Nos. 15-1111 & 15-1112

IN THE

Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
*Petitioner*s

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Writs of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Do the City of Miami's complaints against the petitioner banks seeking money damages and other relief under 42 U.S.C. § 3613(a) for alleged violations of the Fair Housing Act ("FHA") satisfy the "zone of interests" and proximate-causation requirements that this Court has held presumptively apply to all statutory causes of action, where the complaints are based on allegations of harm to the City's fiscal interests from a reduction of property tax revenues and increased budget expenditures due to urban blight, which the City claims resulted from an increase in housing foreclosures allegedly tied, in turn, to discriminatory lending practices by petitioners?

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INTEREST OF AMICUS CURIAE[1]

The Cato Institute is a nonpartisan, public policy research organization dedicated to principles of individual liberty, limited government, free markets, and peace. Through research, scholarship, public speaking, and the filing of amicus briefs, Cato strives to promote a more free and open society reflecting libertarian values.

Among its many areas of focus, Cato advocates for human rights and freedom through adherence to constitutional restraints on the powers of government, including in the work of Cato's Center for Constitutional Studies. The scholars in Cato's Center for Monetary and Financial Alternatives study the effects of regulation on free markets and economic liberty, including in the area of financial services and banking. And with publications like *Freedom in the Fifty States*, Cato spotlights government overreach through uncontrolled fiscal policies and taxation, with a particular focus on the policies of state and local governments. All of these interests converge in the present case.

Here, instead of meeting its fiscal challenges by reducing spending or by seeking the consent of its residents to increase local tax revenues, the City of Miami looks to fund its municipal budget at the expense of the petitioner banks through a creative

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[1] All parties have filed letters consenting to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution toward the brief's preparation or submission.

litigation strategy involving allegations of highly attenuated economic harm. Lawsuits like this one represent a growing phenomenon, particularly under the FHA. The temptation of local governments to pursue such a strategy threatens to diminish the freedom and power of citizens by separating local fiscal policy from the healthy constraints of democracy. This temptation depends entirely on the willingness of federal courts to ignore the substantive limitations Congress meant to place on private causes of action under statutes like the FHA.

Cato respectfully suggests that the insights and perspective it brings to the principles at issue in this case will help inform the Court's consideration.

SUMMARY OF ARGUMENT

The City of Miami's allegations of indirect harm to its fiscal interests are insufficient to support a cause of action against petitioners under the FHA. The complaints fail to establish that the City's grievance falls within the "zone of interests" protected by the statute and that the harm claimed by the City was proximately caused by petitioners' alleged violations of the FHA. While this answer to the question before the Court should be clear, the principles at stake here are of transcendent importance and deserve special emphasis.

1. Separation of powers principles require strict judicial application of the limitations Congress places on statute-created causes of action. In accordance with the Constitution's central structure, the first duty of the courts is to adhere scrupulously to

the separation of the judicial function under Article III from the legislative power of Congress under Article I. This foundational imperative, core to the protection of freedom, means that courts in all cases must give full effect to the substantive requirements Congress incorporates into statutory causes of action like 42 U.S.C. § 3613(a).

2. The "zone of interests" and proximate-causation showings are necessary prerequisites to a civil action under the FHA. In *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), and *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), this Court made clear that to pursue a civil action under a federal statute, a plaintiff must show that its claim falls within the "zone of interests" Congress enacted the statute to protect and (unless Congress expressly provides otherwise) that the violation of the statute was the proximate cause of the plaintiff's particular harm. These are not "prudential" considerations that lie within the discretion of the judiciary to excuse in specific cases, and dicta in this Court's earlier decisions suggesting that they do not apply under the FHA should no longer be followed.

3. The City of Miami's allegations of attenuated fiscal harm in this case do not remotely satisfy these statutory prerequisites. They are similar in nature to the indirect consequential losses that the Court in *Thompson* concluded would fall outside the scope of the parallel Title VII cause of action and that *Lexmark* described as beyond the limits of proximate causation.

