

# HOW PATENT LAW KEEPS THE HOPE OF FAIR HOUSING ALIVE FOR ALL, EVEN AFTER *BANK OF AMERICA CORP.* V. *CITY OF MIAMI*

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I. INTRODUCTION

In 2015, Circuit Judge Jimmie V. Reyna warned that the inexorable expansion of free-speech protection could enable businesses to post signs like “SPICS NOT WELCOME,” simply because of their personal expressive prerogatives.<sup>1</sup> Those words came from his dissent in *In re Tam*, which had an understated connotation that civil-rights legislation writ large could be destabilized and eventually extirpated.<sup>2</sup> The *en banc* majority opinion authored by Circuit Judge Kimberly A. Moore was reticent about those musings.<sup>3</sup> Although the Supreme Court in October Term 2016 affirmed Judge Moore’s views on free speech in the context of trademark law, it said nothing how those views affect civil rights or fair housing now that an entity can ostensibly trademark a business under a racial epithet.<sup>4</sup> Returning to Judge Reyna’s point, if some barriers preventing a segregated society are removed, can other laws provide more than a makeweight defense to prevent minority communities from drifting into the margins?

The Court released *Tam* during the same term that it released *Bank of America Corporation v. City of Miami*, a May 1, 2017, opinion involving a city’s challenge to, among others, predatory lending to Latino-majority communities.<sup>5</sup> Although *Bank of America* recognized that cities have Article III standing to sue under the Fair Housing Act for economic injuries suffered from predatory lending,<sup>6</sup> the Supreme Court rejected the Eleventh Circuit’s

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<sup>1</sup> See, e.g., *In re Tam*, 808 F.3d 1321, 1380 (Fed. Cir. 2015) (Reyna, J., dissenting) (“Whether a restaurant named ‘SPICS NOT WELCOME’ would actually serve a Hispanic patron is hardly the point. The mere use of the demeaning mark in commerce communicates a discriminatory intent as harmful as the fruit produced by the discriminatory conduct.”).

<sup>2</sup> Robert Chang, *Symposium: Market failure*, SCOTUSBLOG (Dec. 20, 2016, 1:52 PM), <http://www.scotusblog.com/2016/12/symposium-market-failure/>, archived at <https://perma.cc/M284-T45Z>.

<sup>3</sup> See *id.* at 1328 (majority opinion) (“Another rejected mark, STOP THE ISLAMISATION OF AMERICA, proclaims that Islamisation is undesirable and should be stopped. Many of the marks rejected as disparaging convey hurtful speech that harms members of oft-stigmatized communities. But the First Amendment protects even hurtful speech.”).

<sup>4</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1764–65 (2017) (plurality opinion, Alito, J.) (“A simple answer to this argument is that the disparagement clause is not ‘narrowly drawn’ to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages any person, group, or institution. It applies to trademarks like the following: ‘Down with racists,’ ‘Down with sexists,’ ‘Down with homophobes.’ It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted.”).

<sup>5</sup> *Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, 2017 U.S. LEXIS 2801, at \*17 (2017)(majority opinion) (“The upshot is that the City alleges economic injuries that arguably fall within the FHA’s zone of interests, as we have previously interpreted that statute.”).

<sup>6</sup> See *id.*

more lenient causation standard, favoring proof of “some direct relation between the injury asserted and the injurious conduct alleged.”<sup>7</sup> Doubtless the result could have been worse for cities suing on the premise that racially discriminatory lending caused municipal blight. The courthouse doors could have closed if the Court had declined to recognize Miami’s standing to bring a lawsuit under the Fair Housing Act.<sup>8</sup>

The visceral reaction to the approbated standard announced in *Bank of America* is that cities face a daunting task to prove causation.<sup>9</sup> “[L]ittle doubt” of failure on remand, reflected Justice Clarence Thomas, with whom Justices Anthony M. Kennedy and Samuel A. Alito Jr. joined.<sup>10</sup> “[A] tough test” on which to prevail, suggested Lyle Denniston, the National Constitution Center’s correspondent for the Supreme Court.<sup>11</sup> Not “a complete loss,” reported Adam Liptak of *The New York Times*.<sup>12</sup> “A mixed-bag ruling,” remarked Tony Mauro in *The National Law Journal*.<sup>13</sup> Portents “seriously undermine the ostensible liberal victory,” offered Steven Mazie of *The Economist*.<sup>14</sup> “[A] real body blow against fair housing in America,” lamented Mark Joseph Stern of *Slate*.<sup>15</sup> So are cities consigned to failure if they attempt to combat predatory lending and urban blight, all of which signal an implicit “Not Welcome” sign to certain vulnerable groups? To borrow logic from another area of the law, surely if a right to bring a lawsuit

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<sup>7</sup> *Id.* at \*20 (quoting *Holmes v. Securities Investors Protection Corporation*, 503 U. S. 258, 268 (1992)).

<sup>8</sup> *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U. S. 555, 560–61 (1992)).

<sup>9</sup> Lyle Denniston, *Cities get limited right to sue for race bias in housing*, NATIONAL CONSTITUTION CENTER (May 1, 2017), <https://constitutioncenter.org/blog/cities-get-limited-right-to-sue-for-race-bias-in-housing>.

<sup>10</sup> *Bank of Am. Corp.*, 2017 U.S. LEXIS 2801, at \*34 (Thomas, J., dissenting).

<sup>11</sup> Denniston, *supra* note 9.

<sup>12</sup> Adam Liptak, *Supreme Court Rules Miami Can Sue for Predatory Lending*, THE NEW YORK TIMES (May 1, 2017), [https://www.nytimes.com/2017/05/01/us/politics/supreme-court-miami-banks-fair-housing.html?ref=collection%2Fbyline%2Fadam-liptak&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=latest&contentPlacement=2&pgtype=collection](https://www.nytimes.com/2017/05/01/us/politics/supreme-court-miami-banks-fair-housing.html?ref=collection%2Fbyline%2Fadam-liptak&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection), archived at <https://perma.cc/FBH7-SH38>.

<sup>13</sup> Tony Mauro, *SCOTUS Decision May Fuel Suits Against Banks*, THE NATIONAL LAW JOURNAL (May 1, 2017), <http://www.nationallawjournal.com/id=1202784977615/SCOTUS-Decision-May-Fuel-Suits-Against-Banks?mcode=1202615705846>, archived at <https://perma.cc/MC9A-5AY5>.

<sup>14</sup> Steven Mazie, *The Supreme Court says cities may sue banks over predatory lending*, THE ECONOMIST (May 2, 2017), <http://www.economist.com/blogs/democracyinamerica/2017/05/so-sue-them>, archived at <https://perma.cc/5H39-7WXF>.

<sup>15</sup> Mark Joseph Stern, *The Supreme Court’s ruling in Bank of America v. Miami strengthened the Fair Housing Act—for now*, SLATE (May 1, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/05/in\\_bank\\_of\\_america\\_v\\_miami\\_the\\_supreme\\_court\\_strengthens\\_the\\_fair\\_housing.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/05/in_bank_of_america_v_miami_the_supreme_court_strengthens_the_fair_housing.html), archived at <https://perma.cc/P8TC-LDKE>.

exists, necessarily a way must exist to prosecute and prove the case.<sup>16</sup> The Fair Housing Act, after all, is at its core a welcoming statute.<sup>17</sup>

Precepts from patent law may invigorate the plight of cities to curb predatory lending. Caselaw requires experts opining on damages in patent cases to attribute economic losses to the patented invention alone, compelling isolation of and evidence demonstrating the worth of the infringing portion of the product.<sup>18</sup> Those experts are deft at discerning whether an infringing component “drives” the purchasing decisions of the product, enabling under certain circumstances compensation for the entire market value of that product.<sup>19</sup> If experts can present competing theories on whether a component is the cause of a price point for a product, so too can experts opine on whether a direct relation exists between predatory lending and the manifestations of dilapidation and decreased tax revenue.

This paper argues that patent law can inform analysis on and demonstrate how cities can prove causation between discriminatory lending practices and the blighted atmospherics of depressed housing. In three parts, the paper provides an overview of the Fair Housing Act, reviews *Bank of America*, and discusses how patent law can assist in proving whether predatory lending causes a city economic harm. *Bank of America* is an exemplar of how purported predation can harm Latino communities writ large and writ small.<sup>20</sup> All is not forlorn for cities seeking relief from lending practices that discriminate among loan applicants. The auspice of a more exacting causation standard does not doom these lawsuits; it forces cities early on to perform the economic analysis necessary to prove actual damages. Patent law offers experts versed in detecting what attribute drives consumer decisions. Although loss of tax revenue from economic blight is fraught with complexity, economists have the tools in a proper adversarial system to present competing views on what caused a city’s downturn. Upon presentation of admissible evidence, whether the banks or cities prevail should turn on a jury’s decision about whether racially motivated predation proximately caused a city—and indirectly its residents—to suffer financial calamity.

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<sup>16</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33 (2015) (“Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’” (citation omitted)).

<sup>17</sup> See generally *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515 (2015) (citation omitted).

<sup>18</sup> *Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015) (“Under § 284, damages awarded for patent infringement ‘must reflect the value attributable to the infringing features of the product, and no more.’” (citation omitted)).

<sup>19</sup> See *id.* at 1302 (“Under the entire market value rule, if a party can prove that the patented invention drives demand for the accused end product, it can rely on the end product’s entire market value as the royalty base.”).

<sup>20</sup> Amy Howe, *Argument preview: Justices to consider scope of Fair Housing Act*, SCOTUSBLOG (Nov. 3, 2016, 10:03 AM), <http://www.scotusblog.com/2016/11/argument-preview-justices-to-consider-scope-of-fair-housing-act/>, archived at <https://perma.cc/D2NF-C83Y>.

## II. RACIAL SEGREGATION AND THE FAIR HOUSING ACT THROUGH OCTOBER TERM 2014

The Supreme Court concluded that de jure racial segregation is unconstitutional roughly one century ago, “but its vestiges remain today, intertwined with the country’s economic and social life.”<sup>21</sup> To appreciate the Fair Housing Act requires understanding its origins and its assentation.

