated that "[f]air housing legislation is a basic keystone to any solution of our present urban crisis." 114 Cong. Rec. 2274 (Feb. 6, 1968). He described the nation's cities as facing "fantastic pressures," and predicted that unless housing discrimination was outlawed, "[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity and urban squalor" would persist. *Id*.

Senator's Mondale's statements were echoed by the Kerner Commission's findings and underscored the harms that cities suffered from housing discrimination and the resulting segregation, including a decreased tax base and adverse health consequences for their residents. These were among the problems the Fair Housing Act was explicitly meant to solve. In passing the Act in 1968, Congress expressed its "desire [to] provid[e] fair housing throughout the United States[,] to stem the spread of urban ghettos and to promote open, integrated housing." *Otero v. New York City Hous. Auth*., 484 F.2d 1122, 1134 (2d Cir. 1973). By its own terms, the Fair Housing Act emphasizes a need to address the systemic issues that precipitated its passage—housing discrimination that caused segregation and urban blight.

Thus, the Court's interpretation that the Fair Housing Act protects not only targeted individuals, but also those who provide support and services necessary to combat segregation and its harms and to assist its victims, flows directly from the history of housing and lending discrimination that led to Congress' enactment of the statute. That is one of the major goals of the Fair Housing Act—to address the broad and widespread harms to our nation's cities caused by these discriminatory housing and lending practices, and to allow cities themselves to seek redress through the courts. Given this new tool, and the Court's harmonious interpretation of the Act in the 1970s and early 1980s, advocates anticipated a reversal of segregation and increased access to opportunity for residents of distressed urban neighborhoods. Massey, *supra*, at 77. Instead, new discriminatory lending practices evolved, residential segregation persisted, and its harm intensified in the decades after *Havens*, culminating with the foreclosure crisis and financial crash of 2008.

IV. THE WELL-ESTABLISHED PATTERNS OF DISCRIMINATORY LENDING LAID THE GROUNDWORK FOR THE PREDATORY LENDING PRACTICES THAT FUELED THE RECENT FORECLOSURE CRISIS

Redlining did not disappear after the passage of the Fair Housing Act. In fact, the segregation and disparities in wealth that redlining created set the stage for new forms of discriminatory lending which had its roots in the 1980s and 1990s, and which ultimately led to the foreclosure crisis beginning in 2008. Predatory loans were pushed on minority communities—a practice known as reverse redlining—to satisfy the secondary mortgage market's voracious demand for securitized loan products. Neighborhoods that had been credit-deprived for decades were vulnerable and were targeted. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629 (2010). Because low-income, minority areas were historically excluded from traditional lending markets, lenders saturated these neighborhoods with discriminatory subprime loan solicitations. Naturally, when the mortgage bubble burst in 2008, the foreclosure crisis disproportionately affected minority communities. Building on segregation and disparities in access to credit that predated the passage of the Fair Housing Act, lending institutions perpetuated and exacerbated the systemic problems in minority communities that the Fair Housing Act was meant to redress.

Residential segregation had created a unique niche of credit-starved minority clients who were targeted for risky subprime loans. *Id.* at 629. Lingering vestiges of more overt residential discrimination, including the absence of low-cost lenders and the rise of fringe financial services providers in predominantly minority neighborhoods, resulted in minority communities being disproportionately targeted by unscrupulous lenders. *Id.* at 630. In short, the long history of redlining had created the ideal setting for predatory lending practices.

A. These Changes Led to Increased Discriminatory Lending Practices

Two major changes in the mortgage market gave rise to the growth in subprime lending. First, the structure of home loans was drastically altered by federal deregulation of the housing market in the early 1980s, which paved the way for credit to be extended to minorities. Engel & McCoy, *supra*, at 87. In 1980, Congress liberalized usury laws by removing interest rate caps on first-lien residential mortgages, opening the door to high-cost subprime loans. *Id.* at 87-88; Donna Harkness, *Predatory Lending Prevention Project: Prescribing a Cure for the Home Equity Loss Ailing the Elderly*, 10 B.U. Pub. Int. L.J. 1, 27 (2000). And while subprime loans are designed for people at increased risk of default, lenders did not market these loans solely to high-risk borrowers. Engel & McCoy, *supra*, at 88. Rather, they took advantage of less sophisticated prime-eligible borrowers, saddling them with costly subprime loans. *Id.*