4. The failure of courts to respect and apply the "zone of interests" and proximate-causation requirements mandated by Congress invites the troublesome and potentially abusive phenomenon exemplified by this lawsuit and a growing wave of others just like it. Local governments are tempted to partner with plaintiffs' lawyers to pursue creative litigation theories of fiscal harm under federal civil rights statutes as a means to meet their local budget needs. In doing so, governments avoid having to reduce spending or to seek the consent of their residents for a tax increase—in other words, they circumvent the usual constraints of democracy that are the primary guarantors of the people's liberty.

To uphold the statutory requirements enacted by Congress in the FHA and to avoid the pitfalls attendant to government by litigation, this Court should reverse the court below.

ARGUMENT

Allegations of indirect harm to a local government's fiscal interests, like those made by the City of Miami in the present case, do not support a claim under the civil action provision of the FHA, 42 U.S.C. § 3613(a).

I. Separation of Powers Requires Courts to Honor the Substantive Conditions Congress Has Incorporated into a Statutory Cause of Action

The structural separation of powers enshrined in the Constitution is the foundation of civil rights in

the United States, and the failure of courts to honor limitations that Congress has built into civil actions created by statute is inconsistent with the effective separation of powers.

Among the three branches of the federal government, the Founders expected the Judiciary to pose the least danger to "the general liberty of the people" because it does not share in Congress's power to enact laws and impose taxes or the Executive's power to administer the laws and enforce compliance. *The Federalist* No. 78 (Alexander Hamilton) 413 (J.R. Pole ed. 2005). For that reason, unlike Members of Congress and the President, federal judges, once appointed, are appropriately insulated from political accountability.

But this fundamental expectation cannot hold where the judiciary assumes authority to encroach on a province reserved to the other branches, for "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" *Id.* (quoting Montesquieu, Spirit of Laws, vol. 1, p.181). Under our constitutional design, the most basic responsibility of the courts is to recognize and give full effect to the laws enacted by Congress.

Accordingly, the courts have no license to revise or expand statutes or to ignore the substantive conditions and limitations Congress has placed on a statutory right, including a private right of action like 42 U.S.C. § 3613(a). *See California v. Sierra Club*, 451 U.S. 287, 297 (1981) (refusing to imply a private right of action under the Rivers and Harbors Appropriation Act on the ground that "the federal

judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide"); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975) (holding that the Judiciary may not expand or circumscribe a statutory right Congress has conferred because of any disagreement with the wisdom of the legislative choices).

II. The Civil Action Provision of the FHA Incorporates the "Zone of Interests" and Proximate-Causation Requirements

This Court's recent decisions establish that plaintiffs seeking to pursue causes of action created by a federal statute must show that their claims fall within the "zone of interests" protected by the statute and, unless Congress has expressly provided otherwise, that the harm they allege was proximately caused by the law's violation. Both requirements are fully applicable to actions under 42 U.S.C. § 3613(a).

In *Thompson v. North American Stainless*, the Court construed the civil action provision of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(f)(1), which, like the FHA provision at issue, authorizes private suits by persons "claiming to be aggrieved" by a violation of the statute. *See* 562 U.S. at 175-78. *Thompson* held that the term "aggrieved" must be read to incorporate the "zone of interests" test, which precludes suits by plaintiffs whose claims are "so marginally related to … the purposes implicit in the statute" as to fall outside the sphere "arguably [sought] to be protected" by the law. *Id.* at 178 (internal quotation marks omitted).

The Court reasoned that if, instead, the "person aggrieved" language were as broad as "injury in fact" standing under Article III, "absurd consequences would follow." *Id.* at 176-77. "For example," the Court stated, "a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as [the shareholder] could show that the value of [the] stock decreased as a consequence," a type of suit far removed from the purposes of Title VII and thus not authorized by Congress in the statute's civil action provision. *Id.* at 177.