### A. *The Fair Housing Act: Acknowledgement that Fairness in Housing Is Inviolable*

As the twentieth century matured, society witnessed the parallel advent of rapid urbanization alongside suburban growth.<sup>22</sup> The upshot was the flight of many whites to rural suburbs, leaving less mobile minorities in urban areas.<sup>23</sup> As the Supreme Court explained in 2015, racial discrimination in lending practices became commonplace:

During this time, various practices were followed, sometimes with governmental support, to encourage and maintain the separation of the races: Racially restrictive covenants prevented the conveyance of property to minorities; steering by real-estate agents led potential buyers to consider homes in racially homogenous areas; and discriminatory lending practices, often referred to as redlining, precluded minority families from purchasing homes in affluent areas.<sup>24</sup>

By the 1960s, the footprint of those practices and prejudices festered, creating “predominantly black inner cities surrounded by mostly white suburbs.”<sup>25</sup>

In response to the yawning separation among races, President Lyndon B. Johnson established the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission.<sup>26</sup> In 1968, after cataloging massive amounts of information, the Kerner Commission found “residential segregation and unequal housing and economic conditions in the inner cities as significant, underlying causes of the social unrest.”<sup>27</sup> Despite *Brown v. Board of Education*,<sup>28</sup> the Kerner Commission warned that the

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<sup>21</sup> Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2515 (2015) (citation omitted).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* (internal and external citations omitted).

<sup>25</sup> *Id.* (citation omitted).

<sup>26</sup> *Id.* at 2516 (citation omitted).

<sup>27</sup> *Id.* (citation omitted).

<sup>28</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).

country was on the precipice of “moving toward two societies, one black, one white—separate and unequal.”<sup>29</sup> The Kerner Commission detailed that nearly two-thirds of nonwhite families living in cities had to endure “sub-standard housing and general urban blight,” while “open and covert racial discrimination” stalled their mobility.<sup>30</sup> To guard against the slide into de facto segregation, the Kerner Commission recommended “a comprehensive and enforceable open-occupancy law making it an offense to discriminate in the sale or rental of any housing . . . on the basis of race, creed, color, or national origin.”<sup>31</sup>

In April 1968, Dr. Martin Luther King Jr. was assassinated in Memphis, Tennessee, hastening resolve to alleviate social unrest.<sup>32</sup> Responding the same month as Dr. King’s assassination, Congress passed the Fair Housing Act, Civil Rights Act of 1968, § 804, 82 Stat. 83, proscribing the denial of housing opportunities on the basis of “race, color, religion, or national origin.”<sup>33</sup> In 1988, Congress amended the Fair Housing Act, establishing, among other things, certain exemptions from liability as well as “familial status” as a protected characteristic.<sup>34</sup>

The Fair Housing Act allows an “aggrieved person” to file a civil cause of action seeking damages for a violation of the statute.<sup>35</sup> An “aggrieved person” includes “any person who . . . claims to have been injured by a discriminatory housing practice.”<sup>36</sup> It forbids “discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race . . . .”<sup>37</sup> And it makes unlawful “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race . . . .”<sup>38</sup>

As retold by the Constitutional Accountability Center, when the Fair Housing Act was first proposed in 1968, certain provisions deputized the Department of Housing and Urban Development to enforce the law directly by, for example, ordering landlords to cease and desist their discriminatory practices or face sanctions.<sup>39</sup> Although that enforcement mechanism was eliminated through the legislative process, the drafters broadened the definition of “aggrieved person” to include as many plaintiffs as possible.<sup>40</sup>

In *Gladstone, Realtors v. Bellwood*, Justice Lewis F. Powell Jr., writing for the Court in a 7-2 opinion released in 1979, edified that plaintiffs under

<sup>29</sup> *Tex. Dep’t of Hous. & Cmty. Affairs*, 135 S. Ct. at 2516 (citation omitted).

<sup>30</sup> *Id.* (citation omitted).

<sup>31</sup> *Id.* (citation omitted).

<sup>32</sup> *Id.* (citation omitted).

<sup>33</sup> *Id.* (citation omitted).

<sup>34</sup> *Id.* (citation omitted).

<sup>35</sup> 42 U.S.C. §§ 3613(a)(1)(A), 3613(c)(1).

<sup>36</sup> *Id.* § 3602(i).

<sup>37</sup> *Id.* § 3604(b).

<sup>38</sup> *Id.* § 3605(a).

<sup>39</sup> Stern, *supra* note 15.

<sup>40</sup> *Id.*

the Fair Housing Act have standing to sue “as [broad] as is permitted by Article III.”<sup>41</sup> On allegations that a village had suffered injury from racially motivated manipulations to the housing market, which denied certain minorities their choice in housing,<sup>42</sup> the Court made unequivocal “that the facts alleged in the complaints and revealed by initial discovery are sufficient to provide standing.”<sup>43</sup> According to Justice Powell, “[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.”<sup>44</sup> The Court observed that “[o]ther harms flowing from the realities of a racially segregated community are not unlikely.”<sup>45</sup> *Gladstone* thus enabled villages to sue for injuries from racial-steering practices.<sup>46</sup>

### *B. Disparate Impact and the Maturing Views of the Fair Housing Act*

Twenty-five years after *Gladstone*, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, the Supreme Court granted a petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit to address whether disparate-impact claims are cognizable under the Fair Housing Act.<sup>47</sup> The Court had concluded in the employment-law context that plaintiffs could sue under Title VII on the theory that practices “fair in form” could still discriminate “in operation.”<sup>48</sup> According to the Court, “the consequences of employment practices, not simply of the motivation,” create a claim for relief from the practices’ disparate impact on the workplace environment.<sup>49</sup> Disparate-impact claims, the Court explained, further the “goal of achieving ‘equality of employment opportunities and remov[ing] barriers that have operated in the past’ to favor some races over others.”<sup>50</sup>

By the time the Court granted certiorari in 2014, eleven federal appeals courts had addressed whether the disparate-impact reasoning of Title VII applied in the Fair Housing Act context—all of which recognizing such a

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<sup>41</sup> *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 109 (1979) (citation omitted).

<sup>42</sup> *Id.* at 95 (“The complaints further alleged that the ‘Village of Bellwood . . . has been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village,’ and that the individual respondents ‘have been denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society.’”).

<sup>43</sup> *Id.* at 115.

<sup>44</sup> *Id.* at 110–11.

<sup>45</sup> *Id.* at 111.

<sup>46</sup> *See generally id.*

<sup>47</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 46 (2014) (“Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to Question 1 presented by the petition.”).

<sup>48</sup> *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971).

<sup>49</sup> *Id.* at 432.

<sup>50</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2517 (2015) (citations omitted).

claim in some form.<sup>51</sup> Among the amicus briefs filed on the merits, nearly two dozen advocated for the claim, while fifteen were opposed.<sup>52</sup> As reported by Amy Howe of the inimitable SCOTUSblog, the prospect of the Court eliminating that theory of liability under Fair Housing Act precipitated two previous settlements before a final decision:

Civil rights groups were so nervous about the prospect that the Roberts court might eliminate disparate-impact suits that two earlier cases were settled before the justices could rule on the merits, but in the end Justice Anthony Kennedy joined the court's four more liberal justices to uphold disparate-impact suits, at least in some circumstances.<sup>53</sup>

The Court held oral argument in January 2015, revealing strident views among a divided bench.<sup>54</sup> Justice Antonin Scalia seemingly favored the plaintiffs: "You have to look at the whole law, and, when all parts are read together, there is such a thing as 'disparate impact.' You don't look at each little piece, you look at the whole law."<sup>55</sup> He then shifted, joining Chief Justice John G. Roberts Jr. in questioning how local-housing authorities could be expected to deal with disparate-impact claims as they build separate housing in poor areas and affluent neighborhoods.<sup>56</sup> When the federal government pressed an expansive view of what constitutes disparate impact, Justice Kennedy characterized the breadth of the position as "very odd."<sup>57</sup> Justice Steven G. Breyer, consistent with three of his colleagues, reflected that if these lawsuits have been "helpful to many people," and if "as far as I can tell, the world hasn't come to an end" in the years since their recognition, why should the Court impede progress?<sup>58</sup>

In June 2015, Justice Kennedy, writing for the Court in a 5-4 opinion, made clear that "disparate-impact claims are cognizable under the Fair Housing Act."<sup>59</sup> Justice Kennedy cautioned that "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."<sup>60</sup> The Court, in the end, endorsed a "robust causality requirement" to prevent "defendants from

<sup>51</sup> Lyle Denniston, *Argument preview: That housing bias issue is back*, SCOTUSBLOG (Jan. 20, 2015, 5:03 PM), <http://www.scotusblog.com/2015/01/argument-preview-that-housing-bias-issue-is-back/>, archived at <https://perma.cc/4YVJ-KZQE>.

<sup>52</sup> *Id.*

<sup>53</sup> Howe, *supra* note 20.

<sup>54</sup> Lyle Denniston, *Argument analysis: Scalia versus Scalia on housing law?*, SCOTUSBLOG (Jan. 21, 2015, 1:40 PM), <http://www.scotusblog.com/2015/01/argument-analysis-scalia-versus-scalia-on-housing-law/>, archived at <https://perma.cc/WGH9-G2A2>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Amy Howe, Justice Scalia keeps both sides guessing in Fair Housing Act case: In Plain English, SCOTUSBLOG (Jan. 22, 2015, 12:18 PM), <http://www.scotusblog.com/2015/01/justice-scalia-keeps-both-sides-guessing-in-fair-housing-act-case-in-plain-english/>, archived at <https://perma.cc/M6XE-KKFH>.

<sup>59</sup> *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2525.

