

1 Article III rationale or a broad zone-of-interest
2 rationale.

3 If I could turn to some of the points that
4 have already come up today, my friend on the other side
5 says that you can't cut and paste injury from one
6 plaintiff to -- one victim of discrimination to another.
7 That's an argument that Gladstone specifically rejected.

8 In Footnote 9 the Court said that what
9 matters here, and this is what was -- this is what was
10 the breadth of the trilogy of Fair Housing Act cases
11 that the Court decided between 1972 and 1982, is that
12 somebody has had their legal rights violated by
13 discriminatory housing practices. It doesn't
14 necessarily have to be the plaintiff's legal rights.
15 The plaintiff has to be injured by that violation, but
16 it doesn't have to be their rights that are violated.
17 And that's what we think is the -- is the work that's
18 being done by the atypical definition of "aggrieved
19 person" that Congress put back into the statute --

20 JUSTICE KAGAN: Well, that's a very broad
21 statement, Mr. Gannon. What do you do, then, with the
22 restaurant or the dry cleaner or the laundry or whatever
23 that wants to sue for somebody else's discrimination?

24 MR. GANNON: Well, I agree with my friends
25 on both sides that that limit is going to come from the

1 proximate-cause analysis. We don't disagree that there
2 is still a proximate-cause limitation implicit in the
3 statutes.

4 And here we think that although Gladstone
5 didn't address proximate cause in those terms, it is
6 important and significant that the Court there said that
7 the City is directly injured by the decrease in property
8 values, and we think that the test -- the ultimate test
9 that this Court stated in Lexmark -- of course, the
10 Court has repeatedly recognized that proximate cause is
11 a statute-by-statute situational inquiry that depends
12 upon the nature of the individual statutes, but the
13 ultimate test is whether there is a sufficiently close
14 connection to the conduct that the statute prohibits.
15 And what this statute prohibits is discriminatory
16 housing practices.

17 JUSTICE BREYER: You may not need to go into
18 it, but how does proximate cause help you? You could
19 have a dry cleaner or you could have a magazine that
20 writes about successes in integration and wants to write
21 about this community before it got wrecked or whatever.

22 Clause could be absolutely clear.
23 Absolutely clear. 15 Bishops testify was totally
24 causal-related. I mean, do they all have suits?

25 MR. GANNON: Well, if not -- I -- I think

1 that what we are saying --

2 CHIEF JUSTICE ROBERTS: They haven't even
3 argued that, and they didn't decide.

4 MR. GANNON: No. And I -- I think -- I
5 think to the extent they can get themselves into the --
6 into the Home framework from Havens, then maybe they
7 could say that they have specific costs that are
8 associated with fighting discrimination.

9 But I wanted to say that what we have --

10 JUSTICE BREYER: And you heard -- you heard
11 what the question was -- the question before and it
12 still is -- if we get into it -- we may not need to, but
13 if we did -- it would be somebody in Alaska who writes
14 magazine articles about successes in integration is
15 going to be wrecked because they don't have the
16 integration. And it's a prime example, absolutely
17 clear, of the causal connection. Can he bring this
18 lawsuit? I mean --

19 MR. GANNON: And I -- we -- we think -- no.
20 We think that -- we think that that is further afield,
21 and we think that --

22 JUSTICE BREYER: You think it's further
23 afield --

24 MR. GANNON: Yes. And the --

25 JUSTICE BREYER: -- not because of causation

1 though, because it's caused. I made a hypothetical
2 where we proved that it's caused.

3 MR. GANNON: Yes, it's caused. But
4 proximate cause is always about determining that
5 something that is caused is still too far away, either
6 in terms of foreseeability or distance or intervening
7 cause or something else, and so proximate cause by
8 definition is carving out something that otherwise would
9 be caused by. Otherwise, it wouldn't be doing anything
10 different from traceability analysis under Article III.

11 And here we think that the reason why this
12 is sufficiently closely connected to the conduct that
13 the statute prohibits is that this statute prohibits
14 discriminatory housing practices, and those practices
15 include things like the terms and conditions of the sale
16 of rental property; things about the real estate-related
17 transactions; things like block busting, which was
18 specifically prohibited by 3604(e). And block busting
19 was a practice by which somebody would go into a
20 neighborhood and induce artificially low-priced panic
21 selling by saying there are minorities coming into this
22 neighborhood. That conduct had an effect on property
23 prices.

24 JUSTICE SOTOMAYOR: Mr. Gannon, how do --
25 how do we write it? Let's take the corner grocer who

1 had a running account with that home or the gardener who
2 every week cleaned the property. I doubt someone who is
3 in foreclosure can afford a gardener, but let's assume
4 that possibility. Why -- how do we write that the City
5 has standing and its injuries are proximately caused,
6 but those people don't?

7 MR. GANNON: I think --

8 JUSTICE SOTOMAYOR: The company shareholder.
9 What's -- how do we say it?

10 MR. GANNON: The link that we see is -- is
11 to property value, and that's the injury that the Court
12 already recognized in Gladstone.