Shortly after this, in 1982, Congress enacted legislation permitting adjustable-rate mortgages, interest-only loans, and balloon clauses. *Id.* This allowed lenders to induce cash-strapped borrowers into loans by offering them low monthly payments on the front end in exchange for burdensome payments down the road that borrowers often cannot afford. *Id.* These new loan products typically contain an array of complex and confusing terms that few borrowers can sufficiently evaluate. *Id.*

The second major shift in the structure of the mortgage market was the creation of Wall Street investment products derived from higher-cost loans, providing massive amounts of capital for their origination. The increasingly widespread development of mortgage-backed securities during the 1980s transformed home lending by splitting apart the origination, servicing, and selling of mortgages into discrete transactions that made it possible for banks to earn more money quickly by originating and selling loans than by lending money and collecting interest payments over time. *Id.* at 88-89. Before this development, lenders had avoided inner-city minority neighborhoods because of a combination of risk aversion, prejudice, and institutional discrimination. Rugh & Massey, *supra*, at 631; Gregory D. Squires et al., *Segregation and the Subprime Lending Crisis* 4-5 (presented at the 2009 Federal Reserve System Community Affairs Research Conference, Washington, D.C., 2009). The invention of securitized mortgages, however, changed the calculus of mortgage lending, making minority households desirable as clients. Rugh & Massey, *supra*, at 631. Virtually any mortgage, however shaky, could be sold and repackaged with other mortgages for sale on the stock market. *Id.* at 632.

Borrowers who had been shunned by lenders suddenly became attractive. The securitization of these mortgages created the incentive for lenders to target minority borrowers, often with predatory loan instruments. The resultant wave of predatory lending targeted at minority borrowers was spearheaded by mortgage brokers who did not bear the risk of their irresponsible lending practices. *Id.* They simply produced mortgages and immediately sold them to banks and other financial institutions, which in turn capitalized these subprime instruments as securities and sold them to investors who assumed the risks. *Id.*; Kathleen C. Engel and Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2045-2054 (2007).

Under the traditional lending model, lenders originate and hold their mortgages, and therefore have a vested interest in ensuring that borrowers can afford to repay their loans. Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* 13 (Center for Responsible Lending Report 2010). Under the new system, however, brokers made loans on behalf of lenders who then sold these mortgages to investment firms, who ultimately pooled and sold complex securities backed by these loans to investors worldwide. *Id.* The quality and viability of these loans became far less important to those who were driving the market, especially since compensation was based on the volume of transactions, rather than loan performance. *Id.* In other words, this moral hazard led to the interests of the mortgage market becoming inconsistent with the interests of the homebuyer. *Id.*

B. These Market Forces Had Widespread Effects in Minority Communities

These two factors—predatory lending practices and private securitization—fundamentally altered the dynamic of the mortgage market. *Id.* They culminated in a sea change for minority homeseekers, turning what had been a scarcity of credit into an abundance. Engel & McCoy, *supra*, at 88. In contrast to the constrained lending industry of the post-war era, the mortgage market enjoyed a constant infusion of capital from Wall Street firms, creating new opportunities for subprime lenders to exploit vulnerable borrowers. *Id.*

Securitization of mortgages gave rise to a new kind of housing-related discrimination: discrimination in mortgage lending shifted from the outright denial of home loans to the systematic marketing of predatory loans to poor minority households, easily identified in segregated neighborhoods, which were themselves the result of earlier waves of housing discrimination. *Id.*; Rugh & Massey, *supra*, at 632. Research has conclusively demonstrated that, even when controlling for income and/or credit risk, people of color were disproportionately targeted for subprime loans during the subprime boom of the 1990s and early aughts. A seminal 2000 study found that African Americans, Asians, Native Americans, and Latinos paid higher rates than Whites for home loans, even after controlling for borrower income, debt, and credit history. Anthony Pennington-Cross et al., *Credit Risk and Mortgage Lending: Who Uses Subprime and Why?* 13, 16 (Research Institute for Housing America Working Paper No. 00-03, 2000). In 2005 and 2006, Federal Reserve Board economists echoed these conclusions, finding that African American and Latino borrowers pay more for home purchases and refinance loans than their similarly-situated White counterparts. Robert Avery et al., *Higher-Priced Home Lending and the 2005 HMDA Data*, Fed. Res. Bull. A123-A166 (2006). A 2006 report by the Center for Responsible Lending found that African American borrowers were more than 30 percent more likely than Whites to receive loans with higher interest rates and prepayment penalties, even after controlling for credit risk. Debbie Gruenstein Bocian et al., *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 16-19 (Center for Responsible Lending Report 2006). And yet another study found that low-income African Americans had subprime loans 2.4 times as often as similarly-situated low-income Whites, while upper-income African American homeowners were three times as likely to end up with subprime loans as comparable White homeowners. Calvin Bradford, *Risk or Race? Racial Disparities in the Subprime Refinance Market* 8 (Center for Community Change 2002).