<sup>60</sup> *Id.* at 2523.



being held liable for racial disparities they did not create.”<sup>61</sup> Justice Alito dissented, joined by Chief Justice Roberts, Justice Scalia, and Justice Thomas.<sup>62</sup> Justice Alito argued that disparate-impact claims hamper “good-faith attempt[s] to ensure minimally acceptable housing for its poorest residents.”<sup>63</sup> Justice Thomas filed a separate dissent, questioning the validity of disparate-impact claims in any context for which it is not expressly provided in the statute.<sup>64</sup>

Many commentators suggested that *Texas Department of Housing* was the pyrrhic victory for the plaintiffs.<sup>65</sup> The Fifth Circuit remanded the case to the U.S. District Court for the Northern District of Texas,<sup>66</sup> and District Judge Sidney A. Fitzwater of the Dallas Division proved those commentators correct when he dismissed the case on grounds that the plaintiff had “failed to prove a prima facie case of discrimination by showing that a challenged practice caused a discriminatory effect.”<sup>67</sup> While *Texas Department of Housing* broadened the types of claims actionable under the Fair Housing Act, the case did not resolve the types of plaintiffs who could sue on those claims.

### III. *BANK OF AMERICA* AND CITY STANDING UNDER THE FAIR HOUSING ACT

Amid the mortgage-backed housing crisis between 2004 and 2012, cities began to explore possible relief from diminished property-tax revenue and burgeoning blight.<sup>68</sup> Local governmental entities crisscrossing the country—from Rhode Island to Maryland to Georgia to Florida to California—tested a novel legal theory against predatory loans, thereby invigorating their own lawsuits under the Fair Housing Act.<sup>69</sup> Just as *Texas Department of*

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<sup>61</sup> *Id.* (citation omitted).

<sup>62</sup> *Id.* at 547 (Alito, J., dissenting).

<sup>63</sup> *Id.* at 548.

<sup>64</sup> *Id.* at 541 (Thomas, J., dissenting).

<sup>65</sup> See, e.g., Amy Howe, *Disparate-impact claims survive challenge: In Plain English*, SCOTUSBLOG (Jun. 25, 2015, 12:21 PM), <http://www.scotusblog.com/2015/06/disparate-impact-claims-survive-challenge-in-plain-english/>, archived at <https://perma.cc/WS4E-QPV6>.

<sup>66</sup> *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 795 F.3d 509, 510 (5th Cir. 2015) (“Accordingly, we now remand this case to the United States District Court for the Northern District of Texas for further proceedings consistent with our opinion and the opinion of the Supreme Court.”).

<sup>67</sup> *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, No. 3:08-CV-0546-D, 2016 U.S. Dist. LEXIS 114562, at \*42–43 (N.D. Tex. Aug. 26, 2016).

<sup>68</sup> Robert Barnes, *Supreme Court says cities can sue big banks over housing bubble damages*, THE WASHINGTON POST (May 1, 2017), [https://www.washingtonpost.com/politics/courts\\_law/cities-may-sue-big-banks-over-predatory-lending-damage-supreme-court-rules/2017/05/01/cf8c108a-2e79-11e7-9534-00e4656c22aa\\_story.html?utm\\_term=.87352122d87c](https://www.washingtonpost.com/politics/courts_law/cities-may-sue-big-banks-over-predatory-lending-damage-supreme-court-rules/2017/05/01/cf8c108a-2e79-11e7-9534-00e4656c22aa_story.html?utm_term=.87352122d87c), archived at <https://perma.cc/247S-XB2T> (“‘Municipal suits like this one were unheard of until recently, when enterprising contingency-fee counsel began pushing them.’ Bank of America told the court in its brief. Baltimore settled a suit it had filed against banks, and there is litigation underway by Cook County, Ill., Oakland, Calif., Los Angeles and other cities.”).

<sup>69</sup> See *id.*; Greg Stohr, *Supreme Court Orders New Look at Bias Lawsuits Against Banks*, BLOOMBERGPOLITICS (May 1, 2017), <https://www.bloomberg.com/politics/articles/2017-05->

*Housing* solved one issue, the debate shifted from *what* could be claimed to *who* could bring the claim. For two cities, that legal theory netted seven-figure settlements with banking institutions, amplifying the implications of these lawsuits.<sup>70</sup> To understand the extant plight between cities and banks requires understanding how cities came to view urban blight and how the Court's opinion in *Bank of America* has shaped expectations.

#### A. *The Inception of City Lawsuits Under the Fair Housing Act*

Cities like Miami faced a moment of reckoning as they watched the progression of tatterdemalion, deleterious blight infect their neighborhoods.<sup>71</sup> Amy Howe put it this way:

It sounds like a scene from “The Wire,” but with palm trees and swimming pools: Gangs run prostitution rings and criminals hide dead bodies in vacant houses. The illegal activities spill over into the rest of the neighborhood, leading to an overall increase in violent crime and stretching police officers and firefighters thin. Property values plummet, creating a vicious circle: Cities have fewer resources to combat these crimes, at the exact time when they need more.<sup>72</sup>

The Miami Fraternal Order of the Police painted a macabre outlook.<sup>73</sup> Foreclosed homes became places to hide dead bodies and facilitate child-sex trafficking.<sup>74</sup> Abandoned swimming pools became sites for deaths from drowning.<sup>75</sup> Those pools, moreover, became breeding grounds for swarms of mosquitos, creating “the epicenter for America’s first Zika outbreak.”<sup>76</sup>

The choice became either to sit idle and blame away problems on the global economic crisis or to fight back and retake once-familiar neighborhoods now appearing alien.<sup>77</sup> Miami, and others, decided to reject the butterfly-effect belief that global market downturns and other distant influences had localized effects on their residents, resolving to explore pernicious

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01/top-u-s-court-orders-new-look-at-bias-lawsuits-against-banks, archived at <https://perma.cc/U37P-DVLG> (“Similar suits have been filed around the country, including claims by Los Angeles and three Georgia counties.”); Liz Farmer, *Why Few Cities Will Take the Supreme Court Up on Their Right to Sue Banks*, GOVERNING (May 11, 2017), <http://www.governing.com/topics/finance/gov-cities-banks-miami-supreme-court.html>, archived at <https://perma.cc/CCG4-QAM2> (“There are, however, a number of open cases in places like Los Angeles; Oakland, Calif.; and Providence, R.I., that benefit from the ruling.”).

<sup>70</sup> Kenneth Jost, *Banks May Pay for Ravaging Minority Neighborhoods*, JOST ON JUSTICE (May 7, 2017), <http://jostonjustice.blogspot.com/2017/05/banks-may-pay-for-ravaging-minority.html>, archived at <https://perma.cc/V37H-4JN7>.

<sup>71</sup> Howe, *supra* note 20.

<sup>72</sup> *Id.*

<sup>73</sup> Farmer, *supra* note 69.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Howe, *supra* note 20.

causal agents more close to home.<sup>78</sup> Miami came to believe that its problems were rooted in banks like Wells Fargo and Bank of America, deducing that those lending entities were discriminating against Latinos and African Americans when issuing them mortgages by making predatory loans that were more likely to lead to foreclosures.<sup>79</sup>

In 2013, Miami filed a lawsuit in the U.S. District Court for the Southern District of Florida against several banks, alleging Fair Housing Act violations premised on the notion “that, since 2004, Defendants have engaged in a continuing and unbroken pattern and practice of mortgage discrimination in Miami that still exists today.”<sup>80</sup> Among the counsel representing Miami included Robert S. Peck, President of the Center for Constitutional Litigation, and Erwin Chemerinsky, Dean and Raymond Pryke Professor of First Amendment Law, University of California Irvine School of Law.<sup>81</sup> The banks enlisted assistance from Goodwin Procter, LLP.<sup>82</sup>

The 63-page complaint alleged that the banks steered undesirable mortgage loans to Latino and African-American borrowers and refused to refinance them on terms that were available to white borrowers.<sup>83</sup> According to the complaint, a regression analysis of available data demonstrated that African-American borrowers were 4.321 times more likely to receive a discriminatory loan than a white borrower with similar underwriting and borrower characteristics.<sup>84</sup> And Latino borrowers were 1.576 times more likely to receive such loans.<sup>85</sup> The allegations reference statements from bank employees, which confirm the practice of directing undesirable loans to minority borrowers.<sup>86</sup> Amid the cavalcade of foreclosures against minority borrowers, the banks purportedly refused to offer refinancing on terms available to white borrowers.<sup>87</sup> An African-American borrower was 13.324 times more likely to experience foreclosure than a white borrower with similar risk characteristics; a Latino borrower was 17.341 times more likely to experience foreclosure.<sup>88</sup> Miami also alleged that a minority-neighborhood borrower was 5.857 times more likely to experience foreclosure than a borrower in a non-minority neighborhood.<sup>89</sup> Miami’s injuries from the supposed predatory

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV-DIMITROULEAS, 2014 U.S. Dist. LEXIS 95445, at \*3 (S.D. Fla. July 8, 2014).

<sup>81</sup> Erwin Chemerinsky, *An Important Victory for Civil Rights*, ACSBLOG (May 2, 2017), <https://www.acslaw.org/acsblog/an-important-victory-for-civil-rights>, archived at <https://perma.cc/P737-K2Z3>; *Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 95445, at \*1.

<sup>82</sup> *Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 95445, at \*1.

<sup>83</sup> See Chemerinsky, *supra* note 81.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

loans resulted in tax-revenue losses, costs attendant to abandoned houses, and frustration of its goal of ending racial segregation in housing.<sup>90</sup>

In 2014, District Judge William P. Dimitrouleas of the Fort Lauderdale Division dismissed the lawsuit on grounds that Miami did not have standing to sue and could not allege facts in support of causation.<sup>91</sup> The district court denied Miami's motions for reconsideration of that order and for leave to file an amended complaint,<sup>92</sup> reasoning that a generalized interest in curbing segregation is not enough to fortify standing under the Fair Housing Act:

[S]prinkling in allegations that the City has a generalized interest in racial integration falls far short of alleging facts sufficient to demonstrate that Defendants' lending practices adversely affected the racial diversity or integration of the City, nor do those generalized allegations appear to be connected in any meaningful way to the purported loss of tax revenue and increase in municipal expenses allegedly caused by Defendants' lending practices.<sup>93</sup>

The U.S. Court of Appeals for the Eleventh Circuit reversed and remanded.<sup>94</sup> Writing for the panel, Circuit Judge Stanley Marcus expressed skepticism over the merits of the lawsuit, but nonetheless remanded on grounds of the district court's errors on standing and proximate cause.<sup>95</sup> According to the Eleventh Circuit, Miami had alleged sufficient injuries to bring a lawsuit and need only show that its injuries were foreseeable from the alleged lending practices.<sup>96</sup>

The banks filed a petition for writ of certiorari, which the Supreme Court granted to the Eleventh Circuit in June 2016.<sup>97</sup> The Court granted the petition several months after the death of Justice Scalia, garnering at least

<sup>90</sup> *See id.*

<sup>91</sup> *See Bank of Am. Corp.*, 2014 U.S. Dist. LEXIS 95445, at \*15, \*18 ("Therefore, this Court finds that the City of Miami's claims fall outside of the zone of interests protected by the FHA; Plaintiff lacks standing to sue under the statute. . . . Plaintiff's claim is entirely derivative, emphasizing how inextricably linked the possible effect of reverse redlining is with other economic forces acting upon the market.").

