

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BANK OF AMERICA CORPORATION, :

4 ET AL., :

5 Petitioners : No. 15-1111

6 v. :

7 CITY OF MIAMI, FLORIDA, :

8 Respondent; :

9 - - - - - x

10

11 and

12

13 - - - - - x

14 WELLS FARGO & CO., ET AL., :

15 Petitioners : No. 15-1112

16 v. :

17 CITY OF MIAMI, FLORIDA, :

18 Respondent. :

19 - - - - - x

20 Washington, D.C.

21 Tuesday, November 8, 2016

22

23 The above-entitled matter came on for oral
24 argument before the Supreme Court of the United States
25 at 10:03 a.m.

1 APPEARANCES:

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3 Petitioners.

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9 Respondents.

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|----|--------------------------------------|------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF | PAGE |
| 3 | NEAL K. KATYAL, ESQ. | |
| 4 | On behalf of the Petitioners | 4 |
| 5 | ORAL ARGUMENT OF | |
| 6 | ROBERT S. PECK, ESQ. | |
| 7 | On behalf of the Respondents | 29 |
| 8 | ORAL ARGUMENT OF | |
| 9 | CURTIS E. GANNON, ESQ. | |
| 10 | For United States, as amicus curiae, | |
| 11 | supporting the Respondents | 44 |
| 12 | REBUTTAL ARGUMENT OF | |
| 13 | NEAL K. KATYAL, ESQ. | |
| 14 | On behalf of the Petitioners | 55 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case No. 15-1111, Bank of America
5 Corporation v. The City of Miami and the consolidated
6 case.

7 Mr. Katyal.

8 ORAL ARGUMENT OF NEAL K. KATYAL

9 ON BEHALF OF THE PETITIONERS

10 MR. KATYAL: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 The question in this case is whether cities
13 can sue under one of our nation's most important laws,
14 the Fair Housing Act. Our answer to that question is
15 yes, sometimes, and I mean three things by that.

16 First, the answer can't be yes always,
17 because that would eviscerate two key doctrines of this
18 Court: Proximate cause and zone of interests.

19 Second, the answer can't be no, never,
20 because cities can identify concrete harms that fall
21 within the zone-of-interests, such as discrete
22 expenditures to combat a particular defendant's racial
23 misconduct.

24 And third, this lawsuit fails both the zone
25 of interests and proximate cause, because the injury it

1 seeks to remedy is unrelated to the Act's purposes, and
2 because that injury is several steps removed from any
3 alleged acts of Petitioners.

4 If I could start with zone of interests.
5 This Court, in Lexmark --

6 JUSTICE GINSBURG: Could you -- before you
7 do that, Mr. Katyal, could you please tell us: You --
8 you said, yes, cities can sue under the FHA, but not
9 this -- not on -- in this scenario.

10 Can you tell us what -- under what
11 circumstances could a city sue?

12 MR. KATYAL: Absolutely, Justice Ginsburg.
13 So we want -- our position is to preserve existing law
14 exactly where it is, and existing law identifies two
15 places where cities can sue. One is a Havens-like
16 situation in which a city, like the NGO in Havens, is
17 combatting discrete instances of discrimination by
18 defendant, and outlaying things, so testers or
19 something.

20 So if you took the allegations in this
21 complaint and -- and when -- we made them out to be the
22 banks were engaged in some sort of discriminatory loans,
23 and the City had to -- had to basically expend funds to
24 test that out to enforce its housing statutes, that
25 looks very much like the one-to-one relationship that

1 was at issue in Havens, both for zone of interest and
2 for proximate cause.

3 JUSTICE SOTOMAYOR: I'm sorry. In Havens,
4 the testers were not city employees. In Havens, they
5 were private organizational employees whose job it was
6 to do this.

7 So why are you attributing the testers' work
8 to the City directly?

9 MR. KATYAL: Because, Justice Sotomayor, in
10 that case -- and this is paragraph (F) of the complaint.
11 It's Appendix page 20 in Havens -- the complaint asks
12 for the City's expenditures to combat -- to identify
13 specific things, including testers and other -- you
14 know, other enforcement things.

15 JUSTICE SOTOMAYOR: Why is this different
16 than the other allegations in Havens that had to do,
17 like here, with lost revenues, with lost tax base, which
18 the Court cited as well? Here there are direct
19 expenditures in terms of increased monitoring of the
20 area by police and other services.

21 Aren't those City expenditures?

22 MR. KATYAL: So those -- that's not Havens,
23 Justice Sotomayor, with respect. I think that's
24 Gladstone.

25 JUSTICE SOTOMAYOR: I'm sorry. I apologize.

1 MR. KATYAL: But -- but -- but our position
2 is that to the extent the City cannot plead a complaint
3 that looks like Gladstone -- and this gets back to
4 Justice Ginsburg's question -- the second bucket in
5 which the City can assert an injury is just like
6 Gladstone in which there is a segregation claim that is
7 being advanced. There was that racial steerers, that
8 Realtors were literally steering African-Americans out
9 of the Village. That is an anti-discrimination harm to
10 the Village itself. And so for zone-of-interest
11 purposes, Gladstone doesn't talk about proximate cause
12 at all, but for zone-of-interest purposes, there is
13 absolutely nothing wrong with that. That is, the City
14 has identified --

15 JUSTICE SOTOMAYOR: I'm sorry, but you're
16 thinking that if banks are forcing people out of a
17 neighborhood, that that's not discrimination?

18 MR. KATYAL: Oh, no. I'm saying that
19 your -- Your Honor, to the extent that that is
20 segregation interest, absolutely it is. And that's what
21 Gladstone recognizes.

22 Here's what it doesn't recognize though. It
23 doesn't recognize something like this complaint, which
24 is not that the City is pleading an anti-discrimination
25 interest. Rather, they are borrowing someone else's

1 anti-discrimination interests, namely the discriminatory
2 loans that happen.

3 So look, our position is the direct victims
4 can obviously sue for that, but so too can the Justice
5 Department and HUD, because that's what Congress
6 empowered them to do, to have a version of *parens*
7 *patriae* standing.

8 But what they are saying is, well, we are
9 harmed downstream for tax revenues and things like that.
10 That looks very much like the shareholder in Thompson
11 that so concerned this Court. That is, the shareholder
12 there was not identifying an anti-discrimination injury;
13 they were identifying an economic injury and cutting and
14 pasting the anti-discrimination --

15 JUSTICE GINSBURG: But what about Gladstone,
16 which is the case of a village suing? They were suing
17 for diminished property values that -- which resulted in
18 loss of revenue. That -- that was -- so to that extent,
19 these two cases seem the same to me. The bottom line,
20 their municipality said our tax base has been depleted.
21 The properties have gone way down in value.

22 MR. KATYAL: So, Justice Ginsburg, I think
23 that that's not totally correct for two reasons. Number
24 one, in Gladstone the injury itself to the Village was
25 an anti-discrimination injury. That's the first part of

1 Gladstone. That's found at page 110 of the opinion.
 2 But here they haven't identified an anti-discrimination
 3 harm to the City of Miami. They have identified an
 4 economic harm. So that's why this case is not within
 5 the zone of interest, but the one there is.

6 It looks much -- you can think of it this
 7 way: There are kind of two lodestars in this Court's
 8 cases. One is the Thompson shareholder. The
 9 shareholder who has an economic injury, no doubt they
 10 are hurt by an underlying act of discrimination at the
 11 front end against someone who is fired, like the CEO who
 12 is fired for race discrimination or something like that.
 13 But this Court said, a-ha, that opens the door towards
 14 way too many lawsuits and landlords --

15 JUSTICE GINSBURG: That was a hypothetical
 16 the Court brought up on its own. I'm -- I'm surprised
 17 you put so much weight on Thompson because that was a
 18 case that upheld standing.

19 MR. KATYAL: Oh, absolutely. And again, our
 20 opinion is fully consistent with Thompson. That is the
 21 language in the opinion itself. It certainly was
 22 something Justice Kennedy raised in oral argument and
 23 then picked up by Justice Breyer in Thompson. But their
 24 actual language and opinion does talk about
 25 shareholders. And it's not just Thompson.