13 This is a question of congressional intent.
14 When you're -- when you're construing proximate cause,
15 you're trying to figure out what Congress intended.
16 This Court had already recognized that a city was
17 directly injured by decreased property value. The same
18 thing it said was true of the neighbors in Gladstone.
19 The neighbors that had their property values diminished
20 were able to recover.

21 I would say that the corner store, to the
22 extent that it has its property values diminished, is
23 situated just like one of those neighbors. To the
24 extent that it's talking about something else like lost
25 profits or the utility company is complaining they lost

1 a customer, those things, we think, are further afield
2 and not so closely connected. And proximate cause has
3 traditionally done that type of --

4 CHIEF JUSTICE ROBERTS: Could you give us
5 some more concrete answers? The -- the utility company,
6 you say it's further afield. Is it covered or not?

7 MR. GANNON: We think it's not covered. We
8 think that -- that -- that what this Court recognized in
9 Gladstone is something that Congress was taking account
10 of, and the property value -- the effect on property
11 values is closely tied to discriminatory housing
12 practices. Congress was entitled to think that that
13 relationship would endure, and as in Lexmark, there is a
14 one-to-one relationship --

15 JUSTICE KENNEDY: How about real estate
16 brokers whose commission is based on the value of the
17 property?

18 MR. GANNON: Yes. Real estate brokers who
19 are involved in the transaction, we discussed in our
20 brief that those are the type of people who have an
21 interest in the transaction, even if it's just an
22 economic interest, they're able to recover. I don't
23 understand my friends on the other side to be disputing
24 that, that -- that if they have a transaction that fails
25 to go through because of this, because of racial

1 discrimination, then they can sue.

2 And we think it is important for the Court
3 to remind -- remember that you don't just to have to
4 have --

5 JUSTICE KENNEDY: What if they wrote it
6 generally? They said this -- this is now a poor
7 community. Our commissions are going to be lower across
8 the board.

9 MR. GANNON: I -- I think that --

10 JUSTICE KENNEDY: They are -- they're
11 somehow different from the corner grocery store? I
12 don't get it.

13 MR. GANNON: No. I think if -- if they were
14 just generically saying business is done --

15 JUSTICE KENNEDY: That is my hypothetical.

16 MR. GANNON: That might be harder for them
17 to establish the types of cases that -- that we've
18 previously seen are where developers, brokers, real
19 estate -- real estate agents have -- have talked about
20 specific transactions that they can say were caused
21 by -- by discriminatory housing practices. And it -- we
22 do think it is important for the Court to recall that
23 those cases involve plaintiffs who don't necessarily
24 have a, quote/unquote, "desegregation interest," as
25 my -- as my friend on the other side puts it.

1 It -- it is enough that they are injured in
2 their economic interests, and as the Court pointed out
3 in inclusive communities, a real estate developer is
4 often a good plaintiff to challenge a local
5 discriminatory housing practice. We don't require that
6 they add on that they are -- they are something like the
7 nonprofit in Havens where, in addition to wanting to
8 make money off of developing their property, they also
9 have an interest in desegregation. And similarly --

10 JUSTICE SOTOMAYOR: So your answer --

11 JUSTICE KAGAN: Perhaps -- please.

12 JUSTICE SOTOMAYOR: Your answer, I think, to
13 the question is that it's limited to those cognizable
14 suits contemplated by the statute, and you see
15 contemplated by the statute as having to do with the
16 possession or value of the property?

17 MR. GANNON: We think that the -- the harms
18 that flow directly from changes in property value were
19 ones that Congress contemplated, both in 1968, and
20 certainly in 1988, after this Court had already -- had
21 already enumerated that as a particular type of harm
22 that was at issue here.

23 And we don't think that the City should have
24 to establish that there's been a change in racial
25 composition of the neighborhood in order to bring a

1 suit, because the Fair Housing Act is intended to
2 cover -- is intended to prohibit discriminatory housing
3 practices throughout the United States, and that
4 includes segregated communities that aren't changing if
5 there is discrimination.

6 CHIEF JUSTICE ROBERTS: So the City can sue
7 based on isolated instances of discrimination?

8 MR. GANNON: To the extent --

9 CHIEF JUSTICE ROBERTS: I thought that the
10 basic pitch of the -- of your position is that it
11 affects the community as a whole, and the City has an
12 interest in ensuring the stability of the communities,
13 not that the City could enforce particular instances of
14 housing discrimination.

15 MR. GANNON: I -- I think it's both. I
16 think that they do have the community representing
17 interest, and -- but I also think that, to the extent
18 that they can say we suffer a harm from this particular
19 transaction -- let's assume it's just one particular
20 apartment complex or something. If --

21 CHIEF JUSTICE ROBERTS: Could be one -- one
22 particular home?

23 MR. GANNON: Yeah. I suspect that that's
24 one where there wouldn't be that much in it to have the
25 City bring that suit instead of the individual loan

1 owner, but --

2 CHIEF JUSTICE ROBERTS: I don't know if
3 there's that much in it. Can the City bring that action
4 or not?

5 MR. GANNON: Yes. It -- to the extent that
6 they can say there is a one-to-one relationship, they
7 are just like the microchip manufacturer in Lexmark.
8 Whenever there is a decline in property value on the
9 part of the -- the primary victim, or the homeowner
10 here, they suffer a corresponding decline in their tax
11 revenue.