<sup>92</sup> *Id.* at \*9.

<sup>93</sup> *Id.* at \*8 n.1.

<sup>94</sup> *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1289 (11th Cir. 2015) ("Nothing we have said in this opinion should be taken to pass judgment on the ultimate success of the City's claims. We hold only that the City has constitutional standing to bring its FHA claims, and that the district court erred in dismissing those claims with prejudice on the basis of a zone of interests analysis, a proximate cause analysis, or the inapplicability of the continuing violation doctrine.").

<sup>95</sup> *Id.* at 1284 ("Because the district court erred both as to the zone of interests and proximate cause, we are obliged to remand the cause of action in the first instance to determine whether or not the City could remedy any statute of limitations deficiency. We decline to evaluate the City's proposed amended complaint before the district court has had the opportunity to do so.").

<sup>96</sup> *Id.* at 1282 ("We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability.").

<sup>97</sup> *Bank of Am. Corp. v. City of Miami*, 136 S. Ct. 2544, 2544–45 (2016) ("Petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit granted. Case consolidated and a total of one hour allotted for oral argument.").

four votes from the remaining eight justices.<sup>98</sup> The questions presented involved whether cities have standing to sue and whether Miami suffered injuries proximately caused by a violation of the Fair Housing Act.<sup>99</sup> In October 2016, the Court granted the federal government's motion for leave to participate in oral argument as *amicus curiae*.<sup>100</sup>

In advance of oral argument, both sides took differing views on the issues before the Court.<sup>101</sup> The banks asserted that Miami does not have standing under the Fair Housing Act because its injury stems from purported discrimination against someone else.<sup>102</sup> Anyone could make a similar claim if Miami has standing, the banks warned, from homeowners whose property values were reduced by the vacant houses to store owners whose sales declined because fewer residents can buy their wares.<sup>103</sup> The banks also inveighed against Miami's proximate-cause theory, identifying other indeterminate causes "ranging from a global recession to a divorce."<sup>104</sup> The banks cautioned that if Miami's claims are not restrained, "liability would extend to all remote-if-unremarkable consequences, stretching as far as the imagination."<sup>105</sup> Miami countered that Congress envisioned the Fair Housing Act as occupying "unique and enormous breadth" for the purpose of providing "fair housing throughout the United States."<sup>106</sup> When they made predatory loans, Miami argued, the banks no doubt anticipated the undesirable outcomes that followed.<sup>107</sup> Miami exhorted that cities play a salient role in fighting housing discrimination because cities are where the impact of that discrimination "is most acutely felt."<sup>108</sup> Allowing cities to sue, Miami explained, will not lead to lawsuits by launderers, butchers, or other local-market participants because "only parties with an interest in fair housing," like cities, can sue.<sup>109</sup> Miami also reassured that, although a stiff causation standard is inconsistent with the statute, its statistical analysis to isolate other possible causes will satisfy scrutiny under any standard.<sup>110</sup>

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<sup>98</sup> Lyle Denniston, *Court to hear major new controversies — next Term*, SCOTUSBLOG (Jun. 28, 2016, 11:47 AM), <http://www.scotusblog.com/2016/06/court-to-hear-major-new-controversies-next-term/>, archived at <https://perma.cc/MR4R-6TX7> ("Amid prospects that the Supreme Court will still be operating with one fewer Justice well into its next Term, the Justices on Tuesday added eight new cases for hearing and decision after the summer recess, with major controversies among the cases.").

<sup>99</sup> See Howe, *supra* note 20.

<sup>100</sup> *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 369 (2016) ("Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.").

<sup>101</sup> See Howe, *supra* note 20.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

The case garnered the attention of two amici with outsized influence in terms of overall filings and persuasive ability.<sup>111</sup> The U.S. Chamber of Commerce filed an amicus brief in support of the banks, arguing that remote-economic-harm exposure could subject “lending institutions and potentially many other business entities[ ] to virtually boundless liability.”<sup>112</sup> The federal government filed an amicus brief in support of Miami, maintaining that efforts to achieve the purposes of the Fair Housing Act depend “heavily on enforcement by persons who are not direct victims of discrimination.”<sup>113</sup> The federal government observed that direct victims “frequently do not know that they have been subjected to discrimination, let alone have the means to change it.”<sup>114</sup>

The Court held oral argument in November 2016, with some cognoscenti suggesting a divided 4-4 tie in the offing.<sup>115</sup> On behalf of the banks, former acting solicitor general Neal Katyal argued that, although some scenarios may exist in which a city could sue, Miami is seeking to impose a “six-step liability”<sup>116</sup> theory both unrelated to and “several steps removed” from the discriminatory conduct that the city alleges.<sup>117</sup> Katyal encountered resistance from several justices, including Justice Elena Kagan.<sup>118</sup> She posited that, on allegations of reverse redlining—the practice of charging non-whites more for their loans than their white counterparts—“who better than the city to recognize that interest and assert it.”<sup>119</sup> “Everything about this complaint,” Justice Kagan reminded, “is about segregation.”<sup>120</sup>

Robert Peck, on behalf of Miami, stressed that the banks’ loans “actually frustrated and counteracted the city’s efforts on fair housing,” causing the city “to lose the benefits of social, professional, and business opportunities that come with an integrated community free from housing discrimination.”<sup>121</sup> Chief Justice Roberts was dubious: “I understand your argument that you’re down the line, but I don’t see how you can say that your loss of

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<sup>111</sup> See Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), <https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/>.

<sup>112</sup> Howe, *supra* note 20.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Adam Liptak, *Can Cities Sue Banks Over Predatory Loans? Supreme Court Will Decide*, THE NEW YORK TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/us/politics/supreme-court-predatory-lending-fair-housing-act.html>, archived at <https://perma.cc/G554-5U59> (“A 4-4 tie in the Supreme Court, which seemed a viable prospect on Tuesday, would leave the appeals court’s ruling in place, handing a victory to Miami but setting no national precedent.”).

<sup>116</sup> *Id.*

<sup>117</sup> Amy Howe, *Argument analysis: City likely to prevail, one way or another, in fair housing case*, SCOTUSBLOG (Nov. 8, 2016, 8:21 PM), <http://www.scotusblog.com/2016/11/argument-analysis-city-likely-to-prevail-one-way-or-another-in-fair-housing-case/>, archived at <https://perma.cc/BYY7-4JRU>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

property taxes is a direct injury.”<sup>122</sup> Justice Kennedy also was skeptical: “The statute doesn’t prohibit decreasing property tax values.”<sup>123</sup> Both Chief Justice Roberts and Justice Kennedy expressed concern over a limiting principle for damages if the city is allowed to recover.<sup>124</sup> Justice Breyer rejoined that the Court need not decide the issue of damages to resolve the current dispute.<sup>125</sup> Yet disquiet remained over opening the courthouse doors to a stampede of lawsuits with unbridled claims. “How do we write it,” Justice Sonia Sotomayor asked Curtis Gannon, who argued on behalf of the federal government, “so that the city can sue but the corner store that lost business as a result of the foreclosure crisis cannot?”<sup>126</sup> In the intervening five months between oral argument and public release, the Court settled on how to write the opinion and also gained a colleague (Justice Neil M. Gorsuch, who did not participate in deciding the case).<sup>127</sup>

### B. Bank of America: *The Duel Sanctions of City Standing Under the Fair Housing Act and Direct-Relation Causation*

In May 2017, Justice Breyer (with whom Chief Justice Roberts, alongside Justices Ruth Bader Ginsburg, Sotomayor, and Kagan, joined) authored the Court’s opinion, recognizing that Miami has constitutional standing to bring a lawsuit under the Fair Housing Act, while vacating and remanding on the issue of causation.<sup>128</sup> Writing for the 5-3 majority, Justice Breyer rejected the argument that Miami was not injured, concluding that the banks’ alleged discrimination implicated widespread foreclosures and vacancies in the city’s minority communities, which decreased the value of the foreclosed homes and affected neighborhoods.<sup>129</sup> The decline in property values, the Court observed, decreased property-tax revenues, forcing the city to spend more on municipal services to remedy blight and unsafe conditions.<sup>130</sup> The banks’ alleged discrimination, according to Justice Breyer, had the effect of increasing spending to salve blighted neighborhoods from which Miami received waning tax revenue.<sup>131</sup>

The Court concluded that those types of harms gave Miami standing to sue as an “aggrieved person” sustaining injuries “within the zone of inter-

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<sup>122</sup> Liptak, *supra* note 115.

<sup>123</sup> Howe, *supra* note 117.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, 2017 U.S. LEXIS 2801, at \*21 (2017) (“The judgments of the Court of Appeals for the Eleventh Circuit are vacated, and the cases are remanded for further proceedings consistent with this opinion. It is so ordered. Justice Gorsuch took no part in the consideration or decision of these cases.”).

<sup>128</sup> *See id.*

<sup>129</sup> *Id.* at \*12 (“Here, we conclude that the City’s claims of financial injury in their amended complaints—specifically, lost tax revenue and extra municipal expenses—satisfy the ‘cause-of-action’ (or ‘prudential standing’) requirement.” (citation omitted)).

<sup>130</sup> *See id.* at \*16–18.