1 This Court's unanimous decision on Lexmark
2 says something much the same about landlords and utility
3 companies, and if you accept their interpretation, you
4 are opening the door not just to the City, but to anyone
5 else who can borrow someone else's anti-discrimination
6 interest, cut and paste it, and --

7 JUSTICE KENNEDY: Well, is your -- is your
8 concession -- I call it your concession -- your
9 formulation that the City can sue sometimes, are you
10 thinking that the City might be in the same position as
11 Home was in -- was it the -- the Havens case?

12 MR. KATYAL: So there's two different
13 buckets, and the first bucket -- that was my first
14 answer to Justice Ginsburg -- yes, the City is like
15 Home, the NGO there. They're identifying specific
16 concrete interests, the expenditures that they have to
17 outlay to combat a defendant's racial misconduct. And
18 so to the extent that a city wants to do that, that's
19 absolutely fine.

20 There is a second category of things as
21 well --

22 JUSTICE KENNEDY: That's how you're
23 saying -- and I don't want to foreclose, prevent you
24 from finishing your answer, but are you saying that the
25 City is limited just to the damages that it -- that it

1 can recover?

2 MR. KATYAL: On that theory, in that bucket,
3 yes, they would be limited to the damages. They are now
4 on the second bucket, the segregation --

5 JUSTICE KENNEDY: But, I mean, is it just
6 the costs they incur in trying to --

7 MR. KATYAL: Just --

8 JUSTICE KENNEDY: -- eliminate
9 discrimination?

10 MR. KATYAL: Just as it is in the NGO in
11 Havens.

12 Justice Kennedy, I see you're troubled by
13 that, but I point out the second thing is the Gladstone
14 segregation category. And in that circumstance, the
15 City can recover for either -- we will put proximate
16 cause to the side for a second. But just in terms of
17 zone of interest, they can recover for the harms by
18 making an integrated neighborhood become segregated,
19 however marginally that may be. That is something they
20 can recover for, as well as, of course, injunctive
21 damages.

22 JUSTICE KENNEDY: But would that be added
23 police force or something like that?

24 MR. KATYAL: No. I don't think it would
25 be -- you know, again, that would, I think, run into

1 proximate-cause problems down the road, because there
2 are many steps and causalities that are --

3 JUSTICE KENNEDY: What can the City recover
4 for general damages of having a segregated -- a more
5 segregated community by a result of -- as a result of
6 the defendant's actions?

7 MR. KATYAL: Well, I think that anything
8 that they can directly outlay, and that may be very hard
9 to identify. And that's why normally this is done more
10 on the injunctive side, and I think the scheme Congress
11 had implied was to give parens patriae standing to the
12 Justice Department and to HUD to bring these cases --

13 CHIEF JUSTICE ROBERTS: Your -- your
14 concession runs into the same problem as your main
15 argument. I mean, if -- if the City can recover for
16 having a more segregated environment, that seemed to be
17 measured by all sorts of things, including tourists
18 aren't going to want to visit it as much.

19 How would you measure the damages if the
20 harm is simply having a more segregated city?

21 MR. KATYAL: I don't know that it runs into
22 the same thing. I'm making an argument about what this
23 Court's precedence on standing requires starting with
24 the 1990 decision in Lujan which says, a city has to
25 identify -- the words of the opinion is -- his injury.

1 So here the City has to identify an
2 anti-discrimination interest that they have suffered.
3 They can't cut and paste and borrow someone else's. So
4 to the extent we are talking about, as this complaint
5 does, kind of diminution in tax bases and so on and
6 that's their injury, that is not an anti-discrimination
7 injury.

8 And so the way to reconcile --

9 JUSTICE KAGAN: But, Mr. Katyal, that
10 suggests that when Congress passed the FHA, it was
11 looking only at individual acts of discrimination to
12 particular persons. But the FHA is a very peculiar and
13 distinctive kind of anti-discrimination statute, which
14 really is focusing on community harms, and we talked
15 about this a lot in the Texas Housing case of a couple
16 of years ago. So it's not just individuals who are
17 harmed; it's communities who are harmed. And that's the
18 basic idea of the entire statute, why Congress passed
19 it.

20 And here the cities are standing up and
21 saying, every time you do this redlining and this
22 reverse redlining, essentially a community is becoming
23 blighted. And who better than the City to recognize
24 that interest and to assert it.

25 MR. KATYAL: Well, we certainly recognize

1 that that is something that is at issue and one of the
2 goals of the Fair Housing Act, but I think the way
3 Congress dealt with that is not by saying, cities are
4 empowered to have some sort of parens patriae standing.
5 That's what they gave the Justice Department and HUD.
6 And as well, by the way, Justice Kagan, in 3610(f),
7 Congress empowered state and local enforcement over
8 housing discrimination to deal with those types of
9 community-centered problems that you're talking about.

10 But here they are not using any of that.
11 They are coming in and saying, we are a person
12 aggrieved. And a person aggrieved in the statute whose
13 chapter is entitled, quote, "Enforcement by Private
14 Persons," and our position is --

15 JUSTICE KAGAN: Well, but they are a person
16 aggrieved under the -- given Congress' purposes in the
17 Act, because they are saying, as you did this redlining,
18 as you did this reverse redlining, our communities, the
19 thing that makes us a city was becoming more and more
20 blighted, and that's what we are trying to recover for,
21 the -- the costs of responding to that, the -- the costs
22 of not having revenues in order to carry out our
23 services for that community and for others.

24 MR. KATYAL: So, Justice Kagan --

25 JUSTICE KAGAN: Not parens patriae. This is

1 their own interest in maintaining their communities free
2 of the kind of racial discrimination that the Act says
3 causes neighborhood blight.

4 MR. KATYAL: Justice Kagan, if the -- if the
5 complaint were written to say that it was about
6 segregation causing blight, we would have no problem
7 with it, which is what I was saying to Justice Ginsburg
8 with respect to zone of interest. The City would fall
9 within that zone of interest. That's Gladstone, and
10 that's what the Kerner Commission Report, which you're
11 referring to says, which is, blight is not caused just
12 on its own but it was a result of segregation. The
13 references to blight in the Kerner Commission Report
14 follow from segregation.

15 JUSTICE KENNEDY: How far out -- how far out
16 would damages extend in -- in the -- the hypothesis you
17 just gave to Justice Kagan?

18 MR. KATYAL: So -- so for zone of interest,
19 I think, you know, you're able to get -- I don't think
20 it matters, that is, to the extent that the City can --
21 the complaint by the City pleads a segregation harm.
22 Even if it's downstream, they are within the zone of
23 interest.

24 Now to turn to proximate cause, though --

25 JUSTICE KAGAN: I'm sorry. I guess I don't

1 understand why this isn't a segregation harm. Here, the
 2 City is saying, you've done this redlining; you've done
 3 this reverse redlining. It's not that it just causes
 4 various foreclosures all over the City; it's causing
 5 foreclosures in particular concentrated areas, and it's
 6 doing that because of racial segregation.

7 And at the same time, it's preventing that
 8 racial segregation from ever being lifted because those
 9 communities are becoming more and more blighted and less
 10 and less capable of becoming integrated communities. So
 11 everything about this complaint is about racial
 12 segregation, it seems to me.

13 MR. KATYAL: Justice Kagan, I'd encourage
 14 you to just look back at what you just said and then
 15 read it against their complaint, because none of that's
 16 in the complaint.

17 JUSTICE KAGAN: So do you think everything I
 18 just said, if their complaint was written like that,
 19 that they could maintain a suit?

20 MR. KATYAL: They could maintain a suit for
 21 segregation. And the measure of damages wouldn't be the
 22 measure of damages which they're seeking, which is
 23 recovery for the 2008 foreclosure crisis in Miami and to
 24 the tune of billions of dollars nationwide. It would
 25 be, again, at most -- and I want to get to proximate

1 cause -- it would be at most the delta between a
2 segregated community that had -- now exists as a result
3 of the defendant's particular conduct and an integrated
4 community that would have existed otherwise. That would
5 be the only measure of damages.