Thompson recognized that several earlier opinions of the Court described the parallel "person aggrieved" language in Title VIII (the FHA) as conferring standing on plaintiffs to the full extent permitted by Article III. *Id.* at 176 (discussing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Bennett v. Spear*, 520 U.S. 154, 165-66 (1997)). But the Court concluded that such statements were "ill-considered" "dictum," and that the actual holdings of these earlier cases were all consistent with the "zone of interests" requirement applied in *Thompson*. 562 U.S. at 176. Accordingly, the Court declined to follow the dictum of *Trafficante*, *Gladstone*, and *Bennett*. *Id.*

And in *Lexmark Int'l v. Static Control Components*, this Court unanimously held that any statutory cause of action created by Congress is presumed (1) to extend "only to plaintiffs whose interests fall within the zone of interests protected

by the law invoked," 134 S. Ct. at 1388 (internal quotation marks omitted), and (2) "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Id.* at 1390.

Lexmark explained that the "zone of interests" test is *not* a matter of "prudential standing"; it does not involve a balancing of competing "prudential" factors for courts to weigh and consider in their discretion, *id.* at 1386-88, or any judgment by a court as to whether "Congress *should* have authorized" a particular suit. *Id.* at 1388 (emphasis in original). Rather, it presents "a straightforward question of statutory interpretation," *id.*: Is the statute before the court properly interpreted as a substantive matter "to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation." *Id.* at 1389 n.5 (internal quotation marks omitted). "[T]he breadth of the zone of interests varies according to the provisions of law at issue," *id.* at 1389, and discerning the scope of the protected sphere requires parsing the substantive provisions of the statute that establish the law's purposes. *See id.* (analyzing the statutory purposes of the Lanham Act and concluding that a plaintiff suing for false advertising under the Act "must allege an injury to a commercial interest in reputation or sales").

The proximate-causation requirement, on the other hand, comes from the long-established common law rule that losses are attributed "to the proximate cause, and not to any remote cause." *Id.* at 1390 (internal quotation marks omitted). Unless expressly abrogated, this venerable rule is presumed to be

incorporated by Congress into statutory causes of action. *Id.*

Application of the proximate-causation test "is controlled by the nature of the statutory" right, and the question "is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* The test, which requires that the plaintiff's injury flow "directly" from the defendant's wrongdoing, is more stringent than the "fairly traceable injury" test of Article III standing. *See id.* at 1391 & n.6. It "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct," such as where "the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Id.* at 1390 (quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992)).

Thus, in construing the Lanham Act in *Lexmark*, the Court held that "while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses" under the Act, "the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'" 134 S. Ct. at 1391 (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006)).

There is no basis to conclude that the civil action provision of the FHA, 42 U.S.C. § 3613(a), is exempt from the same "zone of interests" and proximate-causation requirements. The language of the provision is identical to the "person aggrieved" language

construed by the Court in *Thompson* to include a "zone of interests" test. And nothing in the FHA indicates any intent of Congress to abrogate the common law proximate-cause element.

To the extent *Trafficante*, *Gladstone*, and *Bennett* can be read to suggest that the private right of action authorized in 42 U.S.C. § 3613(a) is co-extensive with Article III standing, those suggestions were disavowed in *Thompson* and should no longer be followed.

III. The Statutory Conditions for a Cause of Action under the FHA Are Not Satisfied in this Case

For the reasons set forth in petitioners' briefs, the allegations made by the City of Miami do not meet the requirements of the "zone of interests" and proximate-causation tests incorporated into the FHA's civil action provision.

The fiscal, budgetary harms claimed by the City are far afield from any adverse effect of discriminatory housing that Congress even arguably meant to redress in Title VIII of the Civil Rights Act. These harms are akin to the financial losses suffered by a company's shareholders as a consequence of the company's racially discriminatory employment practices—a type of harm the Court in *Thompson* described as an "absurd" basis for a suit under the parallel provision of Title VII. 562 U.S. at 177.