<sup>131</sup> *See id.*

ests” from which the Fair Housing Act protects.<sup>132</sup> Citing *Gladstone*, the Court explained that stare decisis compelled an expansive understanding of “aggrieved person,” to which Congress acquiesced by leaving the definition of that term unaltered during the 1998 amendment process.<sup>133</sup>

Although Miami had standing to sue under the Fair Housing Act, the Court rebuked the Eleventh Circuit’s endorsement of foreseeability as sufficient to establish proximate cause, concluding that the city had to demonstrate a “direct relation” between its injuries and the alleged conduct.<sup>134</sup> “[F]oreseeability alone does not ensure the close connection that proximate cause requires,” the Court explained, because “[t]he housing market is interconnected with economic and social life.”<sup>135</sup> Enabling a lawsuit premised on any foreseeable result of predatory lending would, in the Court’s view, spur litigation beyond what Congress intended.<sup>136</sup> Returning to common-law principles, the Court concluded that lawsuits under the Fair Housing Act require “some direct relation between the injury asserted and the injurious conduct alleged.”<sup>137</sup> Declining “to draw the precise boundaries of proximate cause,” or whether Miami pleaded sufficient allegations, the Court remanded the case for further consideration.<sup>138</sup> Justice Breyer concluded by noting that a direct injury is typically not more than one step removed from the tortious act, which “depends in part on the nature of the statutory cause of action, and an assessment of what is administratively possible and convenient.”<sup>139</sup>

Justice Thomas, joined by Justices Kennedy and Alito, concurred in part and dissented in part, arguing that Miami’s injuries are both outside the Fair Housing Act’s zone of interests and “too remote to satisfy” the direct-relation requirement for causation.<sup>140</sup> Justice Thomas criticized previous cases for expanding without statutory support the types of plaintiffs to which the Fair Housing Act confers protection.<sup>141</sup> Foreclosed property and vacant lots,

<sup>132</sup> See *id.* at \*16 (“We need not discuss the Banks’ argument at length, for even if we assume for argument’s sake that some form of it is valid, we nonetheless conclude that the City’s financial injuries fall within the zone of interests that the FHA protects.”).

<sup>133</sup> *Id.* at \*17–18 (“The upshot is that the City alleges economic injuries that arguably fall within the FHA’s zone of interests, as we have previously interpreted that statute. Principles of stare decisis compel our adherence to those precedents in this context. And principles of statutory interpretation require us to respect Congress’ decision to ratify those precedents when it reenacted the relevant statutory text.”).

<sup>134</sup> *Id.* at \*18–21 (“The remaining question is one of causation: Did the Banks’ allegedly discriminatory lending practices proximately cause the City to lose property-tax revenue and spend more on municipal services? The Eleventh Circuit concluded that the answer is ‘yes’ because the City plausibly alleged that its financial injuries were foreseeable results of the Banks’ misconduct. We conclude that foreseeability alone is not sufficient to establish proximate cause under the FHA, and therefore vacate the judgment below.”).

<sup>135</sup> *Id.* at \*20.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (quoting *Holmes v. Securities Investors Protection Corporation*, 503 U. S. 258, 268 (1992)).

<sup>138</sup> *Id.* at \*21.

<sup>139</sup> *Id.* (internal quotation marks omitted; internal and external citations omitted).

<sup>140</sup> *Id.* at \*23 (Thomas, J., concurring in part and dissenting in part).

<sup>141</sup> *Id.* at \*24–26.



Justice Thomas continued, are not the same as racial steering and segregation.<sup>142</sup> The dissent also faulted the majority for failing to address whether plumbers, utility companies, and other local-market participants have standing, taking solace that the case “should not be read to authorize suits by local businesses alleging the same injuries that Miami alleges here.”<sup>143</sup> Justice Thomas concluded by agreeing that proximate cause requires a greater showing than foreseeability, but would have gone further to rule “Miami’s asserted injuries are too remote from the injurious conduct it has alleged.”<sup>144</sup>

Although Miami succeeded in arguing that it had standing to sue, enthusiasm was subdued over the prospect of proving causation under the newly minted standard.<sup>145</sup> *Bank of America* imposed “a tough test” for cities to satisfy, remarked Lyle Denniston.<sup>146</sup> Tony Mauro suggested that the case “gives ammunition to both sides in litigation between cities and banks under the Fair Housing Act over the impact of predatory lending practices on local communities.”<sup>147</sup> Professors Daniel Epps and Ian Samuel commented that, for a “big case,” the Court may have erred in its analysis of proximate cause because foreseeability is the “touchstone” of causation.<sup>148</sup>

Some suggested that *Bank of America* presages a shift in decision-making dynamics. Steven Mazie mused at the idea of Chief Justice Roberts emerging as the new median justice, in view of Justice Kennedy’s rumored retirement.<sup>149</sup> Professor Rick Hasen added that Chief Justice Roberts was “practicing” as the new swing vote.<sup>150</sup> Brianne Gorod, chief counsel for the Constitutional Accountability Center, which filed an amicus brief on behalf of Miami, remarked that “[w]hile [Chief Justice Roberts] clearly remains a conservative justice, today’s ruling is yet another reminder that he is a conservative who occasionally surprises.”<sup>151</sup> Mark Joseph Stern cogitated about an “unexpected vote,” which “affirmed progressive cities’ role in combating housing segregation in the United States.”<sup>152</sup> He branded the vote by the Chief Justice as “a bit mysterious,” offering that the decision “avoided a stalemate” among the eight justices who heard oral argument and limited

<sup>142</sup> *Id.* at \*28–29.

<sup>143</sup> *Id.* at \*32–33.

<sup>144</sup> *Id.* at \*36.

<sup>145</sup> Liptak, *supra* note 12.

<sup>146</sup> Denniston, *supra* note 9.

<sup>147</sup> Mauro, *supra* note 13.

<sup>148</sup> *OT2016 #21: “Good Snake”*, FIRST MONDAYS, (May 8, 2017), <http://www.firstmondays.fm/episodes/2017/5/8/ot2016-21-good-snake>, archived at <https://perma.cc/C5GN-7646>.

<sup>149</sup> Steven Mazie, *Chief Justice Roberts leans to the left*, THE ECONOMIST, (May 4, 2014), <http://www.economist.com/news/united-states/21721658-could-he-emerge-courts-new-swing-vote-chief-justice-roberts-leans-left>, archived at <https://perma.cc/54DR-88W4> (“With Neil Gorsuch now in Antonin Scalia’s old chair and retirement rumours flying about Anthony Kennedy, the 80-year-old perennial swing justice who has spent nearly three decades on the bench, could Chief Justice Roberts be emerging as the court’s new median vote?”).

<sup>150</sup> Stephanie Mencimer, *The Supreme Court Just Dealt a Huge Blow to Wells Fargo and Bank of America*, MOTHER JONES (May 1, 2017), <http://www.motherjones.com/politics/2017/05/supreme-court-delivers-blow-bad-banks>, archived at <https://perma.cc/8R6E-PQV2>.

<sup>151</sup> *Id.*

<sup>152</sup> Stern, *supra* note 15.

Miami's recourses going forward.<sup>153</sup> Stern lamented that uncertainty in proving causation may lead cities to forego suing under Fair Housing Act, "deciding it isn't worth devoting time, energy, and resources to a court battle that won't even result in restitution."<sup>154</sup>

The counsels of record for both sides displayed optimism. Erwin Chemerinsky was succinct: "The Supreme Court's decision is an important victory for civil rights because it allows cities to sue to halt and remedy this racial discrimination."<sup>155</sup> Victoria Mendez, Miami's City Attorney, said much the same: "We are pleased that the Supreme Court validated the city's standing to bring its claims under the Fair Housing Act."<sup>156</sup> Robert Peck remained undaunted: "As we told the Supreme Court, we can satisfy a direct causation standard, so that does not concern us."<sup>157</sup> Deepak Gupta (who represented several national organizations of cities, counties, and local elected officials in the case) called Justice Thomas's argument a "typical sky-is-falling hyperbole," effusing confidence in proving the allegations "on a block-by-block basis if necessary."<sup>158</sup> Representatives for the banks offered a different take: "We believe that under the stringent standards articulated by the Supreme Court, it will be very difficult for Miami or any other municipality to show the required connection between the claimed damages and unsubstantiated allegations about our lending practices, which do not reflect how we operate in the communities we serve."<sup>159</sup> The banks had previously observed that "[m]unicipal suits like this one were unheard of until recently, when enterprising contingency-fee counsel began pushing them," casting the charges as "without merit."<sup>160</sup>

The future remains unclear for these lawsuits and is largely dependent on the standards upon which courts eventually settle. Yet advocates can influence these legal contours by articulating reasonable principles to govern proceedings. Fealty to *Bank of America* is paramount, and patent law may provide an appropriate framework to craft discussions in this area.

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Chemerinsky, *supra* note 81.

<sup>156</sup> Lawrence Hurley, *U.S. top court says cities can sue over predatory lending but sets high bar*, REUTERS (May 1, 2017), <http://www.reuters.com/article/us-usa-court-discrimination-idUSKBN17X1UF>, archived at <https://perma.cc/7CK3-FSMQ>.

<sup>157</sup> Stohr, *supra* note 69.

<sup>158</sup> Bob Egelko, *Supreme Court says cities can sue banks under housing bias law*, SAN FRANCISCO CHRONICLE (May 1, 2017), <http://www.sfchronicle.com/news/article/Supreme-Court-says-cities-can-sue-banks-under-11112911.php>, archived at <https://perma.cc/68X2-6ZUW>.

<sup>159</sup> Stohr, *supra* note 69.

<sup>160</sup> Barnes, *supra* note 68.