6 CHIEF JUSTICE ROBERTS: How -- how do you
7 measure that?

8 MR. KATYAL: I'm not sure. And that's why I
9 do think ultimately it may fail on proximate cause. But
10 at least we're -- we've been talking so far about zone
11 of interest, and that's, of course, all Gladstone dealt
12 with was zone of interest.

13 And with respect to zone of interest, I
14 think that that complaint, the one that, Justice Kagan,
15 you read, would satisfy zone of interest. It would
16 allow at least a city to come in and get injunctive
17 relief to try and preserve the kind of
18 community-centered concepts that you're talking about.

19 Now, the question is, would they be able to
20 recover damages for that, including damages to the
21 diminution of their tax base? It's certainly true,
22 Justice Ginsburg, that Gladstone has that line at the
23 end of page 110 which talks about diminution of tax
24 revenues. The next line is, of course, that's enough
25 for Article III standing.

1 So I don't think this Court has ever decided
2 the question of whether or not proximate-cause
3 principles allow a segregation lawsuit to extend so far.

4 JUSTICE GINSBURG: Your answer aimed at
5 Gladstone would be, I take it from everything you said,
6 that Gladstone would flunk at the proximate-cause stage?

7 MR. KATYAL: So I do think that that's
8 right; that is, there would be so many steps involved --
9 and you could just take a look at this complaint. And
10 if you look at the Solicitor General's brief for page --
11 brief at page 30, you see all the steps that are
12 required before the City is injured.

13 You have to have discriminatory loans.
14 Those discriminatory loans have to lead to defaults.
15 The defaults have to lead to foreclosures. The
16 foreclosures need to lead to increase in vacancies. The
17 increase in vacancies needs to lead to reduction in
18 property values. And then that is supposed to reduce
19 it.

20 JUSTICE KENNEDY: I usually think of
21 proximate cause -- correct me if I'm wrong -- as a
22 question of liability, not damages -- Palsgraf. No
23 liability.

24 MR. KATYAL: Correct. So it isn't --

25 JUSTICE KENNEDY: So it wasn't a question of

1 damages. But you say proximate cause bears on both
2 liability and damages?

3 MR. KATYAL: I do. I think that this Court
4 has kind of thought about it that way. You could think,
5 for example, at Lexmark, and has said -- you know, I
6 think what this Court has said is you look to the
7 underlying damages that are being sought to understand.
8 Is the complaint within the kind of standard
9 proximate-cause principles?

10 And here, if you accept their theory, that
11 chain, you'll be doing something I don't know that this
12 Court has ever done before, which is to allow such a
13 long chain of causation, a non-direct cause of -- chain
14 of causation to the tune of, again, billions of dollars
15 to recover from the --

16 JUSTICE KAGAN: Mr. Katyal --

17 MR. KATYAL: -- foreclosure crisis.

18 I'm sorry. Go ahead.

19 JUSTICE KAGAN: Can I ask a separate
20 question? We've been talking a lot about zone of
21 interests and the question about whether the
22 zone-of-interest test applies at all.

23 Because you have three cases prior to this
24 1988 re-enactment of the old 1968 language. And in each
25 of three cases -- in Trafficante, in Gladstone, in

1 Havens -- the Court very specifically says that this
2 language stretches to the limits of Article III.

3 So Congress is amending the statute in 1988
4 against that backdrop. Why shouldn't we understand that
5 to mean that the language means it stretches to the
6 limits of Article III?

7 MR. KATYAL: For three reasons, Justice
8 Kagan.

9 The first is that, at most, the
10 congressional ratification doctrine only applies to
11 holdings of the Court, not that -- I know you weren't on
12 the Court for Thompson, but a lot of the rest of us were
13 here. And in Thompson, the Court unanimously --

14 JUSTICE KAGAN: I'm disabled from having
15 thoughts on this subject.

16 MR. KATYAL: No, no, absolutely not. I was
17 actually anticipating the reverse.

18 So, I mean -- so -- and so -- but I think
19 the Court went through this. They heard the Solicitor
20 General's argument at time, which was that this was all
21 to the limits and binding holdings and what this Court
22 said --

23 JUSTICE KAGAN: I guess I don't understand.
24 I mean, we can argue about whether these were holdings
25 and whether these were a dicta, and there are arguments

1 on both sides of that.

2 But here I am on Congress. I mean, suppose
3 you were an advisor to a congressman. And the
4 congressman said, okay. I don't really like this idea
5 of going to the limits of Article III. I think we
6 should limit it.

7 You say, no worries. Just use the same
8 language.

9 And he says, use the same language? That
10 language has been consistently understood to go to the
11 limits of Article III.

12 And you say, oh, no. Don't worry. It's
13 dicta.

14 And he says, okay. I feel relieved. We can
15 now use this language.

16 I mean, wouldn't you be fired?

17 MR. KATYAL: Well, Your -- Your Honor, I
18 think I'd be fired if I did what you said, which is not
19 actually follow what this Court's cases require, which
20 is, quote, "An express negation of the zone-of-interest
21 test," not borrowing from some, you know, implicit
22 doctrine.

23 Because at its high water mark, this Court
24 has said in Jama: "The congressional ratification
25 doctrine is only a guide to word what Congress

1 implicitly thought."

2 And at least starting in 1983 in the Block
3 case -- and I think even going before that in the AGC
4 case, perhaps going even before that -- this Court has
5 said, you need an express negation by Congress in order
6 to abrogate the zone-of-interest test.

7 And that is just not what happened here. At
8 most, it was borrowing --

9 JUSTICE GINSBURG: Strange -- strange
10 development, because the zone-of-interest test, at least
11 as it was announced in data processing, was understood
12 to expand standing over what it had been before. So the
13 zone-of-interest test was that, having in standing, it
14 was facilitating the ability to bring lawsuits.

15 MR. KATYAL: Well, certainly. But by the
16 time of Block, which was a case about limiting
17 standing -- and that was before 1988, so I think you've
18 got that problem.

19 You'd also be fired, Justice Kagan, for
20 another reason in your hypothetical, which is the
21 Congressional Report that you wrote, the House Report,
22 as a staffer, says, you know, there's only two things
23 that you were trying to codify: One was that testers
24 have standing under Havens, and the other is that
25 administrative and judicial standing applies the same

1 standard. Those are the only two things in the House
2 Report --

3 JUSTICE KAGAN: I don't read the -- the
4 House Report that way. The House Report does refer to a
5 couple of particular aspects of those cases. But the
6 House Report seems to me to cut against you because it
7 makes clear that Congress knew about those cases. And
8 those cases are, of course, the cases which said that
9 standing stretches to the limits of Article III.

10 And if you really look at the legislative
11 history of this Act, it's pretty clear that when
12 Congress is acting in 1988, it took off the shelf a bill
13 that was discussed in 1980. And in that bill, there was
14 a lot of discussion about whether standing should go to
15 the limits of Article III. And Congress was thinking of
16 changing that language.

17 And Drew Days, the Assistant Attorney
18 General for Civil Rights, and the HUD Secretary, they
19 both come in and they tell Congress, if you change that
20 language, it's a problem, because then you're cutting
21 back on standing. And Congress decided not to change
22 that language because it wanted, as Drew Days said and
23 as the HUD Secretary said, to go to the limits of
24 Article III.

25 MR. KATYAL: I'll answer that, and then I'd

1 like to turn to proximate cause.

2 So, Justice Kagan, even if all of that is
3 true, I think this Court has insisted on an express
4 negation for precisely this reason, so that you don't go
5 tap Drew Days and what -- have to --

6 JUSTICE SOTOMAYOR: Mr. Katyal, this is not
7 an express -- an express limitation that means we're
8 not -- we're doing away or we are keeping the zone of
9 interest, because Lexmark itself was -- just establishes
10 that rule. There was no explicit statement. What the
11 Court did was look at the statute, the endangered
12 species statute, look at its words, and decide that "any
13 person" meant any person and decided it did away with
14 the zone of interests.

15 Here, we have a Congress in 1988 taking the
16 word "aggrieved," which was in the -- in Title VII and
17 many other statutes but undefined. And what it did was
18 take the definition looked at by prior regulations,
19 examined by this Court in its three cases establishing
20 Article III standing, and put in a definition of
21 "aggrieved" that is very different from the normal
22 definition.

