Fair Housing Act — Standing and Proximate Cause — Bank of America Corp. v. City of Miami

The Fair Housing Act[1] (FHA) was the last of the three major civil rights statutes passed in the 1960s, its passage spurred by a presidential commission's conclusion that the United States was "moving toward two societies, one black, one white — separate and unequal."[2] The FHA prohibits, among other things, racial discrimination in the terms and conditions of home sales and mortgage loans.[3] Any "aggrieved person" is permitted to file suit to enforce its restrictions.[4] Last Term, in *Bank of America Corp. v. City of Miami*,[5] the Supreme Court affirmed that cities can be "aggrieved persons" under the FHA.[6] The Court also held that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged'" and remanded the case for reconsideration under this higher standard.[7] The majority opinion is moderate in nature, with one issue resulting in a victory for the City and the other for the banks. If the Court was looking for a middle ground between the parties' positions, this was the right one. The precedents supporting broad standing under the FHA were hard to avoid, and proximate cause is a better doctrinal tool to prevent exposing lenders to the out-of-control liability that seemed to worry the Court. Future courts will decide the legacy of the decision, however, as the extent to which this standard will in fact limit liability is unclear.

Bank of America Corp. came about as an indirect result of the 2008 financial crisis. In the years following the crisis, housing markets in Florida and the City of Miami in particular were devastated. At the peak of the recession in 2010, when foreclosures numbered 2.9 million nationwide, nearly 500,000 of the foreclosed homes were located in Florida.[8] By the time the City filed suit in 2013, Miami had a higher foreclosure rate than any other large U.S. city.[9]

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[1] 42 U.S.C. §§ 3601–3619 (2012).

[2] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2516 (2015) (quoting OTTO KERNER ET AL., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968)).

[3] *See* 42 U.S.C. §§ 3604(b), 3605(a).

[4] *Id.* § 3613(a)(1)(A).

[5] 137 S. Ct. 1296 (2017).

[6] *See id.* at 1303.

[7] *Id.* at 1306 (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

[8] *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, REALTYTRAC (Jan. 12, 2011), http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309 [http://perma.cc/6CYD-T6NF].

[9] *1.4 Million U.S. Properties with Foreclosure Filings in 2013 Down 26 Percent to Lowest Annual Total Since 2007*, REALTYTRAC (Jan. 13, 2014), http://www.realtytrac.com/content/foreclosure-market-report/2013-year-end-us-foreclosure-report-7963 [http://perma.cc/FQT5-KHN9].

According to the City, these foreclosures and their effects were not distributed proportionally across Miami's population with regard to race. Miami claimed that several banks engaged in both redlining and "reverse redlining" in the City, on the one hand refusing to offer minorities credit on the same terms as whites and on the other imposing harsher, predatory terms when loans were offered to minority borrowers.[10] Compared to similarly situated white customers, minority borrowers faced higher interest rates, were charged more baseless fees and penalties, and were more often refused loan refinancing and modification when faced with the possibility of default.[11]

On these facts, Miami filed lawsuits against Bank of America, Wells Fargo, and Citigroup, in each case bringing a claim for violations of the FHA and a claim of unjust enrichment.[12] The City alleged that the banks' practices constituted a pattern and practice of discrimination in mortgage lending that led to disproportionately high foreclosure rates in Miami's minority neighborhoods.[13] In turn, the increase in foreclosures decreased the City's property tax revenues and required additional spending on public services, such as police and emergency first responders, to remedy blight and prevent unsafe living conditions associated with the increase in vacant homes.[14] The district court dismissed the FHA claims, holding that the City did not have standing to sue under the statute because its alleged economic injuries did not fall within the zone of interests the Act was intended to protect.[15] These claims also failed, the court said, because the City could not establish that the banks' actions were the proximate cause of its injuries.[16] The district court dismissed the unjust enrichment claim on the grounds that the complaint did not state that the City "conferred any direct benefit" on the banks, as required under Florida law.[17]

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10 *See* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1267 (11th Cir. 2015).

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

12 *See Bank of Am. Corp.*, 800 F.3d at 1266 & n.1.