## IV. HOW PATENT LAW CAN ASSIST COURTS IN ADJUDICATING CITY LAWSUITS UNDER THE FAIR HOUSING ACT

Patent law is an oddity, as compared to other areas of the law.<sup>161</sup> Patent litigation requires time and steady resources in part because dispositive issues are not apparent at the outset.<sup>162</sup> Before and certainly after *Bank of America*, city lawsuits against lending institutions under the Fair Housing Act are no different. Looking past superficial dissimilarities, proving that a physical object infringes on written claim language is comparable to proving urban blight arose from discriminatory lending paperwork. Patent law edifies litigation under *Bank of America* because it provides a case-management approach to technical evidentiary issues and imposes a strict standard for expert testimony before a jury can hear the case. Fidelity to *Bank of America* requires robust case management, facilitating enough discovery to determine whether triable issues exist. And for the burgeoning segment of Latino homeowners now and in the future, patent law offers a solution for those victimized by predatory lending practices motivated on the basis of race.<sup>163</sup>

A. *Offset from the Atmospheric of the FHA and Patent Law: Latinos Emerging as the Majority of New Homeowners*

In 1968, President Johnson, the same president who signed the Fair Housing Act into law,<sup>164</sup> recognized the observance of National Hispanic Heritage Week, which would later expand to a month-long celebration “of the culture and traditions of those who trace their roots to Spain, Mexico and the Spanish-speaking nations of Central America, South America and the Caribbean.”<sup>165</sup> Fast forward 45 years, by July 2015, Hispanics constituted 17.6% of the total population in the United States, totaling roughly 56.6 million individuals.<sup>166</sup> Between July 2014 and July 2015, Hispanics made nearly half of the approximately 2.5 million people added to the nation’s

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<sup>161</sup> Cf. *Bayer CropScience AG v. Dow AgroSciences LLC*, Nos. 2016-1530, 2016-1623, 2017 U.S. App. LEXIS 3678, at \*12 (Fed. Cir. Mar. 1, 2017) (“To the extent that the parties raise issues unique to patent law, we review those issues under our law.”).

<sup>162</sup> *Soitec, S.A. v. Silicon Genesis Corp.*, No. 99-10826-NG, 2002 U.S. Dist. LEXIS 16841, at \*27 (D. Mass. Aug. 23, 2002) (“In other words, patent law does not necessarily require patentees to give hard and fast quantitative boundaries to their claims; all that it requires is that the patent ‘sufficiently inform one of ordinary skill in this art of the boundaries of the claims.’” (citation omitted)).

<sup>163</sup> Partick Sisson, *Booming Hispanic homeownership helping fuel U.S. housing market*, CURBED (Sept. 5, 2017), <https://www.curbed.com/2017/9/5/16255166/hispanic-homeownership-affordable-housing>, archived at <https://perma.cc/Z82J-76QY>; FFF: *Hispanic Heritage Month 2016*, UNITED STATES CENSUS BUREAU (Oct. 12, 2016), <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff16.html>, archived at <https://perma.cc/8PDZ-UKXE>.

<sup>164</sup> *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015).

<sup>165</sup> UNITED STATES CENSUS BUREAU, *supra* note 163.

<sup>166</sup> *Id.*

total population during that period.<sup>167</sup> By 2060, the Hispanic population will constitute 28.6% of the nation's population.<sup>168</sup> And it goes without saying, all of those people will need a place to live.

Prognostications suggest that Latinos are expected to make up 52% of new homebuyers between 2010 and 2030.<sup>169</sup> Even as homeownership hovered near a 50-year low, more than 330,000 Hispanics formed new households in 2016.<sup>170</sup> Reports suggest that this trend goes against odds, observing “a low rate of inherited wealth in the Hispanic community, a shortage of low-cost housing options, and higher-than average loan refusal rates among potential Hispanic homeowners.”<sup>171</sup> Demographers suggest that sheer determination to achieve the dream of owning a home—in spite of obstacles—is driving this trend.<sup>172</sup> According to the U.S. Bureau of Labor Statistics, this invariable determination is also evidenced in Hispanics accounting for 76.4% of the growth in the country's labor force between 2010 and 2016, as well as 20.8% of new entrepreneurs in 2015.<sup>173</sup> Amazingly all of this comes as Latinos bore an outsized impact on their savings in the aftermath of the 2008 recession, wiping out two-thirds of Latino wealth.<sup>174</sup> Put in stark relief, the median white household in 2011 had a net worth of \$111,146, compared with \$8,348 for the median Hispanic household.<sup>175</sup> That Latinos are homeowners in greater frequency does not demonstrate equal access on equal terms. Industry and determination cannot be confused as evidence of the same experience.

The facts of *Bank of America* and its newly minted legal standard cast a pall over what has become America's largest segment of homeowners. Accepting as true the allegations of *Bank of America*, no doubt preying on individual vulnerabilities will become more difficult as yesterday's minorities become today's mainstream majorities. Still, for those vulnerable segments of the population, a pernicious tendency will endure to skew toward offering predatory loans and disparate treatment against which the Fair Housing Act was design to protect.<sup>176</sup> To keep the sordid tendency toward segregation at bay,<sup>177</sup> litigants must endeavor to keep cases like *Bank of America* alive for when they are needed most. And to achieve that modest

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Sisson, *supra* note 163.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Cf. Jamelle Bouie, *This Was a White-Power Movement Showing Its Strength*, SLATE (Aug. 12, 2017), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/08/the\\_charlottesville\\_rally\\_was\\_a\\_white\\_power\\_movement\\_showing\\_its\\_strength.html](http://www.slate.com/articles/news_and_politics/politics/2017/08/the_charlottesville_rally_was_a_white_power_movement_showing_its_strength.html), archived at <https://perma.cc/64K3-9N64>.

<sup>177</sup> Molly Olmstead, *The NAACP Has Issued a Travel Advisory for American Airlines*, SLATE (Oct. 25, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/10/25/the\\_naACP\\_issued\\_a\\_national\\_travel\\_advisory\\_for\\_black\\_travels\\_flying\\_on.html](http://www.slate.com/blogs/the_slatest/2017/10/25/the_naACP_issued_a_national_travel_advisory_for_black_travels_flying_on.html), archived at <https://perma.cc/85UA-XB58>.

aim, patent law provides a means to keep the Fair Housing Act from deteriorating into a vacant lot in which fairness is a banality recognizable by name only.

*B. Case-Management Plans for Patent Litigation as a Model Approach to Prove or Disprove Lawsuits under Bank of America*

Patent cases follow a typical progression to trial (or dismissal). The U.S. District Court for the Eastern District of Texas hosted 28% of all patent-infringement lawsuits in 2014, 43% in 2015, and 36% in 2016.<sup>178</sup> That district court's approach to patent law and case management provides an exemplar for how it litigate Fair Housing Act claims brought by cities against banks.

Similar to patent cases, claims arising under *Bank of America* are not readily susceptible to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) because those claims require evidentiary rigor beyond the pleadings.<sup>179</sup> At the pleadings stage, a city is required to demonstrate causation by alleging a direct relation between the alleged conduct of predatory lending and the economic harm suffered.<sup>180</sup> Cities must show harm within one step of the lending practices.<sup>181</sup> As the Federal Circuit has observed, a patent-infringement complaint need only "contain sufficient factual allegations to enable this court to reasonably conclude that" the accused is plausibly liable.<sup>182</sup> The alleged facts must create an impression guided by common sense that, if believed, discovery could prove liability.<sup>183</sup>

District courts have heeded the Federal Circuit's guidance, eschewing dismissal for failure to state a claim because of the need for greater factual development, disclosure and questioning of experts, and the avoidance of premature determinations.<sup>184</sup> To address those issues at the pleadings stage,

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<sup>178</sup> *Statistics from Patent Cases Filed by Year*, LEX MACHINA (March 27, 2017), <https://law.lexmachina.com/court/table#Patent-tab>, archived at <https://perma.cc/L3F7-LTYC>.

<sup>179</sup> *See, e.g.,* *Voit Techs., LLC v. Drucker Labs, L.P.*, No. 4:16-CV-00695, 2017 U.S. Dist. LEXIS 67867, at \*5 (E.D. Tex. May 4, 2017) ("Taking these facts as true and viewing them in the light most favorable to Voit, the Court determines that Voit pleaded sufficient facts to plausibly allege Drucker directly infringed the '412 Patent."); *Novartis Pharms. Corp. v. Actavis, Inc.*, No. 12-366-RGA-CJB, 2012 U.S. Dist. LEXIS 176445, at \*30 (D. Del. Dec. 5, 2012) ("In this case, Defendants do not argue that Plaintiffs have failed to plead sufficient facts to establish claims of direct and indirect infringement under the requirements of Rule 8 or the Supreme Court's precedent in [*Twombly*] and its progeny.")

<sup>180</sup> *Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, 2017 U.S. LEXIS 2801, at \*20-21 (May 1, 2017).

<sup>181</sup> *See id.*

<sup>182</sup> *R+L Carriers, Inc. v. DriverTech LLC* (In re Bill of Lading Transmission & Processing Sys. Patent Litig.), 681 F.3d 1323, 1346 (Fed. Cir. 2012)

<sup>183</sup> *See id.* at 1341.

<sup>184</sup> *See, e.g.,* *Raytheon Co. v. Cray, Inc.*, No. 2:16-CV-00423-JRG-RSP, 2017 U.S. Dist. LEXIS 56729, at \*7 (E.D. Tex. Mar. 12, 2017) (denying a motion to discuss, noting that "[w]hile Form 18 no longer applies, the question is what difference there is, if any, between Form 18 and the *Iqbal/Twombly* standard"); *Butamax™ Advanced Biofuels LLC v. Gevo, Inc.*, No. 11-54-SLR, 2012 U.S. Dist. LEXIS 86215, at \*4 (D. Del. June 21, 2012) ("Given the complex technology at issue and the standard of review, the court finds these counterclaims

would be “inappropriate” and circumscribe a party’s right to develop a case borne out over time on patent infringement, invalidity, and damages.<sup>185</sup> The grant of a motion to dismiss requires “rare circumstances where facts [are] sufficient to rule on an affirmative defense.”<sup>186</sup> As cities embark on proving that predatory lending caused economic losses and blight, plausible economic theories become concrete only through adversarial discovery and greater appreciation of the complex reasons why cities lose tax revenue and neighborhoods fall into dilapidation.