23 MR. KATYAL: Justice Sotomayor --

24 JUSTICE SOTOMAYOR: Why is that --

25 MR. KATYAL: It is not very different. It

1 is a "plain Jane," deterred definition of person
2 aggrieved. It doesn't look like what you're talking
3 about, the Endangered Species Act, which allows any
4 person to sue. And it was their interpretation of if
5 it's accepted, you'd be doing something, I think, for
6 the first time in the Federal code. There is no
7 all-comers damages statute that allows anyone to sue the
8 way their interpretation would.

9 Now, on proximate cause, our main point to
10 you is this: This Court, in Lexmark, said there is a
11 general rule -- and this is an independent argument from
12 zone of interests -- there's a general rule that says
13 that liability is cut off after the first step.

14 If you adopt this theory of the complaint,
15 you're accepting sixth-step liability in a way that this
16 Court has never done before. At most, this Court, in
17 Lexmark, unanimously said you can expand it a little bit
18 beyond the first step for a kind of one-to-one
19 relationship. But here, this Court -- or this complaint
20 is seeking damages for the foreclosure crisis of 2008,
21 something that is way, way beyond anything this Court
22 has insisted on.

23 JUSTICE KAGAN: When you say that -- when
24 you said to me that the complaints that I wrote would
25 have been covered by the Act, do you think it also would

1 fall within proximate-cause principles?

2 MR. KATYAL: I -- I think that the -- the
3 complaint would have to satisfy a directness
4 requirement. So to the extent that the City could
5 identify segregation -- segregation harms directly, in
6 the way that maybe a university could when they
7 become -- you know, when they lose diversity or
8 something like that. To the extent there's some direct,
9 close, one-to-one relationship, absolutely, 100 percent,
10 every day of the week.

11 And, of course, Congress could write a
12 statute that enables something and abrogate the
13 traditional proximate-cause doctrine. But here they
14 haven't done any of that. Here they have applied,
15 again, a kind of plain Jane version of damages. And
16 what they're seeking here with this creative
17 complaint -- which, you know, the Fair Housing Act has
18 been around since before I was born, and only until a
19 couple of years ago have we ever seen a complaint that
20 looks anything like this.

21 Here they're seeking to recover for the
22 foreclosure crisis of 2008. That can't possibly satisfy
23 proximate-cause principles starting with Justice Holmes'
24 opinion in Southern Pacific in 1918, going all the way
25 to the Holmes opinion of this Court just more recently.

1 So you've got kind of Holmes and Holmes.

2 JUSTICE KAGAN: But is one understanding --
3 like, I guess, when I started reading the briefs, I was
4 confused about this, because there's one understanding
5 of proximate cause, which is that usually proximate
6 cause is about foreseeability and only foreseeability.

7 Now, there are definitely places where we've
8 said there's this additional directness requirement, but
9 only in pretty discrete areas. And I guess I -- like I
10 sort of come back to this notion that I think what our
11 -- our precedent suggests is it's a little bit statute
12 by statute as to whether proximate cause is a
13 foreseeability inquiry and only that, or whether it has
14 additional components.

15 MR. KATYAL: I'll -- I'll answer that, and
16 then if I could reserve the balance of my time.

17 I think this Court in Paroline said, quote,
18 "The proximate cause generally falls to the basic
19 requirement, there must be a direct relationship between
20 the injury asserted and the injurious conduct."

21 JUSTICE SOTOMAYOR: So --

22 MR. KATYAL: I think Paroline and Lexmark
23 both do that. That is the general rule, not the outlier
24 rule.

25 JUSTICE SOTOMAYOR: So what do we do with

1 all of the statements in Havens? I'm quoting. "There
2 is little significance in the difference between direct
3 and indirect injuries for purposes of filing suit under
4 the FHA. Trafficante. While members of minority groups
5 were damaged the most from discrimination, the
6 proponents of the legislation emphasize that those who
7 were not the direct objects of discrimination had an
8 interest in ensuring fair housing."

9 MR. KATYAL: Justice Sotomayor, I absolutely
10 agree --

11 JUSTICE SOTOMAYOR: Well, I mean --

12 MR. KATYAL: -- with all of them. Those are
13 standard cases --

14 JUSTICE SOTOMAYOR: -- we have repeatedly
15 said --

16 MR. KATYAL: I'm sorry.

17 JUSTICE SOTOMAYOR: -- the difference
18 between direct and indirect, it has no meaning in the
19 statute. The foreseeability always has meaning.

20 MR. KATYAL: Justice Sotomayor, we've never
21 said anything about proximate cause. That all goes to
22 standing. That's a completely different inquiry.

23 If I may reserve.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Peck.

1 ORAL ARGUMENT OF ROBERT S. PECK

2 ON BEHALF OF THE RESPONDENTS

3 MR. PECK: Mr. Chief Justice, and may it
4 please the Court:

5 The City of Miami brought this -- these
6 cases seeking injunctive relief and monetary damages
7 because the banks' practice of providing minority
8 borrowers with more expensive and riskier loans than
9 they qualified for, or that nonminority borrowers
10 received, actually frustrated and counteracted the
11 City's efforts on fair housing, and -- and tended to --
12 to cause the City to lose the benefits of social,
13 professional, and business opportunities that come with
14 an integrated community free from housing
15 discrimination.

16 Now, you heard my friend describe these as
17 two buckets, that if the complaint makes that out
18 clearly, then we do have standing that we fit within the
19 zone of interests. We thought that the original
20 complaint that we filed made this apparent. The
21 Eleventh Circuit agreed with us.

22 But when the district court dismissed us
23 with prejudice on the original complaint, we made a
24 motion for reconsideration to try to make more explicit
25 what we thought was implicit in this complaint.

1 As a result, the Court did deny us the
2 opportunity to do that. But if you look at that amended
3 complaint, it does talk about the fact that the City
4 operates a Department of Community and Economic
5 Development which takes complaints about fair housing,
6 that tries to mediate it, that counsels, that educates
7 citizens about it, and is in charge of all these kinds
8 of efforts that we thought were part of our original
9 complaint.

10 At the same time, we recognize that the
11 injury to the City is one that comes from the -- the
12 failure to fall into the nondiscrimination principles
13 embodied in the Fair Housing Act. And so those two
14 buckets do exist in this complaint. And if they don't,
15 then they do exist if we had the opportunity to amend
16 the complaint and make it even more explicit.

17 And --

18 JUSTICE SOTOMAYOR: I'm looking at the Joint
19 Appendix, page 186, your opening paragraph where you
20 say, "BoA's conduct has harmed the residents of Miami
21 and impaired the" -- "the City's strong, long-standing,
22 and active commitment to open integrated residential
23 housing patterns and its attendant benefits of creating
24 a stable community -- community."

25 And then you go on to the specific damages,

1 the loss of tax revenues, and increased expenses.

2 It's those types of allegations in your
3 amended complaint that you're pointing to?

4 MR. PECK: I -- I point to those. I point
5 to those on -- on 232 and 233, which describe the
6 operation of -- or our Department of Community and
7 Economic Development.

8 And so as a result --

9 JUSTICE SOTOMAYOR: This pretty much tracks
10 Havens and Gladstone.

11 MR. PECK: It does, indeed, Justice
12 Sotomayor.

13 As so -- so a result, we think that
14 regardless of whether you take the Article III approach
15 to standing in this case, or take a more narrow
16 formulation that depends on the fact that we -- our
17 aggrievement is tied to violations of the Act, the City
18 of Miami has standing.

19 And -- and the -- I don't understand either
20 bank in their briefs should disagree with us on that as
21 long as we make those pleadings. And so it seems odd
22 that we would be prevented from making those pleadings
23 as explicit as possible, certainly under Rule 15.

24 JUSTICE KENNEDY: Do you think you're a
25 victim of discrimination? Because it seems to me the

1 damages that you seek are not going to be paid to those
2 who were the direct victims of the discrimination.

3 MR. PECK: We are seeking -- we are
4 direct -- a direct victim. This Court has repeatedly,
5 in all three cases dealing with standing under the Fair
6 Housing Act, recognized that it's direct and indirect
7 damages that are at issue; that plaintiffs who are
8 indirectly harmed are also harmed. And our -- we are
9 suing for our own injuries. We do not have parens
10 patriae status to sue for our residents.