12 CHIEF JUSTICE ROBERTS: So the City can
13 bring an action of the sort we're talking about here in
14 the case of one subprime mortgage that results in a
15 foreclosure?

16 MR. GANNON: If they can say that that --
17 that's -- that that was caused by discriminatory housing
18 practices --

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. GANNON: -- and that it injured them?
21 Yes. That's just like the -- the residents in
22 Trafficante or the City in Gladstone. They are able to
23 say, we are injured by this.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Katyal, you have four minutes.

1 REBUTTAL ARGUMENT OF NEAL K. KATYAL

2 ON BEHALF OF THE PETITIONERS

3 MR. KATYAL: Four points, Your Honor.

4 First, with respect to this complaint, to
5 paragraph 186 and so on, we agree. Our blue brief at
6 page 33 says that they do identify an interest, but they
7 have to plausibly allege some impact on segregation in
8 order to survive. They haven't done that. They haven't
9 told you whether segregation is increasing or decreasing
10 as a result of the bank's conduct.

11 Second, the damages here they seek are way,
12 way broader than what they're painted out to be. Just
13 the taxes and the complaint are bad enough. Indeed, the
14 Bank of America petition -- cert petition at page 34
15 cites one of the complaints filed by the same counsel
16 against Cobb County, seeking hundreds of millions of
17 dollars.

18 There are 19,300 cities in America. If you
19 adopt their theory, you would be allowing all of them to
20 bring complaints just like this.

21 Now, we've said that if you accept their
22 interpretation, you'd be opening the door. The
23 Solicitor General says, huh-uh; proximate cause is
24 somehow a limitation on that.

25 Their own proximate-cause tests, as our

1 brief explains, eliminates the directness requirement.
2 So I think it will be hard, and that's why I don't think
3 he had an answer, Justice Breyer, on the magazine, or
4 things like that.

5 And then, Justice Sotomayor, you asked him
6 how to write the opinion to avoid the gardener, and his
7 answer was, look at Gladstone, because Gladstone has a
8 direct reduction in property values. That cannot be a
9 consistent theory for this Court on proximate-cause
10 principles for many reasons, one of which Gladstone is
11 not a proximate-cause case at all. It's not briefed or
12 argued.

13 But second, even the language he's reading
14 to you is only at the very end of Gladstone, saying that
15 if you have a reduction in property value, then it will
16 directly reduce the tax base.

17 This complaint's totally different. You've
18 got five steps, as the Solicitor General's own brief
19 explains, before you even get to the reduction in
20 property value. Each of those are opportunities for
21 intervening causes, and all the kinds of things that
22 this Court in Lexmark said are the reasons why we cut
23 off liability at the first step.

24 Now, his other answer was to say, well, look
25 at the Congressional Report. The Congressional Report

1 identifies that Congress was concerned with property
2 values, and therefore concerned with cities.

3 That Congressional Report also says Congress
4 was equally concerned with employers who suffered from
5 segregated neighborhoods, employees who were fired
6 because the neighborhoods suffered from blight, and
7 shops and other things.

8 So if you take their standard, which is,
9 look at the Congressional Report, figure out who's
10 harmed by housing discrimination, even downstream, you
11 would come to the same conclusion we do, which is this
12 is an unlimited theory of liability. It would allow
13 landlords to sue, utilities companies to sue, and,
14 Justice Sotomayor, gardeners to sue.

15 We've also said one other thing, Justice
16 Kagan. This gets to your point earlier about the
17 congressional scheme. If you adopt on zone of interest
18 their interpretation of "aggrieved persons," 3612 allows
19 "aggrieved persons" to intervene as a matter of right in
20 Federal litigation.

21 Our view is what Congress did was it
22 empowered direct victims to sue, as well as some
23 indirect victims, in the Justice Department. Their
24 interpretation says, any city, including one that's not
25 even motivated by the same type of, you know, presumably

1 wonderful motivations as the City of Miami, can come in
2 and intervene in a direct victims lawsuit and possibly
3 muck it up in any number of directions. That can't
4 possibly be what Congress thought about when they have
5 used the words "person aggrieved" in the statute, to
6 allow cities to come in and interfere with -- with a --
7 kind of lawsuits filed by direct victims.

8 JUSTICE SOTOMAYOR: Well, it's hard to think
9 that Congress didn't know that in 1988, when we've
10 already let a village come in, in a municipality.

11 MR. KATYAL: But, Justice Sotomayor, our
12 position on this -- and this is very important -- we're
13 not quibbling with that. Gladstone is absolutely 100
14 percent good law. We're not seeking to change it.
15 They're the ones that are seeking to expand it in two
16 directions, both by taking it out of segregation and by
17 expanding proximate cause to the sky.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 11:03 a.m., the case in the
21 above-entitled matter was submitted.)

22

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