13 *See* City of Miami v. Bank of Am. Corp., No. 13-24506-CIV, 2014 WL 3362348, at *1 (S.D. Fla. July 9, 2014). The three cases were heard by District Judge William Dimitrouleas, who applied the same substantive analysis to each. *See* City of Miami v. Citigroup Inc., No. 13-24510-CIV, 2014 WL 11444104, at *1 (S.D. Fla. Sept. 16, 2014); City of Miami v. Wells Fargo & Co., No. 13-24508-CIV, 2014 WL 11380948, at *1 (S.D. Fla. Sept. 16, 2014).

14 *See Bank of Am. Corp.*, 2014 WL 3362348, at *2.

15 *See id.* at *4.

16 *See id.* at *5. The court also stated that the claims were barred by the FHA's two-year statute of limitations. *See id.* at *6. On appeal, the Eleventh Circuit held that the "continuing violation doctrine" applied, which permits otherwise untimely claims when other acts of discrimination occurred during the statutory period. *See Bank of Am. Corp.*, 800 F.3d at 1284–85. The banks did not appeal this issue to the Supreme Court.

17 *Bank of Am. Corp.*, 2014 WL 3362348, at *6 (emphasis omitted).

The City appealed, and the Eleventh Circuit reversed in part and affirmed in part.[18] In a unanimous opinion,[19] the court began by addressing standing. Standing has both a constitutional component, which addresses whether the dispute presents an Article III case or controversy, and a statutory component, which looks to whether the plaintiff has a claim under the relevant statute.[20] The court first held that Miami had Article III standing because it suffered a decrease in tax revenue traceable to the banks' challenged lending practices.[21] The court also held that Miami was an "aggrieved person" under the FHA, following Supreme Court precedent extending statutory standing under the Act to the limit permitted by Article III.[22] And, relying in part on a statistical analysis provided by the City, the court held that the complaint stated a sufficiently close connection between the banks' practices and the City's injuries to establish proximate cause.[23] In the lone setback for the City, the court affirmed the district court's dismissal of the unjust enrichment claim.[24] Bank of America and Wells Fargo filed petitions for certiorari, and the Supreme Court granted review and consolidated the two cases.

The Supreme Court vacated and remanded. Writing for the Court, Justice Breyer[25] began by recounting the City's alleged injuries, which included economic and noneconomic harms. According to the City, the banks' practices not only had increased foreclosure rates, leading to reduced tax revenues and increased spending on municipal services, but also had affected the racial makeup of the City and "impaired the City's goals [of] assur[ing] racial integration and desegregation."[26] Before analyzing the City's standing claim, Justice Breyer noted that statutory

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[18] *Bank of Am. Corp.*, 800 F.3d at 1289. The City appealed all three decisions, and each was decided in a separate opinion by the same panel on the same substantive grounds. *See* City of Miami v. Citigroup Inc., 801 F.3d 1268 (11th Cir. 2015); City of Miami v. Wells Fargo & Co., 801 F.3d 1258 (11th Cir. 2015). The court stated that the *Bank of America* opinion "contains the most detailed account of our reasoning." *Bank of Am. Corp.*, 800 F.3d at 1266 n.1.

[19] The opinion was written by Judge Marcus and joined by Judge Wilson and Senior Judge Schlesinger of the District Court for the Middle District of Florida.

[20] *See Bank of Am. Corp.*, 800 F.3d at 1272–73.

[21] *Id.*

[22] *Id.* at 1273–78.

[23] *See id.* at 1282–83. Among the study's more notable findings: a Bank of America loan in a neighborhood with greater than 90% minority residents was 5.857 times more likely to result in foreclosure than one in a majority-white neighborhood; nearly a third of the bank's loans made between 2004 and 2012 in predominantly black and Latino neighborhoods resulted in foreclosure; and black and Latino borrowers were 1.5 times more likely to receive predatory loans after controlling for objective risk factors. *Id.* at 1268.

[24] *Id.* at 1289.

[25] Justice Breyer was joined by Chief Justice Roberts and Justices Ginsburg, Sotomayor, and Kagan. Justice Gorsuch took no part in the consideration of the cases.