And the super-attenuated, multi-step chain of causation alleged by the City only proves that the

City's budget pressures cannot be the direct result of petitioners' lending practices, but are, at best, a highly remote consequence that necessarily must involve the intervening decisions and actions of innumerable third parties. Even crediting the City's allegations, such indirect financial losses are "purely derivative" of the harms suffered by direct victims of discrimination, 134 S. Ct. at 1390, and are on par with the consequential commercial losses of the landlord or the electric company that the Court in *Lexmark* said would clearly fail the proximate-causation test. *See id.* at 1391.

IV. Failure to Apply the "Zone of Interests" and Proximate-Causation Tests to Preclude Suits Like the City of Miami's Invites Government Overreach

This case exemplifies the pernicious side of the *Trafficante* dictum. It shows how adherence to that dictum has encouraged local governments, in partnership with plaintiffs' lawyers, to twist federal civil rights laws into funding vehicles to augment their budgets through non-democratic means.

If courts construe 42 U.S.C. § 3613(a) to authorize suits to the full extent of Article III standing, then any type of consequential economic loss, no matter how far detached from the social ills Congress sought to redress in the FHA, can give rise to a claim under the statute, provided only that the loss is "fairly traceable" to alleged housing discrimination. The economic loss claimed in this case is the ultimate in consequential damages: the impact of

urban blight on the City's property tax base and budget outlays.

The prospect that the City can recoup this loss and replenish its municipal coffers by tapping into the resources of the nation's largest banks through a federal cause of action for money damages is too tempting to pass up. Most governments have an insatiable hunger for revenue, and plaintiffs' lawyers, who themselves stand to win sizable fee awards from these actions, have little trouble convincing local officials that FHA litigation or similar suits under other federal civil rights laws is the answer to their fiscal woes. These suits promise a new and potentially rich source of funding that does not require elected officials to secure the consent of voters or face the wrath of local property owners and other taxpayers.

Thus, Miami is not alone. At least a dozen other cities, counties, and school districts have partnered with plaintiffs' lawyers to pursue nearly identical complaints under the FHA for money damages against banks and other lending institutions—in some cases seeking damages in excess of a billion dollars. Brief for Petitioners Bank of America Corp., et al., No. 15-1111, at 7 & n.2; *see, e.g.*, *County of Cook v. HSBC North America Holdings Inc.*, 136 F. Supp. 3d 952 (N.D. Ill. 2015) (following *Trafficante* and denying motion to dismiss); *County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909 (N.D. Ill. 2015) (refusing to follow *Trafficante* and granting motion to dismiss); *City of Los Angeles v. JPMorgan Chase & Co.*, No. 2:14-cv-04168, 2014 WL 6453808 (C.D. Cal. Nov. 14, 2014) (denying motion to dismiss

based on *Trafficante*); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014) (same).

These suits are the latest wave in the troubling trend of government by litigation. They follow the patterns set by state attorneys general who have joined forces with contingency-fee plaintiffs' lawyers to sue, for example, the tobacco industry for the States' share of healthcare costs attributable to smoking and the gun industry for the societal costs of gun violence—litigation models that have been criticized by legal commentators as unconstitutional, unethical, and inconsistent with the political theory of a democratic government.[2]

Should respondent prevail on the question now before the Court, this litigation tide will be uncontainable. Cities and counties from coast to coast will have a potentially unlimited flow of revenue to fund their spending habits—an enticing source of new funds that is beyond the constraints of

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[2] *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 80-81 (2010) (arguing that "[i]t is difficult to imagine an arrangement more rife with danger, cynicism and potential abuse than this one" and concluding that the "government's use of private contingent fee attorneys in civil litigation is (1) inconsistent with the nation's democratic tradition, (2) unethical, and (3) a violation of the Due Process Clause"); U.S. Chamber Institute for Legal Reform, Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector (Sept. 2013).

democracy and effectively free of any need to secure the consent of their local residents.

That result will make a mockery of the private civil rights remedies Congress enacted to achieve the core anti-discrimination goals of the FHA and Title VII. And it will bring a loss of civil liberties, freedom, and self-determination for all the millions of citizens who reside in the plaintiff jurisdictions.

CONCLUSION

For the foregoing reasons, amicus the Cato Institute respectfully urges the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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