Although the district court in *Bank of America* dismissed Miami’s complaint before discovery,<sup>187</sup> compelling a hyper-burden of plausibility at the pleadings stage for these lawsuits finds no foothold in civil procedure and betrays the Seventh Amendment’s promise of a trial by jury. Although civil procedure identifies certain causes of action that carry a higher pleading standard (e.g., fraud),<sup>188</sup> nothing in the history of the Fair Housing Act suggests that plaintiffs should have to prove with certainty or state with particularity their case to survive dismissal. The Supreme Court has ratcheted up the pleading standards writ large, as compared to erstwhile conceptions of notice pleading<sup>189</sup>; but *Bank of America* did not engraft an atextual heightened burden of pleading to survive motions to dismiss beyond what the Court has already required in other cases. Unlike other causes of action, no law requires cities to proffer evidence, make certifications, or affirmatively prove causation at the outset.<sup>190</sup> Courts therefore should not prejudice these lawsuits when allegations of plausible facts exist. These procedural safeguards reflect the Seventh Amendment guarantee of a jury trial in civil cases, which must be “jealously guarded.”<sup>191</sup> Imposing inordinate obstacles at the pleading stage, while locking out discovery, is antithetical to this

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particularly ill suited for disposition on a motion for judgment on the pleadings.”); *Walker Digital, LLC v. Facebook, Inc.*, 852 F. Supp. 2d 559, 562–63 (D. Del. 2012) (denying defendants’ Rule 12(b)(6) motion, filed on the grounds that the accused marketing promotions do not satisfy the claim limitations of the asserted patents, as premature because “the court is not prepared to engage in a claim construction exercise . . . with no context whatsoever provided by discovery or a motion practice”).

<sup>185</sup> *See Actavis, Inc.*, 2012 U.S. Dist. LEXIS 176445, at \*28–30; *see also Dumas v. Diageo PLC*, No. 15cv1681 BTM (BLM), 2016 U.S. Dist. LEXIS 46691, at \*7 (S.D. Cal. Apr. 6, 2016) (“However, there are ‘rare situations’ where it is appropriate to grant a motion to dismiss based on review of the advertisement or product packaging itself.” (citation omitted)).

<sup>186</sup> *Lismont v. Alexander Binzel Corp.*, No. 2:12cv592, 2013 U.S. Dist. LEXIS 163943, at \*10 (E.D. Va. Nov. 18, 2013).

<sup>187</sup> *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV-DIMITROULEAS, 2014 U.S. Dist. LEXIS 95445, at \*15, \*18 (S.D. Fla. July 8, 2014).

<sup>188</sup> FED. R. CIV. P. 9.

<sup>189</sup> *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

<sup>190</sup> *See, e.g., TEX. CIV. PRAC. & REM. CODE ANN.* § 150.002(a) (requiring a plaintiff to file a certificate of merit in any lawsuit for “damages arising out of the provision of professional services”); 19 U.S.C. § 1337(b)(1) (requiring a complaint sworn out by oath before filing a complaint in the International Trade Commission).

<sup>191</sup> *Jacob v. City of New York*, 315 U.S. 752, 752–53 (1942); U.S. CONST. AMEND. 7.

promise.<sup>192</sup> The Seventh Amendment ensures an opportunity to prosecute a triable case consistent with extant civil procedure.<sup>193</sup>

In addition to applying *Bank of America* consistent with other causes of action at the pleadings stage, a specialized scheduling order should govern these cases tailored to the unique discovery requirements of the parties. In the Eastern District of Texas, the local rules for patent cases are set apart from local rules governing other civil cases.<sup>194</sup> Although creating a formalistic set of rules for *Bank of America* cases is unnecessary because those cases are less frequent in number than patent cases,<sup>195</sup> the idiosyncrasies of scheduling patent cases can assist courts and parties when litigating Fair Housing Act claims against predatory lending. Among the relevant provisions, the Eastern District of Texas has default confidentiality rules to offset the absence of agreed upon protective orders.<sup>196</sup> Doubtless banks and other lending institutions would like to avail themselves of those protections until parties can agree on a proposed protective order. As part of the parties' initial disclosures, the court also requires patentees to disclose their theories of patent infringement.<sup>197</sup> A corollary rule would enable banks soon after the filing of the complaint to understand a city's theories beyond factual assertions. These disclosures bridge the divide between the complaint and expert discovery.

The local patent rules also provide for targeted document production and a formal pleading-amendment process after discovery closes.<sup>198</sup> Sample docket-control orders provide deadlines marching backward from jury selection, forcing parties to conform to established timelines for mediation, expert disclosures, fact discovery, expert reports, expert discovery, dispositive motions, pretrial filings, trial filings, and post-trial filings.<sup>199</sup> Sample discovery

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<sup>192</sup> See *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 527 F. Supp. 2d 1084, 1101 (N.D. Cal. 2007) ("The court holds that if, after the close of discovery, the party requesting a jury cannot produce evidence supporting its claim to monetary damages, then the party no longer has a right to a jury."); U.S. CONST. AMEND. 7.

<sup>193</sup> See *Wilson v. Volkswagen of Am.*, 561 F.2d 494, 503-04 (4th Cir. 1977) ("The reason for this narrower range of discretion is that the sanction of a default judgment, though 'a rational method of enforcement of the discovery rules,' in an appropriate case, represents in effect 'an infringement upon a party's right to trial by jury under the seventh amendment' and runs counter to 'sound public policy of deciding cases on their merits,' and against depriving a party of his 'fair day in court.'" (internal footnotes and citations omitted)).

<sup>194</sup> See *Rules and Orders*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, <http://www.txed.uscourts.gov/?q=rules-and-orders>, archived at <https://perma.cc/RM5Y-D5AN> (last visited May 9, 2017).

<sup>195</sup> See Stohr, *supra* note 69 (referencing the scarce number of cases filed by cities); Farmer, *supra* note 69 (referencing the scarce number of cases filed by cities).

<sup>196</sup> E.D. TEX. P.R. 2-2.

<sup>197</sup> E.D. TEX. P.R. 3-1.

<sup>198</sup> E.D. TEX. P.R. 3-2, 3-4, 3-6.

<sup>199</sup> See *Docket Control Order – Patent*, *District Judge Rodney Gilstrap*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, <http://www.txed.uscourts.gov/?q=rules-and-orders>, archived at <https://perma.cc/9NSG-2KRJ> (last visited May 9, 2017).

orders force the parties to provide certain information as the case progresses, including a duty to supplement discovery.<sup>200</sup>

The upshot is an efficient case-management plan to bring the case to a fulcrum, either disposing of the claims quickly or providing a trial for which to prepare. *Bank of America* cases require expert testimony and complex economic theories, and the Eastern District of Texas provides an approach to resolve disputes with deliberate speed.<sup>201</sup>

*C. Patent-Law Standards for Expert Witnesses as an Analogue to Discerning Competent Causation Experts in the Fair Housing Act Context*

Discovery is indispensable to prove a case; an expert's application of that discovery is indispensable to win a case. Cases under *Bank of America* require time and necessitate discovery. But providing time for discovery is beneficent only if the standards for expert testimony promote the presentation of competent evidence on proximate cause consistent with *Bank of America*. Although not identical, the Federal Circuit's approach to expert discovery may assist courts as they determine governing precepts in the wake of *Bank of America*.

An unassailable tenet of summary judgment is that a jury is entitled to hear competent testimony from experts on their views of the evidence if those opinions generate a genuine dispute of material fact.<sup>202</sup> Meretricious agreements fade, salutary arguments remain. When qualified experts reach differing views on the same underlying facts, "a classic battle of the experts" arises, rendering summary judgment inapposite.<sup>203</sup> Caselaw animates how experts on causation between economic harm and lending practices can reach a jury for a triable verdict.

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<sup>200</sup> See Discovery Order – Patent, *District Judge Rodney Gilstrap*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, <http://www.txed.uscourts.gov/?q=rules-and-orders>, archived at <https://perma.cc/9NSG-2KRJ> (last visited May 9, 2017).

<sup>201</sup> See, e.g., *Allergan, Inc. v. Teva Pharms. USA, Inc.*, No. 2:15-cv-1455-WCB (LEAD CASE), 2017 U.S. Dist. LEXIS 63977, at \*17–18 (E.D. Tex. Apr. 27, 2017) ("The parties are directed to promptly meet and confer regarding the discovery needed by Allergan to oppose the inventorship defense. The Court expects that the parties will be able to reach agreement on that issue. However, in the event of a dispute, the Court orders that the parties present the dispute to the Court no later than May 5, 2017."); see also *Fuentes v. City of Corpus Christi*, No. 2:15-CV-327, 2016 U.S. Dist. LEXIS 131840, at \*7 (S.D. Tex. Sept. 27, 2016) ("The prejudice of allowing the amendment is that it will be detrimental to the efficient and timely resolution of the case. Discovery has ended. Dispositive motions have been filed. The trial is less than a month away. The proposed defendants would be entitled to answer, conduct discovery and file dispositive motions. If granted, the proposed amendment would necessitate another continuance of the trial. At this stage of the proceedings, with the trial less than a month away, on these facts, the undersigned finds Plaintiffs' have not established good cause to amend to add defendants.").

<sup>202</sup> See generally *MeadWestVaco Corp. v. Rexam Beauty & Closures, Inc.*, 731 F.3d 1258, 1269 (Fed. Cir. 2013) ("As discussed above, the XRD crystallinity limitation came down to a battle of the experts."); see also FED. R. CIV. P. 56.

<sup>203</sup> See *Edwards Sys. Tech., Inc. v. Digital Control Sys.*, 99 F. App'x 911, 921 (Fed. Cir. 2004).



In *Daubert v. Merrell Dow Pharmaceuticals*, the Supreme Court deputized trial judges as gatekeepers to glean admissible expert testimony, prescribing assessments of “whether the reasoning or methodology underlying the testimony is scientifically valid,” and of “whether that reasoning or methodology properly can be applied to the facts in issue.”<sup>204</sup> Those assessments focus “on principles and methodology, not on the conclusions that they generate.”<sup>205</sup> Federal Rules of Evidence 702 and 703 assist trial courts in this determination.<sup>206</sup> Under Rule 702, a witness may be “qualified as an expert by knowledge, skill, experience, training, or education,” and that expert may testify under the following circumstances:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.<sup>207</sup>

Rule 703 adds that “[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.”<sup>208</sup>

*Daubert* empowers a trial court to exclude an expert upon a showing of “unreliable principles or methods, legally insufficient facts and data, or where the reasoning or methodology is not sufficiently tied to the facts of the case.”<sup>209</sup> Issues of credibility and truth are fact questions; not reasons for which to exclude.<sup>210</sup> *Daubert* reminds that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”<sup>211</sup>

Experts on patent-infringement damages face a steep burden, and causation experts after *Bank of America* can learn from them. To appraise the value of the patented invention, a patentee must show evidence “tending to separate or apportion . . . [its] damages between the patent feature and the unpatented features.”<sup>212</sup> But if the patentee “can prove that the patented feature drives demand for the entire product,”<sup>213</sup> that patentee can recover the entire market value of the product because the patented feature set the

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<sup>204</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–93, 597 (1993).