[26] *Bank of Am. Corp.*, 137 S. Ct. at 1301 (quoting Joint Appendix at 232, *Bank of Am. Corp.*, 137 S. Ct. 1296 (Nos. 15-1111, 15-1112), 2016 WL 4502302).

standing is fundamentally an issue of statutory interpretation: "The question is whether the statute grants the plaintiff the cause of action that he asserts."[27]

The Court held that the City's injuries were "at the least, '*arguably* within the zone of interests'" protected by the FHA.[28] The FHA permits suits by any "aggrieved person,"[29] and Justice Breyer noted that the Court had interpreted this provision broadly in previous cases.[30] The Court quoted *Trafficante v. Metropolitan Life Insurance Co.*'s[31] statement that this provision "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'"[32] The Supreme Court had once even approved of standing for a municipality claiming economic injury resulting from realtors "steering" prospective homeowners into particular neighborhoods based on race, lending further credence to Miami's claim.[33] Congress had not rejected this interpretation of the FHA by amending the statute, and — though the banks pointed to similar language in other statutes now being construed more narrowly[34] — the Court chose not to upset settled FHA precedent.

On proximate cause, the Court held that the court of appeals erred in requiring Miami to allege only that its injuries were "foreseeable" consequences of the banks' conduct.[35] Instead, the Court held that a plaintiff must establish "some direct relation between the injury asserted and the injurious conduct alleged" to show proximate cause under the

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[27] *Id.* at 1302.

[28] *Id.* at 1303 (quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970) (emphasis added)).

[29] This term is defined in the statute as "any person who . . . claims to have been injured by a discriminatory housing practice" or "believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i) (2012). Before Congress amended the statute in 1988, the relevant term was "person aggrieved." *See Bank of Am. Corp.*, 137 S. Ct. at 1303.

[30] *Bank of Am. Corp.*, 137 S. Ct. at 1303.

[31] 409 U.S. 205 (1972).

[32] *Bank of Am. Corp.*, 137 S. Ct. at 1303 (quoting *Trafficante*, 409 U.S. at 209).

[33] *See Bank of Am. Corp.*, 137 S. Ct. at 1304–05; Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 109–11 (1979) ("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. . . . If, as alleged, petitioners' 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 110–11.).

[34] In *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), the Court held that the language "person aggrieved" in Title VII did not extend standing as far as Article III permits. *See id.* at 176–77. Bank of America relied heavily on this decision in its standing argument. *See* Brief for Petitioners at 19–22, *Bank of Am. Corp.*, 137 S. Ct. 1296 (No. 15-1111).

[35] *See Bank of Am. Corp.*, 137 S. Ct. at 1305; *see also* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015) ("We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability.").

FHA.[36] Under this standard, liability generally does not extend "beyond the first step" of a causal chain.[37] Rather than apply the test, the majority left the question for the lower courts on remand, as no circuit court had yet applied this analysis to an FHA claim and the issue would benefit from further percolation.[38]

Justice Thomas[39] filed an opinion concurring in part and dissenting in part. Justice Thomas began by highlighting the unusual nature of Miami's FHA claim, noting that the City did not claim to have been discriminated against by the defendants, nor did it sue on behalf of its residents who were victims of discrimination.[40] He disputed that the zone of interests protected by the FHA extended to standing's constitutional limits. Faced with the language in the cases cited by the majority, Justice Thomas quoted an opinion authored by Justice Scalia labeling it "'ill-considered' dictum" with "absurd consequences."[41] The same zone-of-interests limitation should apply in FHA cases as in suits under any other statute, Justice Thomas argued, because there was no evidence that Congress had intended to deviate from the ordinary background rule.[42] This rule blocks suits from plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit."[43]

Under this standard, Justice Thomas claimed that the City's asserted economic injuries were "not arguably related to the interests the statute protects."[44] The City differed from the "quintessential 'aggrieved person'" under the FHA, namely, "a prospective home buyer or lessee discriminated against during the home-buying or leasing process."[45] Unlike plaintiffs in previous cases, Miami did not claim to have been injured by lenders either steering residents to certain areas based on race or otherwise maintaining segregation.[46] Justice Thomas ended his zone-of-interests discussion by highlighting two "notable" limitations to the

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[36] *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

[37] *Id.* (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 10 (2010)).

[38] *See id.* For a review of the benefits of lower court decisions before Supreme Court review of a case, see Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 484–89 (2012).

[39] Justice Thomas was joined by Justices Kennedy and Alito.

[40] *See Bank of Am. Corp.*, 137 S. Ct. at 1307 (Thomas, J., concurring in part and dissenting in part).