C. Subprime Lending, Disproportionately Concentrated in Minority Areas, Led to the Foreclosure Crisis and Great Recession

Segregation and a history of limitations on access to credit in U.S. urban areas combined to create ideal conditions for predatory lending in poor minority neighborhoods. Rugh & Massey, *supra*, at 630; Vicki Been et al., *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 Fordham Urban L.J. 361, 364-72 (2008). In turn, with the increase in predatory lending practices, the risk of foreclosure was concentrated disproportionately on minority borrowers and homeowners. Rugh & Massey, *supra*, at 630. From the beginning of the subprime market in the 1990s, the number of African American and Latino homeowners paying more than half of their incomes for housing grew by 39 and 98 percent, respectively. Patrick Simmons, *A Tale of Two Cities: Growing Affordability Problems amidst Rising Homeownership for Urban Minorities* 5-6, App. A (Fannie Mae Foundation 2004).

As the housing market became saturated in 2006, housing prices stalled, foreclosures skyrocketed, and faith in mortgage-backed securities disappeared, bringing down the mortgage securitization industry and taking much of the U.S. economy with it. Rugh & Massey, *supra*, at 634. Growing out of the long historical pattern of housing and lending discrimination, the resulting wave of foreclosures during the Great Recession was disproportionately concentrated in areas that only a few years earlier had been primary targets for the marketing of subprime loans. *Id*. Among borrowers with mortgages that were originated between 2005 and 2008, nearly 8% of both African American and Latinos have lost their homes to foreclosures, compared to 4.5% of Whites. Bocian et al., *Foreclosures by Race and Ethnicity* 2. Consequently, African Americans also experienced greater losses in total wealth as a result of the housing crisis and subsequent Great Recession. Between 2007 and 2009, a typical African American household's wealth declined by 19 percent, compared to 12 percent for Whites. Sarah Burd-Sharps & Rebecca Rasch, *Impact of the U.S. Housing Crisis on the Racial Wealth Gap Across Nations* 12 (commissioned by *amicus* ACLU) (Social Science Research Counsel 2015). None of these figures should come as any surprise; "it is axiomatic that a subprime loan is more likely to default than a prime loan, and that more defaults lead to more foreclosures." Ira Goldstein & Dan Urevick-Ackelsberg, *Subprime Lending, Mortgage Foreclosures and Race: How far have we come and how far have we to go?* 6 (The Reinvestment Fund 2008).

The long-term consequences of predatory lending practices, concentrated in minority communities, continued during the recovery period. From 2009-2011, median White household wealth exhibited zero loss, excluding home equity, while African American households continued to experience severe declines, with the typical African American household losing 40 percent of non-home-equity wealth. Burd-Sharps & Rasch, *supra*, at 10, 19. Researchers found that African Americans suffered these losses due to pressures from the recession, including the need to cover the ballooning costs of their toxic mortgages. *Id*. at 13. A study by HUD revealed that even after controlling for economic and demographic variables, African American households terminated homeownership 30 percent more often than comparable White households. Donald Haurin & Stuart Rosenthal, *The Growth Earnings of Low Income Households and the Sensitivity of Their Homeownership Choices to Economic and Socio-Demographic Shocks* vi, 16, 19 (U.S. Dep't of Housing and Urban Development 2005). Finally, even after the end of the foreclosure crisis that gave rise to the Great Recession, predatory lending practices have continued. As the Court of Appeals stated, "While the types of loans that Defendants allegedly issued to minority borrowers may have changed during the relevant time period, [the plaintiff] alleges that they remained high-risk and discriminatory." 800 F.3d 1285-86. Moreover, a recent report details a new wave of predatory lending that was prominent in the 1930-1960 period whereby land installment contracts are being peddled disproportionately to low income families of color, taking away valuable home equity. Jeremiah Battle, Jr. et al., *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color* 3 (National Consumer Law Center 2016).

V. PREDATORY AND DISCRIMINATORY LENDING PERPETUATES AND EXACERBATES THE HARMS OF RESIDENTIAL SEGREGATION AND HAS HAD A MAJOR IMPACT ON CITIES—THE PRECISE CIRCUMSTANCES ADDRESSED BY THIS COURT IN *VILLAGE OF BELLWOOD*

A. The Harm from Discriminatory Predatory Lending

Just as predatory lending practices targeted African Americans and Latinos across income levels, mass foreclosures in these minority communities resulting from these predatory market practices had very serious adverse impacts on the segregated communities of cities. Viewed in their proper cumulative and historical context, the Petitioners' practices caused minority-owned properties to fall into foreclosure when they otherwise would not have and had a disastrous impact on cities. Foreclosure is one more area in which the minority experience has been worse than that of Whites.