11 CHIEF JUSTICE ROBERTS: But your injuries
12 are derivative of the injury to the homeowners who had
13 the subprime mortgages and who suffered the foreclosure
14 and so on. You don't start with you. I understand your
15 argument that you're down the line, but I -- I don't see
16 how you can say that your loss of property taxes is a
17 direct injury.

18 MR. PECK: It is a -- what -- what we're
19 saying is the injury here is the injury to our interest
20 in an integrated community that has those business and
21 social opportunities that this Court found cognizable in
22 -- in Gladstone.

23 CHIEF JUSTICE ROBERTS: Where -- where is
24 the limit to that? I mean you asked for property taxes,
25 but presumably you suffer loss of sales taxes because of

1 the blight on the community. It's less attractive to
2 tourists so you lose tourist revenues. Why -- why would
3 -- would you be able to recover loss in tourist
4 revenues?

5 MR. PECK: We do not think we can.

6 CHIEF JUSTICE ROBERTS: And why is that?

7 MR. PECK: And that's --

8 CHIEF JUSTICE ROBERTS: I certainly can see
9 the logic. It's not as attractive a city, people are
10 going to go somewhere else and so on.

11 MR. PECK: But cities are in a unique
12 position. This is their neighborhoods. These are their
13 residents. There are zoning laws. The issues of
14 property values and even property taxes are baked into
15 the home loans that are -- are made by the banks. They
16 are part and parcel of the issue here.

17 And the fact is that the cities have an
18 affirmative obligation that require them to -- to look
19 out for fair housing. Miami, among other cities, gets
20 block grants from the Department of Housing and Urban
21 Development that require them to take affirmative --

22 CHIEF JUSTICE ROBERTS: So articulate in a
23 sentence what the difference is. You don't get taxes
24 that you would get from tourists visiting. You do get
25 property taxes. So what is it that cuts off the chain?

1 MR. PECK: Well, we believe that because it
2 has to be tied specifically to the property. So we
3 could get property taxes, but --

4 CHIEF JUSTICE ROBERTS: How do you -- how do
5 you -- how are costs of increased services, whether it's
6 police or whatever, how is that directly tied --

7 MR. PECK: We're not claiming for the
8 increased services of police, but -- but our department
9 that has to look for unsafe structures and -- and find
10 those structures because they've been abandoned after
11 foreclosure, that our department that has to remediate
12 neighborhoods. So this is the other end of having
13 fought against afflictions to fair housing. This is the
14 other end when you try to remediate the neighborhoods
15 and make it whole again. So those efforts are the ones
16 that we seek damages for, and those flow directly from
17 it.

18 Let's note that, in Gladstone, this Court
19 recognized that a city -- a municipality is directly
20 injured in its property values and -- and the taxes that
21 are forgone that go to services, and so that's where we
22 see the direct connection.

23 JUSTICE GINSBURG: Mr. Katyal said that
24 Gladstone never got to proximate cause. It just decided
25 whether there was standing.

1 MR. PECK: Justice Ginsburg, the -- the
2 Court did not describe proximate cause here, but it's
3 hard to read that sentence with anything but referring
4 to proximate cause. It is a direct injury that flows
5 from the discriminatory conduct.

6 Now, one thing that my friend also said was
7 that we are seeking billions. Now, in our complaint
8 we -- we mention the fact that we had lost millions, not
9 hundreds of millions, not billions in property taxes.

10 We note that before the City of Miami
11 brought its case, the cities of Memphis and Baltimore
12 both brought cases, and they ended up settling cases
13 with identical types of allegations for less than
14 10 million each. So we are not talking about huge sums
15 of money that --

16 CHIEF JUSTICE ROBERTS: Well, presumably one
17 of the issues factored into the settlement was the
18 question that's presented today. In other words, if --
19 if you had prevailed they wouldn't have to give up a
20 percentage on the possibility that they might not be
21 stating a claim.

22 MR. PECK: You know, it's possible. At that
23 point I don't believe anyone had raised proximate cause
24 as a separate issue, but the cities had survived
25 multiple motions to dismiss that went to the zone of

1 interest, so that is what caused other cities to see the
2 survival of that and the settlement of those cases as a
3 possibility to prove these cases.

4 JUSTICE SOTOMAYOR: Mr. Peck, would you go
5 back to the question the Chief started with, which is,
6 how do you define the limits of your foresee --
7 foreseeability tests? Clearly less tourism. Less sales
8 tax. Less of a lot of other things can be potentially
9 foreseeable, but you're suggesting they are not
10 recoverable. So is it because they are not foreseeable
11 or is it because they are not measurable?

12 MR. PECK: I think they are difficult to
13 measure. And they -- they may be foreseeable, but I
14 think that also there is the potential for superseding
15 events that cut off the causal chain there.

16 But here when you --

17 JUSTICE KENNEDY: You want us to use the
18 word, the phrase, the concept "proximate cause" in
19 determining how far damages extend?

20 MR. PECK: You know, I -- I think it -- it
21 provides some help, but not a great deal of help.

22 In Lexmark, for example --

23 JUSTICE KENNEDY: So -- so what -- where do
24 I turn next?

25 MR. PECK: Well, you know -- you know, in

1 Lexmark the guidance that this Court gave was that
2 damages incurred for the very conduct the statute
3 prohibits. We think that what we've done is propose an
4 approach --

5 JUSTICE KENNEDY: The statute doesn't
6 prohibit decreasing property tax values.

7 MR. PECK: But it does prohibit -- it
8 prohibits discrimination in housing, and this is one of
9 the damages that we suffer that is directly from -- the
10 result of these kinds of home loans. So therefore,
11 we've -- we've tried to cabin our damages with respect
12 to these specific properties and -- and we -- damages
13 that they generate directly to the City.

14 You know, all proximate cause requires is a
15 sufficient connection between the alleged misconduct and
16 the result, and it includes any injury the statute seeks
17 to protect against. So here we have injuries that the
18 statute seeks to protect against. My friend doesn't
19 disagree that those injuries are protected by the
20 statute, and, certainly, in Gladstone and Havens, those
21 injuries are the injuries that this -- this Court
22 recognized.

23 So the question then becomes what's
24 appropriate damages? We think we have proposed damages
25 that are tightly connected to the actual injury that the

1 City has suffered.

2 JUSTICE BREYER: Do we have to go into that,
3 or not? I'm not -- not saying we should or shouldn't,
4 but I mean, do we have to to decide this case, decide
5 the damages, what damages are appropriate?

6 MR. PECK: You do not need to decide that.
7 In fact, one of the things that the Eleventh Circuit
8 noted is that in the time between when the briefs were
9 written and when we argued the case, this Court came
10 down with the decision in Inclusive Communities, and in
11 that decision, the Court's mentioned that there is a
12 proximate-cause pleading standard that needs to be
13 incorporated. And the Eleventh Circuit said, we are not
14 going to delve into what that exactly is and remand it
15 to the district court for that decision. And we think
16 that that -- that can play out in -- in the further
17 litigation of this lawsuit.

18 CHIEF JUSTICE ROBERTS: So if we include
19 language along the lines that don't worry, it's not
20 going to be very much based on the experience in -- in
21 Baltimore and -- and Memphis?

22 (Laughter.)

23 MR. PECK: Well, I just think that the --
24 you know, the fact that our -- our opponents have
25 indicated that we are talking about billions and

1 billions of dollars and that this is about the 2008
2 financial crisis, which I also want to deny, needed a
3 response.

4 And -- and -- and with respect to the
5 financial crisis, if -- if the 2008 financial crisis
6 was, indeed, the purpose of this lawsuit, then the
7 statute of limitations, which is two years, would
8 have -- would have ended this lawsuit a long time ago.

9 But instead what we found, and what the
10 Eleventh Circuit acknowledged, is that while the kinds
11 of loans -- the financial crisis was set off by subprime
12 lending. But the kinds of loans that are being offered
13 here have taken different forms, but the underlying
14 practice remains the same, that minority borrowers are
15 getting more expensive and riskier loans that are
16 quicker to foreclosure, and -- and that foreclosure may
17 be as many, for some minorities, seven times as
18 frequently as the non-minority borrowers.