[41] *Id.* at 1308 (quoting Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 176 (2011)).

[42] *See id.* at 1307.

[43] *Id.* at 1308 (omission in original) (quoting *Thompson*, 562 U.S. at 178).

[44] *Id.* at 1309; *see also id.* ("[N]othing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow.").

[45] *Id.*

[46] *See id.* at 1310.

majority opinion's analysis.[47] First, the majority did not directly state that the zone of interests extends as far as Article III permits.[48] Second, the Court did not squarely address the banks' argument that the City's theory would permit suits by local businesses claiming that discrimination led to foreclosures and fewer customers, instead relying on precedent that supported standing for municipalities as a particular class of plaintiff.[49] In Justice Thomas's view, the conclusion that Miami is an aggrieved person "is wrong, but at least it is narrow."[50]

Justice Thomas concurred in the majority's proximate cause holding, though he would have held that the City failed to meet the heightened standard rather than remand the cases to the Eleventh Circuit.[51] Miami's theory of causation, even taken on its own terms, requires multiple steps.[52] Because the court of appeals has no comparative advantage over the Supreme Court in evaluating the viability of the theory, Justice Thomas thought remand was unnecessary.[53]

The majority in *Bank of America Corp.* succeeded in finding a defensible middle path and potential limit to liability, if this was its goal.[54] The Court allowed Miami's suit to move forward but enacted a higher bar to establish liability, one that the City and future plaintiffs in its position might not be able to meet. Based on the issues before it, the Court had two options: limiting the zone of interests protected by the statute, which would have been a clear departure from precedent, or limiting proximate cause, which would not. Still, the Court will have to wait to see how effectively its holding functions as a limitation on novel FHA claims, as it is not obvious how the new standard is to be applied.

There is reason to suspect that concerns about massive, unchecked liability animated the Court's decision. Many commentators have noted that substantive considerations regarding the merits of a case often color a court's decisions on formally unrelated questions.[55] Professor Richard

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[47] *Id.*

[48] *Id.*

[49] *See id.* at 1310–11.

[50] *Id.* at 1311.

[51] *See id.* at 1311–12.

[52] *See id.* at 1311.

[53] *See id.*

[54] Because Justice Gorsuch had not joined the Court before oral argument, the Court had the incentive of avoiding a 4–4 split, which would have left the Eleventh Circuit's ruling in place.

[55] This charge is most often made about standing and other justiciability doctrines. *See, e.g.*, Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1742–43 (1999); Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 617 (2004) (arguing that judges "render law-abiding and predictable decisions in circumstances where clear precedent *and* effective judicial oversight exists," but otherwise follow ideological preferences). Others have proposed a link between remedies and the definition of substantive rights. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

Fallon offers a rich version of this claim in his "Equilibration Thesis."[56] Under Fallon's approach, courts "decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[57] If courts find a pattern of outcomes unacceptable or undesirable, they might adjust various doctrines in any number of ways to get better overall results.[58] This implies that a concern about remedies for a particular claim, for example, might lead a court to impose a higher bar to get into court or to make out that kind of claim on the merits.[59]

This theory would explain much of the Court's decisionmaking in *Bank of America Corp.* In explaining why foreseeability was insufficient for proximate cause, the majority noted that "entertaining suits to recover damages for any foreseeable result of an FHA violation would risk 'massive and complex damages litigation.'"[60] And both opinions alluded to the banks' argument that Miami's standing theory would allow suits by private businesses claiming economic loss, a consequence that even the majority was hesitant to embrace.[61] Some questioning at oral argument suggests that a primary worry was finding a reasonable limit to theories of liability like Miami's, out of concern about both future damages suits by municipalities and private suits by local businesses. The issue of damages came up repeatedly,[62] though there was no remedy-related question before the Court. Justice Breyer made just this point, asking Miami's counsel, "Do we have to go into [damages], or not? I'm not . . . saying we should or shouldn't, but I mean, do we have to to decide this case, decide the damages, what damages are appropriate?"[63] It is difficult to imagine much clearer evidence of remedial concerns slipping into what is typically considered an analytically distinct inquiry.[64]

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[56] *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006).

[57] *Id.*

[58] *Id.*

[59] *See id.* at 685 ("Merits judgments influence justiciability rulings; remedial apprehensions influence holdings on the merits; and remedial concerns also influence the shaping of justiciability doctrines.").