<sup>205</sup> *Id.* at 595.

<sup>206</sup> See FED. R. EVID. 702 & 703.

<sup>207</sup> FED. R. EVID. 702.

<sup>208</sup> FED. R. EVID. 703.

<sup>209</sup> *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1296 (Fed. Cir. 2015) (citation omitted).

<sup>210</sup> See *id.* (citation omitted).

<sup>211</sup> *Daubert*, 509 U.S. at 596.

<sup>212</sup> *Rembrandt Soc. Media, LP v. Facebook, Inc.*, 561 F. App’x 909, 912 (Fed. Cir. 2014) (citation omitted).

<sup>213</sup> *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67 (Fed. Cir. 2012).

price point.<sup>214</sup> A Fair Housing Act expert on causation, similarly, must isolate the various causes of decreased tax revenue and blight, assessing what act (if any) is within one step of the alleged harm.<sup>215</sup> If economic statistics show that one act drove economic downturn, then a jury should be able to hear that testimony.

The concept of apportionment in patent cases addresses concerns over “skew[ing] the damages horizon for the jury,”<sup>216</sup> which extrapolated to the Fair Housing Act, instructs how to isolate the potential culprits of urban decay. The net effect is the same: distracting information is culled from the jury. The process forces patent experts, for fear of exclusion, “to focus on reliable evidence of . . . [the] invention itself and to avoid potentially misleading forms of presentation of evidence.”<sup>217</sup> A causation theory under the Fair Housing Act, likewise, “must be based on ‘sound economic and factual predicates.’”<sup>218</sup>

Addressing what caused deterioration in Miami, as well as other blighted locations, adjures experts to opine on actual damages and to “tie proof of [economic injury] to the [lending practices’] footprint in the marketplace.”<sup>219</sup> Review of relevant-timeframe “market studies,” borrower “surveys,” admissions from lending institutions, regression analysis, and the like are ineluctable.<sup>220</sup> That the identity of true causes eludes certainty and is only occasionally gleaned through the passage of time should not stymie the causation analysis.<sup>221</sup> That position, at best, is a counterpoise against causation.<sup>222</sup> The law has never required certainty of proof, just that a party carry its burden before a trier of fact. Hewing toward an articulable standard to discern causation enables that jury presentation.

The work of experts “is not an exact science”<sup>223</sup> Yet applying certain principles should help courts in ferreting out proper evidence for a jury to consider. Admissible expert testimony follows the Goldilocks principle: if

<sup>214</sup> See *id.* at 67–68.

<sup>215</sup> *Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, 2017 U.S. LEXIS 2801, at \*20–21 (May 1, 2017).

<sup>216</sup> *LaserDynamics*, 694 F.3d at 67, 68 (quoting *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1319–20 (Fed. Cir. 2011)).

<sup>217</sup> *Facebook, Inc.*, 561 F. App’x at 912–13 (citation omitted).

<sup>218</sup> *LaserDynamics*, 694 F.3d at 67 (citation omitted).

<sup>219</sup> *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010).

<sup>220</sup> *LaserDynamics*, 694 F.3d at 69 (citation omitted).

<sup>221</sup> See John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1555–56 (2017) (“The causes of the crisis remain unclear. It was popular at the time to blame the ‘epidemic’ of constitutional tort litigation fueled by proliferating plaintiffs’ attorneys and civil liberties groups. Today, [t]he academic literature has settled on the view that the mid 1980s liability insurance crisis was an extreme dip in the longstanding underwriting cycle in property casualty insurance, perhaps exacerbated by a mid-1980s change in taxation rules governing the reserves held by property casualty insurance companies.” (internal footnotes omitted and citations omitted)).

<sup>222</sup> *Marx v. Ebner*, 180 U.S. 314, 319 (1901) (“It is seldom that such certainty of proof is possible.”); see also *United States v. Barrera-Gonzales*, 952 F.2d 1269, 1272 (10th Cir. 1992) (“It is rarely possible to prove anything to an absolute certainty.”).

<sup>223</sup> *Summit 6, LLC v. Samsung Elecs. Co.*, 802 F.3d 1283, 1296 (Fed. Cir. 2015).

the testimony fits within the margins of relevant facts and legal competency, the jury should decide liability consistent with *Bank of America*.<sup>224</sup>

## V. CONCLUSION

Although public debate persists over whether the Constitution permits executives to pardon offenses moored in unalloyed animus against Latinos,<sup>225</sup> the Fair Housing Act remains a backstop and clarion “WELCOME” to all comers.<sup>226</sup> Proving whether predatory lending practices cause urban blight is a fraught endeavor, especially as homeownership among Latinos has soared.<sup>227</sup> For various complicated reasons, even though *Bank of America* instituted standing for cities to sue under the Fair Housing Act for injuries from blight and property-tax degradation, understanding what caused those circumstances can be as confounding as comparing a patent’s claims to an article of manufacture to determine infringement. Yet proof—or disproof—of predatory lending cannot be impossible, especially if a right exists to which a remedy attaches.<sup>228</sup>

Although vaticinations are less than sanguine for cities under the Court’s direct-relation framework, patent law offers an approach to ascertain whether the harms are within one step of the alleged conduct.<sup>229</sup> The fact-based inquiry of patent infringement is analogous to Fair Housing Act proximate cause insofar as both require discovery and experts to unearth whether an alleged act caused a legally cognizable harm. Pleadings alone are insufficient to make these determinations, and enabling Rule 12(b)(6) as the primary vehicle to resolve cases is a solution unmoored from statutory text or the constitutional guarantee of a jury trial, circumscribing a city’s right to develop its case and present it to a jury.<sup>230</sup> In addition, the demanding expert-testimony standards upon which patent law imposes can guide courts in determining which experts offer admissible accounts on causation. District courts have tools to dispose of unqualified experts unable to isolate the apparent causes of blight and decreased tax revenues.<sup>231</sup> But when experts pre-

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<sup>224</sup> Judith Curry, *The Goldilocks Principle*, CLIMATE ETC. (Dec. 22, 2012), <https://judithcurry.com/2012/12/22/the-goldilocks-principle/>, archived at <https://perma.cc/DV8X-QQMN> (“The Goldilocks principle states that something must fall within certain margins, as opposed to reaching extremes.”).

<sup>225</sup> *Pardon Our Tone*, VERSUS TRUMP, (Oct. 19, 2017), <https://takecareblog.com/podcast>.

<sup>226</sup> *Cf.* *In re Tam*, 808 F.3d 1321, 1380 (Fed. Cir. 2015) (Reyna, J., dissenting).

<sup>227</sup> Sisson, *supra* note 163; *FFF: Hispanic Heritage Month 2016*, UNITED STATES CENSUS BUREAU (Oct. 12, 2016), <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff16.html>, archived at <https://perma.cc/77XU-NA6B>.

<sup>228</sup> *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 164 (1803) (“It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

<sup>229</sup> *Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, 2017 U.S. LEXIS 2801, at \*20–21 (May 1, 2017).

<sup>230</sup> *See* U.S. CONST. AMEND. 7.

<sup>231</sup> *See* *Commonwealth Sci. & Indus. Research Organisation v. Cisco Sys.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015) (“Likewise today, given the great financial incentive parties have to exploit the inherent imprecision in patent valuation, courts must be proactive to ensure that the

sent dueling competent evidence on causation, nothing in a functioning adversarial system should prevent the issue of proximate causation from going to the jury.<sup>232</sup>

The Fair Housing Act did not endeavor to make unfair the ability to secure fair housing. Fairness requires that, if an entity has standing to sue, the ability must exist to prove the case. Fettering to a hobble prosecution to catalyze fair housing does violence to the legal system and perverts the appellation of “Equal Justice Under Law.”<sup>233</sup> *Bank of America* is best read as protecting cities and their residents, and, under the appropriate framework, cities can prove their cases if the evidence exists and is direct. If it takes a village to raise a child,<sup>234</sup> it also takes a city to protect its citizens from outside predation. Fair housing is aspirational if the fight is not fair. Emboldened with evidence, cities play an integral role in the fight for fairness, both on the ground and in the courts.<sup>235</sup>

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testimony presented—using whatever methodology—is sufficiently reliable to support a damages award.”); FED. R. EVID. 702.

<sup>232</sup> *Summit 6*, 802 F.3d at 1300 (“We agree with the district court that the jury verdict was supported by sufficient evidence and tied to the facts of this case. We therefore affirm the district court’s denial of Samsung’s motion for judgment as a matter of law of no damages.”).

<sup>233</sup> *Visitor’s Guide to the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/visiting/visitorsguide-supremecourt.aspx>, archived at <https://perma.cc/BJ9F-G3RA> (last visited May 11, 2017) (“Its charge, emblazoned over the doors of this building, is to ensure ‘Equal Justice Under Law.’”).

<sup>234</sup> Joel Goldberb, *It Takes A Village To Determine The Origins Of An African Proverb*, NATIONAL PUBLIC RADIO (July 30, 2016), <http://www.npr.org/sections/goatsandsoda/2016/07/30/487925796/it-takes-a-village-to-determine-the-origins-of-an-african-proverb>, archived at <https://perma.cc/U3UN-CLNJ>.

<sup>235</sup> Richard Wolf, *Supreme Court says cities can sue banks over predatory loans*, USA TODAY (May 1, 2017), <https://www.usatoday.com/story/news/politics/2017/05/01/supreme-court-says-cities-can-sue-banks-over-predatory-loans/100890224/>, archived at <https://perma.cc/E4ET-5TNL> (“‘Here the cities are standing up and saying, ‘every time you do this redlining and this reverse redlining, essentially a community is becoming blighted.’ And who better than the city to recognize that interest and to assert it?’ Justice Elena Kagan said at the time.”).