19 CHIEF JUSTICE ROBERTS: Is there -- is there
20 a difference? I couldn't -- the -- the complaint was
21 not clear to me, anyway, between subprime loans and
22 predatory loans.

23 MR. PECK: You -- predatory loans are used
24 as sort of a generic term to talk about a taking
25 advantage of a borrower. Subprime loans are -- are

1 simply those loans that have interest rates that are so
2 low that it looks like it's a wonderful deal until, of
3 course, you look at some of -- some of the balloon
4 payments that are later --

5 CHIEF JUSTICE ROBERTS: So are all -- all
6 subprime loans properly categorized as predatory?

7 MR. PECK: I believe that the subprime loans
8 that -- that fueled the financial crisis are all
9 considered predatory.

10 JUSTICE KENNEDY: Suppose you have a
11 business that -- that is losing money, losing employees,
12 because the neighborhood is deteriorating. Do they have
13 a -- a stronger or a weaker claim than you do? They
14 have lost profits from their business because the
15 neighborhood has been debilitated.

16 MR. PECK: I think they have a weaker claim.
17 We have a claim that's tied to the fact --

18 JUSTICE KENNEDY: They are property owners.

19 MR. PECK: They are property owners, but
20 they're also commercial property owners. And -- and
21 there's -- there is no -- no damage to their personal
22 property.

23 But -- but here what we are saying is --
24 if -- if I could step back for a moment. The Endangered
25 Species Act, this Court in *Bennett v. Spears*, recognized

1 that Article III standing applies to the Endangered
2 Species Act, but you still have to make a claim that's
3 based on an interest in the preservation of animals.
4 You can't make a claim based on discrimination as --
5 that applies to housing discrimination or something like
6 that. There is some generalized zone of interest that
7 ties the statute to the cause of action.

8 Here I say that the City has a special
9 interest in fair housing and an integrated community
10 that the FHA is designed to vindicate. The employer
11 does not. The local dry cleaner does not. Now, they
12 have this unique relationship to the fact that this is
13 their community, their neighborhoods, their residents,
14 which they zone, and they decide how the property is
15 supposed to be used, and they provide services to every
16 one of these residents, and so, therefore --

17 CHIEF JUSTICE ROBERTS: But wouldn't the
18 business owner have an interest in running his business
19 in an integrated vibrant neighborhood just as the City
20 would have, I would say, a less direct interest in
21 having that neighborhood preserved in the City?

22 MR. PECK: You know, it may be so that a
23 particular business does have that interest. But I
24 think that it's very difficult to -- to claim the kinds
25 of damages that you've claimed.

1 Remember, one difference between the FHA
2 and -- and Title VII, for example, is that we recognize
3 indirect harms. We allow neighbors, testers, nonprofit
4 organizations, and cities, and developers, and real
5 estate brokers, all to sue to vindicate that interest.

6 We don't allow the -- the equivalent of a
7 neighbor, a co-worker, to bring an action for
8 discrimination that's been visited upon one of their
9 colleagues. We don't allow others within that kind of
10 realm to bring these actions. And I think that's part
11 of the problem that a business that makes this claim
12 might have.

13 So in the end, what I'm -- I'm suggesting is
14 that there are direct injuries by virtue of these two
15 what -- what my friend describes as buckets. A direct
16 injury to the City in its efforts to secure fair housing
17 by draining those resources, and those resources are
18 recoverable, and that that, indeed, satisfies any kind
19 of proximate cause, as well as an injury to that
20 interest in an integrated community that allows the
21 business opportunities, the social opportunities, the
22 professional opportunities to flow that this Court
23 recognized in the Gladstone case and suggested that the
24 appropriate -- and even my friend in his brief suggested
25 the appropriate damages in such an instance is the loss

1 of property value and property taxes, which, frankly,
2 are part and parcel of this whole mortgage loan
3 industry.

4 So we are not asking for something that's
5 different, that's out of the realm, that's away from
6 what this process is. But something that's integral to
7 that process.

8 So in the end what we suggest is the City of
9 Miami is not so marginally involved in Fair Housing, is
10 not working inconsistently, and its injuries are so fair
11 afield from it that we are outside the zone of interest,
12 whatever zone of interest applies, because, after all,
13 it's not a very demanding test. And there is a reason
14 for that, and that's because we are aggrieved in every
15 sense of the word by the discrimination that was
16 propounded here.

17 And at the same time, we think that that
18 statement from Lexmark that I quoted earlier -- that it
19 has to essentially flow from the fact that there was
20 some violation of the Act, is it sufficient too? And in
21 each instance, we think our -- our injury is direct, but
22 even if it were to be examined more minutely, as my
23 friend suggests, those minute steps are all true of the
24 individual borrower who has to take out a discriminatory
25 loan, who has to then default, who has to then arrive

1 in -- in foreclosure, who has to find that he has to
2 abandon that house, and then he can bring that lawsuit
3 still, because all those different steps are -- you
4 know, the -- the -- the financial state of the economy,
5 the -- the nature of his job situation, his family
6 situation, all have effects on that. But we recognize
7 that this is proximately caused -- his damages are
8 proximately caused from the injury that the Fair Housing
9 Act recognizes.

10 So for those reasons, I suggest that this
11 Court ought to affirm the Eleventh Circuit.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Gannon.

14 ORAL ARGUMENT OF CURTIS E. GANNON

15 FOR UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE RESPONDENTS

17 MR. GANNON: Mr. Chief Justice, and may it
18 please the Court:

19 In Gladstone, this Court concluded that a
20 municipality was injured if discriminatory housing
21 practices caused a reduction in property values and,
22 therefore, diminished its tax revenues. Congress
23 recodified that result with its 1988 amendments to the
24 Fair Housing Act, and the Court should hold that the
25 same injury is still cognizable today, whether an

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

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

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

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

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

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

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

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

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

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

1 that what we are saying --

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

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

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

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

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

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

24 MR. GANNON: Yes. And the --

25 JUSTICE BREYER: -- not because of causation

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

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

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

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

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

7 MR. GANNON: I think --

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

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

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

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

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

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

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

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

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

1 discrimination, then they can sue.

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

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

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

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

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

15 JUSTICE KENNEDY: That is my hypothetical.

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

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

10 JUSTICE SOTOMAYOR: So your answer --

11 JUSTICE KAGAN: Perhaps -- please.

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

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

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

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

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

8 MR. GANNON: To the extent --

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

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

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

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

1 owner, but --

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Yes.

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

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Katyal, you have four minutes.