[60] *Bank of Am. Corp.*, 137 S. Ct. at 1306 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)).

[61] *See id.* at 1304 (explaining, but not directly addressing, the banks' hypothetical); *id.* at 1310–11 (Thomas, J., concurring in part and dissenting in part).

[62] The word "damages" was said thirty-six times in the hour-long argument. *See* Transcript of Oral Argument, *Bank of Am. Corp.*, 137 S. Ct. 1296 (Nos. 15-1111 & 15-1112), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1111_ca7d.pdf [https://perma.cc/D5UE-G9UB]. Counsel for Wells Fargo stressed that finding for the City would mean permitting a "non-direct . . . chain of causation to the tune of, again, billions of dollars." *Id.* at 19.

[63] *Id.* at 38.

[64] *See* Fallon, *supra* note 56, at 635.

With the remedy issue hanging in the background, the Court seemed motivated to arrive at some sort of limitation. If this was the case, the Court was correct to focus on proximate cause. It may have even understated the reasons for finding Miami to fall within the FHA's zone of interests. As the Court only recently made clear, the zone-of-interests analysis requires courts to employ the "traditional tools of statutory interpretation."[65] Stare decisis bears the most weight in statutory interpretation decisions,[66] and the relevant holdings here are prominent and exceedingly clear. The Court decided a trio of major FHA standing cases between 1972 and 1982. First, the Court upheld standing for two tenants of an apartment building who alleged their landlord discriminated against minority applicants, stating that Congress intended "to define standing as broadly as is permitted by Article III of the Constitution."[67] Next, the Court allowed a municipality's suit to move forward based on the asserted injuries of increased racial segregation and a diminished tax base.[68] Last, the Court found standing for a "tester" who was told false information while attempting to collect evidence of racial steering and for a nonprofit claiming impairment in its ability to facilitate equal access to housing.[69] It once again repeated that standing extends as broadly as Article III permits.[70] These statements might be dicta, as Justice Thomas and Justice Scalia argued, but only in the sense that any general proposition will not be the only one that supports reaching a particular conclusion.[71]

The Court's proximate cause holding required overturning no longstanding precedents and is broadly in line with recent decisions involving other statutes.[72] Moreover, the general purpose of proximate

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[65] Lexmark Int'l, Inc., v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014).

[66] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, . . . the legislative power is implicated, and Congress remains free to alter what we have done."); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) ("Statutory precedents . . . enjoy a super-strong presumption of correctness.").

[67] Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) (quoting Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971)).

[68] *See* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 110–11 (1979).

[69] *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 372–74, 379 (1982).

[70] *Id.* at 372.

[71] *Cf.* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 647–48 (1995) ("[B]ecause this reason directly supports the Court's result, it does not become dicta just because the Court could have given a narrower reason. Under that logic all reasons would be dicta, since all reasons can always be narrowed to the point at which their degree of generality is no greater than the outcome they support.").

[72] *See* Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992) (holding that a "direct relation" was required under the Racketeer Influenced and Corrupt Organizations Act); *see also* Lexmark Int'l, Inc., v. Static Control Components, Inc., 134 S. Ct. 1377, 1394 (2014) (noting the "'general tendency' not to stretch proximate causation 'beyond the first step'" (quoting *Holmes*, 503 U.S. at 271)).

cause in tort doctrine is to impose a reasonable limit on liability.[73] Looking more closely at the source of the Court's proximate cause standard helps to illuminate why it might severely restrict future cases like Miami's and to explain why Justice Thomas thought remand was unnecessary. The Court quoted a case interpreting the Racketeer Influenced and Corrupt Organizations Act[74] (RICO) for the requirement that a plaintiff show a "direct relation" between the injury and the defendant's unlawful conduct.[75] Later RICO cases make clear that this is a demanding standard. For example, in one case the City of New York brought a RICO claim against an online cigarette seller that fraudulently failed to report a list of its purchasers to the state government to facilitate the City's collection of sales taxes.[76] The Supreme Court rejected the City's theory of causation because "the conduct directly causing the harm was distinct from the conduct giving rise to the fraud."[77] The harm was caused by consumers' failure to pay city taxes, a duty they had regardless of the company's alleged failure to meet its legal obligation to the state that would have made the City's tax collection easier.[78] Because there was no direct causal connection between the unlawful conduct and the injury, the City could not establish proximate cause under the direct relation test.