Predatory lending strips minority communities of wealth and equity, but financial devastation is only the beginning. Foreclosures attract criminal activity; when the foreclosure rate increases by one percentage point, the rate of violent crime rises 2.33 percent. Dan Immergluck, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime* 21 Housing Studies 851, 863 (2006). An investigation by *amicus* NFHA found that foreclosed homes often attract squatters and vandals, and become venues for late-night parties, resulting in increased calls to police and additional city services. National Fair Housing Alliance, *Zip Code Inequality: Discrimination by Banks in the Maintenance of Homes in Neighborhoods of Color* 11 (2014).

Foreclosures also lead to bulk investor purchases, changing mostly owner-occupied neighborhoods into rental communities. For example, in Oakland, California investors bought 42 percent of "real estate owned" ("REO") homes on the market from 2007 to 2011. *Id*. at 12-13. Bulk investors rarely maintain their properties to the same extent as resident homeowners and are apt to abandon homes when they realize they will not earn sufficient profit. Sarah Edelman, *Cash for Homes: Policy Implications of an Investor-Led Housing Recovery* 5-7 (Center for American Progress 2013). The vulnerability of vacant REO properties to vandalism and theft further decreases the value of properties in these neighborhoods. Stephen Whitaker and Thomas Fitzpatrick, *The Impact of Vacant, Tax-Delinquent, and Foreclosed Property on Sales Price of Neighboring Homes* 1, 4-5 (11-23R Federal Reserve Bank of Cleveland 2012).

Poorly maintained, vacant foreclosed properties also pose public health hazards. A 2014 American Heart Association study found that living near a foreclosed home increases one's risk of hypertension. Mariana Arcaya et al., *Effects of Proximate Foreclosed Properties on Individuals' Systolic Blood Pressure in Massachusetts, 1987 to 2008*, 129 Circulation 2262 (2014). Other research indicates that high foreclosure rates in neighborhoods correlate with increased emergency room visits by neighboring residents for an array of health concerns, including diabetes and anxiety. Janet Currie & Erdal Tekin, *Is There A Link Between Foreclosure and Health?* 28 (National Bureau of Economic Research Working Paper 17310, 2011). And the health effects of foreclosures can be even more direct: abandoned swimming pools produce thousands of mosquitoes, increasing the chances of mosquito-borne diseases. Christine Vidmar, *Seven Ways Foreclosures Impact Communities* 5 (Neighborworks America 2008).

Foreclosures also have far-flung consequences for families. Children may have to change schools and adjust to new teachers, curricula, and expectations. Educational attainment is positively correlated with residential stability, and the consequences of dislocation can last a lifetime and resonate across generations. Christopher Herbert & Eric Belsky, *The Homeownership Experience of Low-Income and Minority Families* 103-106 (HUD Office of Policy Development and Research 2006). Parents and children lose important social networks that can give a sense of belonging, and connection to jobs and positive social relationships. Engel & McCoy, *supra*, at 100-01.

Particularly pertinent to this case, the harms from foreclosures stretch municipalities and their services and diminish their ability to alleviate the injuries to their poorest and most heavily minority communities. Conservative estimates indicate that each foreclosure within an eighth of a mile of a house causes a 0.9 percent decline in property value, leading to a decreased municipal tax base. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single Family Mortgage Foreclosures on Property Values*, 17 Housing Policy Debate 57 (2006). Cuyahoga County, Ohio, which includes Cleveland, documented a loss of over $46 million in tax revenue due to foreclosed properties. Frank Ford et al., *The Role of Investors in the One-to-Three Family REO Market: The Case of Cleveland* 8 (Joint Center For Housing Studies, Harvard Univ. 2013). Lost tax revenue limits a municipality's ability to provide community services, including public education, sanitation, and police protection. At the same time, municipalities must provide increased services to the segregated minority communities that have suffered the harms of discriminatory lending and the resultant mass foreclosures. Quite simply, a city is left in the lurch when widespread foreclosures blight its neighborhoods.

In the end, the discrimination in subprime lending that invariably led to higher rates of foreclosure in minority communities has in turn led to instability in education and employment, negative impacts on health, and restrictions on public services. Predatory lending on this mass scale has effectively continued the long history of discriminatory housing and lending practices that have plagued our country and facilitated and reinforced the segregation and disparities in wealth and credit that precipitated passage of the Fair Housing Act in the first place.