If the FHA is interpreted in the same manner, Miami's partial victory will be short-lived. Stated in the manner most favorable to the City, there is at least one step between the banks' alleged unlawful practices and any injury to the City: the banks disproportionately offered bad loans to minorities, who then defaulted at high rates, which caused Miami to collect less property tax revenue than it otherwise would have.[79] But if this is the interpretation that governs the FHA, it is difficult to understand why the Court chose to remand the case rather than issue a final decision on these grounds.[80]

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[73] *See* DAN B. DOBBS ET AL., THE LAW OF TORTS § 199 (2d ed. 2011).

[74] 18 U.S.C. §§ 1961–1968 (2012).

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

[76] *See* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 4 (2010).

[77] *Id.* at 11; *see also id.* at 10 ("Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.").

[78] *Id.* at 11.

[79] Justice Thomas offered a multi-step version:

> As a result of the lenders' discriminatory loan practices, borrowers from predominantly minority neighborhoods were likely to default on their home loans, leading to foreclosures. The foreclosures led to vacant houses. The vacant houses, in turn, led to decreased property values for the surrounding homes. Finally, those decreased property values resulted in homeowners paying lower property taxes to the city government.

Bank of Am. Corp., 137 S. Ct. at 1311 (Thomas, J., concurring in part and dissenting in part) (citations omitted).

[80] The majority claimed the Court could not apply the analysis because it lacked the benefit of a lower court decision applying the correct proximate cause standard, *see id.* at 1306 (majority opinion), but as Justice Thomas noted, the cases reached the Supreme Court at the motion to dismiss

Perhaps forgoing the application of the standard was simply the cost of getting a majority.[81] Or possibly the answer is not as simple as Justice Thomas makes it. As with the zone-of-interests analysis, the bounds of the proximate cause inquiry are "controlled by the nature of the statutory cause of action."[82] RICO and the FHA are fundamentally different statutes with different histories and purposes,[83] though they share a basis in tort law principles.[84] In the case of the FHA, the Supreme Court has approved claims of a similarly indirect nature to Miami's in the past, albeit without addressing proximate cause.[85] Because the inquiry is statute specific, courts have the option of taking these purposes and each statute's precedents into consideration when applying the proximate cause test to fashion the scope of liability; doing so may undermine the liability-limiting power of the heightened causation requirement.

In *Bank of America Corp.*, the Court resolved the issues it faced in a pragmatic way: it hewed closely to precedent in deciding who is an "aggrieved person," but imposed a heightened causation requirement to rein in what it seemed to perceive as a novel, potentially limitless theory of liability. Instead of applying the new standard itself, however, the Court remanded the case for the Eleventh Circuit to do so. Such minimalism has its virtues.[86] But it also means that it is up to lower courts to determine its limiting power, and ultimately to decide what the legacy of the decision will be.

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stage and the Eleventh Circuit "has no advantage over [the Court] in evaluating the complaint[]," *id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

[81] *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 540 (1983) ("[T]he cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved."). Though not logically inconsistent, the tension between Miami's harm being within the zone of interests protected by the FHA yet potentially not proximately caused by conduct made unlawful under the statute also suggests compromise.

[82] Lexmark Int'l, Inc., v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (2014).

[83] The Court recognized "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society" in a recent case allowing disparate impact claims to proceed under the FHA. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525–26 (2015). RICO, by contrast, does not typically vindicate any interest in racial justice.

[84] *See Bank of Am. Corp.*, 137 S. Ct. at 1305 ("A claim for damages under the FHA . . . is akin to a 'tort action' . . . ." (quoting Meyer v. Holley, 537 U.S. 280, 285 (2003))); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 466–68 (2006) (Thomas, J., concurring in part and dissenting in part) (applying tort principles in a RICO case).

[85] *See* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 110–11 (1979) (finding standing for a municipality alleging that the defendants' steering practices fostered segregation and reduced the number of total home buyers, thus decreasing home prices, which diminished the tax base and potentially harmed its ability to collect revenue to provide public services).

[86] *See generally* Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (arguing that minimalist decisions encourage reason-giving, promote accountability, and minimize the costs of errors in judicial judgment).