B. The Harms to the City of Miami are Equivalent to Those in Bellwood

What has happened in the City of Miami is an example of the devastation cities incur from predatory lending targeting minority communities and the resultant foreclosures. The City alleges that loans by Petitioners Bank of America and Wells Fargo originating in Miami from 2004-2012 in predominantly (greater than 90%) minority neighborhoods were 5.857 times more likely to result in foreclosure than such a loan in a majority (over 50%) White neighborhood. City of Miami Complaint at 20. Moreover, African American Bank of America borrowers in Miami with a credit score over 660 (indicating good credit) were 53% more likely to receive a predatory loan than White borrowers, while a comparable Latino borrower was over twice as likely to receive such a loan. *Id*. at 15. The end results of these disparities are unsurprising: 32.8% of Bank of America's loans in predominantly African American or Latino neighborhoods resulted in foreclosure, compared to only 7.7% of its loans in majority White neighborhoods. *Id*. at 20. As in so many other cities, the extensive pattern of discriminatory lending by banks like Petitioners led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned properties.

The harms experienced by the City of Miami are precisely the same as in *Village of Bellwood*, 441 U.S. 91, where this Court held that municipalities have standing to sue under the Act. As in the present case, the municipality alleged that it had been injured "by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village." *Id*. at 95. The Court recognized that the effect of the brokers' unlawful steering practices on the Village of Bellwood's neighborhoods "can be profound," *Id*. at 110—just as the discriminatory lending practices by the banks in this case have harmed Miami. The Court expressly acknowledged the detrimental effects of segregation on schoolchildren, a harm municipalities are in a unique position to address. *Id*. at 111 n.24. And the Court focused specifically on economic harms of segregation to cities which deplete resources needed to combat segregation and assist victims of discrimination: "If [the brokers'] steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. . . . A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id*. at 110-11. This Court concluded that if, as alleged, "the [brokers'] sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct." *Id*. at 111. Just like the Village of Bellwood, the City of Miami claims that the defendants' discriminatory policy has reduced local property values, diminishing its tax base, and threatening its ability to provide essential services. And, like the Village of Bellwood, the City of Miami has standing to sue for discriminatory housing practices that have perpetuated and exacerbated the harms caused by racial segregation.

Petitioners try to distinguish the injury alleged by Miami from that in *Village of Bellwood*, arguing that the causal connection between their alleged discriminatory conduct and the harm suffered by the City is different from that in Bellwood and not based on an interest in non-discrimination. But, such an argument ignores how similar the two cases are and is without merit. The injuries to the municipalities in both cases are virtually the same. They both grow out of racial discrimination. In Miami, the discrimination exacerbated the poor conditions in the City's segregated minority neighborhoods and caused injury to Miami from those deteriorated conditions. In *Village of Bellwood*, racial discrimination contributed to the creation of a segregated minority neighborhood, causing identical harms to Bellwood from this segregation. *Id*. Based on this Court's determination that Bellwood had standing, the conclusion here must be that the City of Miami also has standing and has sufficiently alleged proximate cause.

Because the Fair Housing Act was designed to specifically address systemic injuries to cities caused by discriminatory housing and lending practices, and because the City of Miami has alleged significant injury caused by Petitioners' discriminatory lending, the City has standing and has stated a claim for relief under the Fair Housing Act.[3]

CONCLUSION

Amici respectfully urge this Court to uphold the decision of the Court of Appeals for the Eleventh Circuit that the City of Miami has standing and can plead sufficient proximate cause under the Fair Housing Act for the harms caused by the Petitioner Banks' widespread discriminatory lending practices that

[3] A major issue in this case is whether standing under the Fair Housing Act should continue to be as broad as Article III permits, as established in the three standing decisions of this Court from the 1970s and 1980s, or whether the Act incorporates a "zone of interests" analysis. In *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 176 (2011), this Court "acknowledge[d]" and "reiterate[d] that the term 'aggrieved' in [the Fair Housing Act] reaches as far as Article III permits [citing *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997) and *Gladstone*]," but found these holdings to be "compatible with the zone of interests limitation. . . ." Thus, even if a "zone of interests" analysis were to be imposed on Fair Housing Act standing, the "zone of interests" in cases where municipalities allege injuries similar to those of the Village of Bellwood—such as those alleged by the City of Miami—is as broad as the statutory standing in *Bellwood*.

harmed the City's poorest communities and the City itself.

Respectfully submitted,

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