1 REBUTTAL ARGUMENT OF NEAL K. KATYAL

2 ON BEHALF OF THE PETITIONERS

3 MR. KATYAL: Four points, Your Honor.

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

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

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

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

25 Their own proximate-cause tests, as our

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

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

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

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

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

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

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

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

22

23

24

25

| A | 37:25 add 52:6 added 11:22 addition 52:7 additional 27:8 27:14 address 46:5 administrative 22:25 adopt 25:14 55:19 57:17 advanced 7:7 advantage 39:25 advisor 21:3 affirm 44:11 affirmative 33:18,21 afflictions 34:13 afford 49:3 afield 43:11 47:20,23 50:1 50:6 African-Amer... 7:8 AGC 22:3 agents 51:19 aggrieved 14:12 14:12,16 24:16 24:21 25:2 43:14 45:18 57:18,19 58:5 aggrievement 31:17 ago 13:16 26:19 39:8 agree 28:10 45:24 55:5 agreed 29:21 ahead 19:18 aimed 18:4 AL 1:4,14 Alaska 47:13 all-comers 25:7 allegations 5:20 6:16 31:2 35:13 allege 55:7 | alleged 5:3 37:15 allow 17:16 18:3 19:12 42:3,6,9 57:12 58:6 allowing 55:19 allows 25:3,7 42:20 57:18 amend 30:15 amended 30:2 31:3 amending 20:3 amendments 44:23 America 1:3 4:4 55:14,18 amicus 2:8 3:10 44:15 analysis 46:1 48:10 animals 41:3 announced 22:11 answer 4:14,16 4:19 10:14,24 18:4 23:25 27:15 52:10,12 56:3,7,24 answers 50:5 anti-discrimin... 7:9,24 8:1,12 8:14,25 9:2 10:5 13:2,6,13 anticipating 20:17 anyway 39:21 apartment 53:20 apologize 6:25 apparent 29:20 APPEARAN... 2:1 Appendix 6:11 30:19 applied 26:14 applies 19:22 20:10 22:25 | 41:1,5 43:12 approach 31:14 37:4 appropriate 37:24 38:5 42:24,25 area 6:20 areas 16:5 27:9 argue 20:24 argued 38:9 47:3 56:12 argument 1:24 3:2,5,8,12 4:3 4:8 9:22 12:15 12:22 20:20 25:11 29:1 32:15 44:14 45:7 55:1 arguments 20:25 arrive 43:25 Article 17:25 20:2,6 21:5,11 23:9,15,24 24:20 31:14 41:1 45:1 48:10 articles 47:14 articulate 33:22 artificially 48:20 asked 32:24 56:5 asking 43:4 asks 6:11 aspects 23:5 assert 7:5 13:24 asserted 27:20 Assistant 2:6 23:17 associated 47:8 assume 49:3 53:19 attendant 30:23 Attorney 23:17 attractive 33:1,9 attributing 6:7 atypical 45:18 | avoid 56:6 |
|---|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| B | back 7:3 16:14 23:21 27:10 36:5 40:24 45:19 backdrop 20:4 bad 55:13 baked 33:14 balance 27:16 balloon 40:3 Baltimore 35:11 38:21 bank 1:3 4:4 31:20 55:14 bank's 55:10 banks 5:22 7:16 33:15 banks' 29:7 base 6:17 8:20 17:21 56:16 based 38:20 41:3,4 50:16 53:7 bases 13:5 basic 13:18 27:18 53:10 basically 5:23 bears 19:1 becoming 13:22 14:19 16:9,10 behalf 2:2,4 3:4 3:7,14 4:9 29:2 55:2 believe 34:1 35:23 40:7 benefits 29:12 30:23 Bennett 40:25 better 13:23 beyond 25:18,21 bill 23:12,13 billions 16:24 19:14 35:7,9 38:25 39:1 binding 20:21 | | | |

| | | | | |
|-------------------------|-------------------------|-------------------------|---------------------------|-------------------------|
| Bishops 46:23 | 29:17 30:14 | 28:21 29:12 | Circuit 29:21 | claiming 34:7 |
| bit 25:17 27:11 | 42:15 | 34:24 35:2,4 | 38:7,13 39:10 | Clause 46:22 |
| blight 15:3,6,11 | business 29:13 | 35:23 36:18 | 44:11 | cleaned 49:2 |
| 15:13 33:1 | 32:20 40:11,14 | 37:14 41:7 | circumstance | cleaner 41:11 |
| 57:6 | 41:18,18,23 | 42:19 46:5,10 | 11:14 | 45:22 46:19 |
| blighted 13:23 | 42:11,21 51:14 | 46:18 48:4,7,7 | circumstances | clear 23:7,11 |
| 14:20 16:9 | busting 48:17,18 | 49:14 50:2 | 5:11 | 39:21 46:22,23 |
| block 22:2,16 | | 55:23 58:17 | cited 6:18 | 47:17 |
| 33:20 48:17,18 | C | caused 15:11 | cites 55:15 | clearly 29:18 |
| blue 55:5 | C 3:1 4:1 | 36:1 44:7,8,21 | cities 4:12,20 5:8 | 36:7 |
| BoA's 30:20 | cabin 37:11 | 48:1,2,3,5,9 | 5:15 13:20 | close 26:9 46:13 |
| board 51:8 | call 10:8 | 49:5 51:20 | 14:3 33:11,17 | closely 48:12 |
| born 26:18 | capable 16:10 | 54:17 | 33:19 35:11,24 | 50:2,11 |
| borrow 10:5 | carry 14:22 | causes 15:3 16:3 | 36:1 42:4 | co-worker 42:7 |
| 13:3 | carving 48:8 | 56:21 | 55:18 57:2 | Cobb 55:16 |
| borrower 39:25 | case 4:4,6,12 | causing 15:6 | 58:6 | code 25:6 |
| 43:24 | 6:10 8:16 9:4 | 16:4 | citizens 30:7 | codify 22:23 |
| borrowers 29:8 | 9:18 10:11 | CEO 9:11 | city 1:7,17 4:5 | cognizable |
| 29:9 39:14,18 | 13:15 22:3,4 | cert 55:14 | 5:11,16,23 6:4 | 32:21 44:25 |
| borrowing 7:25 | 22:16 31:15 | certainly 9:21 | 6:8,21 7:2,5,13 | 52:13 |
| 21:21 22:8 | 35:11 38:4,9 | 13:25 17:21 | 7:24 9:3 10:4,9 | colleagues 42:9 |
| bottom 8:19 | 42:23 54:14 | 22:15 31:23 | 10:10,14,18,25 | combat 4:22 |
| breadth 45:10 | 56:11 58:19,20 | 33:8 37:20 | 11:15 12:3,15 | 6:12 10:17 |
| Breyer 9:23 | cases 8:19 9:8 | 52:20 | 12:20,24 13:1 | combatting 5:17 |
| 38:2 46:17 | 12:12 19:23,25 | chain 19:11,13 | 13:23 14:19 | come 17:16 |
| 47:10,22,25 | 21:19 23:5,7,8 | 19:13 33:25 | 15:8,20,21 | 23:19 27:10 |
| 56:3 | 23:8 24:19 | 36:15 | 16:2,4 17:16 | 29:13 45:4,25 |
| brief 18:10,11 | 28:13 29:6 | challenge 52:4 | 18:12 26:4 | 57:11 58:1,6 |
| 42:24 50:20 | 32:5 35:12,12 | change 23:19,21 | 29:5,12 30:3 | 58:10 |
| 55:5 56:1,18 | 36:2,3 45:10 | 52:24 58:14 | 30:11 31:17 | comes 30:11 |
| briefed 56:11 | 51:17,23 | changes 52:18 | 33:9 34:19 | coming 14:11 |
| briefs 27:3 | categorized 40:6 | changing 23:16 | 35:10 37:13 | 48:21 |
| 31:20 38:8 | category 10:20 | 53:4 | 38:1 41:8,19 | commercial |
| bring 12:12 | 11:14 | chapter 14:13 | 41:21 42:16 | 40:20 |
| 22:14 42:7,10 | causal 36:15 | charge 30:7 | 43:8 46:7 49:4 | commission |
| 44:2 47:17 | 47:17 | Chief 4:3,10 | 49:16 52:23 | 15:10,13 50:16 |
| 52:25 53:25 | causal-related | 12:13 17:6 | 53:6,11,13,25 | commissions |
| 54:3,13 55:20 | 46:24 | 28:24 29:3 | 54:3,12,22 | 51:7 |
| broad 45:1,20 | causalities 12:2 | 32:11,23 33:6 | 57:24 58:1 | commitment |
| broader 55:12 | causation 19:13 | 33:8,22 34:4 | City's 6:12 | 30:22 |
| brokers 42:5 | 19:14 47:25 | 35:16 36:5 | 29:11 30:21 | communities |
| 50:16,18 51:18 | cause 4:18,25 | 38:18 39:19 | Civil 23:18 | 13:17 14:18 |
| brought 9:16 | 6:2 7:11 11:16 | 40:5 41:17 | claim 7:6 35:21 | 15:1 16:9,10 |
| 29:5 35:11,12 | 15:24 17:1,9 | 44:12,17 47:2 | 40:13,16,17 | 38:10 52:3 |
| bucket 7:4 10:13 | 18:21 19:1,13 | 50:4 53:6,9,21 | 41:2,4,24 | 53:4,12 |
| 11:2,4 | 24:1 25:9 27:5 | 54:2,12,19,24 | 42:11 | community 12:5 |
| buckets 10:13 | 27:6,12,18 | 58:18 | claimed 41:25 | 13:14,22 14:23 |

| | | | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 17:2,4 29:14 30:4,24,24 31:6 32:20 33:1 41:9,13 42:20 46:21 51:7 53:11,16 community-ce... 14:9 17:18 companies 10:3 57:13 company 49:8 49:25 50:5 complaining 49:25 complaint 5:21 6:10,11 7:2,23 13:4 15:5,21 16:11,15,16,18 17:14 18:9 19:8 25:14,19 26:3,17,19 29:17,20,23,25 30:3,9,14,16 31:3 35:7 39:20 55:4,13 complaint's 56:17 complaints 25:24 30:5 55:15,20 completely 28:22 complex 53:20 components 27:14 composition 52:25 concentrated 16:5 concept 36:18 concepts 17:18 concerned 8:11 57:1,2,4 concession 10:8 10:8 12:14 concluded 44:19 conclusion | 57:11 concrete 4:20 10:16 50:5 conditions 48:15 conduct 17:3 27:20 30:20 35:5 37:2 46:14 48:12,22 55:10 confused 27:4 Congress 8:5 12:10 13:10,18 14:3,7 20:3 21:2,25 22:5 23:7,12,15,19 23:21 24:15 26:11 44:22 45:19 49:15 50:9,12 52:19 57:1,3,21 58:4 58:9 Congress' 14:16 congressional 20:10 21:24 22:21 49:13 56:25,25 57:3 57:9,17 congressman 21:3,4 connected 37:25 48:12 50:2 connection 34:22 37:15 46:14 47:17 considered 40:9 consistent 9:20 56:9 consistently 21:10 consolidated 4:5 construing 49:14 contemplated 52:14,15,19 corner 48:25 49:21 51:11 Corporation 1:3 | 4:5 correct 8:23 18:21,24 corresponding 54:10 costs 11:6 14:21 14:21 34:5 47:7 counsel 28:24 44:12 54:24 55:15 58:18 counsels 30:6 counteracted 29:10 County 55:16 couple 13:15 23:5 26:19 course 11:20 17:11,24 23:8 26:11 40:3 46:9 court 1:1,24 4:11,18 5:5 6:18 8:11 9:13 9:16 18:1 19:3 19:6,12 20:1 20:11,12,13,19 20:21 21:23 22:4 24:3,11 24:19 25:10,16 25:16,19,21 26:25 27:17 29:4,22 30:1 32:4,21 34:18 35:2 37:1,21 38:9,15 40:25 42:22 44:11,18 44:19,24 45:8 45:11 46:6,9 46:10 49:11,16 50:8 51:2,22 52:2,20 56:9 56:22 Court's 9:7 10:1 12:23 21:19 38:11 cover 53:2 | covered 25:25 50:6,7 creating 30:23 creative 26:16 crisis 16:23 19:17 25:20 26:22 39:2,5,5 39:11 40:8 curiae 2:8 3:10 44:15 CURTIS 2:6 3:9 44:14 customer 50:1 cut 10:6 13:3 23:6 25:13 36:15 45:5 56:22 cuts 33:25 cutting 8:13 23:20 <hr/> D <hr/> D 4:1 D.C 1:20 2:2,7 damage 40:21 damaged 28:5 damages 10:25 11:3,21 12:4 12:19 15:16 16:21,22 17:5 17:20,20 18:22 19:1,2,7 25:7 25:20 26:15 29:6 30:25 32:1,7 34:16 36:19 37:2,9 37:11,12,24,24 38:5,5 41:25 42:25 44:7 55:11 data 22:11 day 26:10 Days 23:17,22 24:5 deal 14:8 36:21 40:2 dealing 32:5 | dealt 14:3 17:11 debilitated 40:15 decide 24:12 38:4,4,6 41:14 47:3 decided 18:1 23:21 24:13 34:24 45:11 decision 10:1 12:24 38:10,11 38:15 decline 54:8,10 decrease 46:7 decreased 49:17 decreasing 37:6 55:9 default 43:25 defaults 18:14 18:15 defendant 5:18 defendant's 4:22 10:17 12:6 17:3 define 36:6 definitely 27:7 definition 24:18 24:20,22 25:1 45:18 48:8 delta 17:1 delve 38:14 demanding 43:13 deny 30:1 39:2 department 2:7 8:5 12:12 14:5 30:4 31:6 33:20 34:8,11 57:23 depends 31:16 46:11 depleted 8:20 derivative 32:12 describe 29:16 31:5 35:2 describes 42:15 desegregation |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 51:24 52:9 designed 41:10 deteriorating 40:12 determining 36:19 48:4 deterred 25:1 developer 52:3 developers 42:4 51:18 developing 52:8 development 22:10 30:5 31:7 33:21 dicta 20:25 21:13 difference 28:2 28:17 33:23 39:20 42:1 different 6:15 10:12 24:21,25 28:22 39:13 43:5 44:3 48:10 51:11 56:17 difficult 36:12 41:24 diminished 8:17 44:22 49:19,22 diminution 13:5 17:21,23 direct 6:18 8:3 26:8 27:19 28:2,7,18 32:2 32:4,4,6,17 34:22 35:4 41:20 42:14,15 43:21 56:8 57:22 58:2,7 directions 58:3 58:16 directly 6:8 12:8 26:5 34:6,16 34:19 37:9,13 46:7 49:17 52:18 56:16 directness 26:3 | 27:8 56:1 disabled 20:14 disagree 31:20 37:19 46:1 discrete 4:21 5:17 27:9 discrimination 5:17 7:17 9:10 9:12 11:9 13:11 14:8 15:2 28:5,7 29:15 31:25 32:2 37:8 41:4 41:5 42:8 43:15 45:6,23 47:8 51:1 53:5 53:7,14 57:10 discriminatory 5:22 8:1 18:13 18:14 35:5 43:24 44:20 45:13 46:15 48:14 50:11 51:21 52:5 53:2 54:17 discussed 23:13 50:19 discussion 23:14 dismiss 35:25 dismissed 29:22 disputing 50:23 distance 48:6 distinctive 13:13 district 29:22 38:15 diversity 26:7 doctrine 20:10 21:22,25 26:13 doctrines 4:17 doing 16:6 19:11 24:8 25:5 48:9 dollars 16:24 19:14 39:1 55:17 door 9:13 10:4 55:22 doubt 9:9 49:2 | downstream 8:9 15:22 57:10 draining 42:17 Drew 23:17,22 24:5 dry 41:11 45:22 46:19 <hr/> E E 2:6 3:1,9 4:1,1 44:14 earlier 43:18 57:16 economic 8:13 9:4,9 30:4 31:7 50:22 52:2 economy 44:4 educates 30:6 effect 48:22 50:10 effects 44:6 efforts 29:11 30:8 34:15 42:16 either 11:15 31:19 48:5 Eleventh 29:21 38:7,13 39:10 44:11 eliminate 11:8 eliminates 56:1 else's 7:25 10:5 13:3 45:23 embodied 30:13 emphasize 28:6 employees 6:4,5 40:11 57:5 employer 41:10 employers 57:4 empowered 8:6 14:4,7 57:22 enables 26:12 encourage 16:13 endangered 24:11 25:3 40:24 41:1 ended 35:12 | 39:8 endure 50:13 enforce 5:24 53:13 enforcement 6:14 14:7,13 engaged 5:22 ensuring 28:8 53:12 entire 13:18 entitled 14:13 50:12 enumerated 52:21 environment 12:16 equally 57:4 equivalent 42:6 ESQ 2:2,4,6 3:3 3:6,9,13 essentially 13:22 43:19 establish 51:17 52:24 establishes 24:9 establishing 24:19 estate 42:5 50:15,18 51:19 51:19 52:3 estate-related 48:16 ET 1:4,14 events 36:15 eviscerate 4:17 exactly 5:14 38:14 examined 24:19 43:22 example 19:5 36:22 42:2 47:16 exist 30:14,15 existed 17:4 existing 5:13,14 exists 17:2 expand 22:12 | 25:17 58:15 expanding 58:17 expend 5:23 expenditures 4:22 6:12,19 6:21 10:16 expenses 31:1 expensive 29:8 39:15 experience 38:20 explains 56:1,19 explicit 24:10 29:24 30:16 31:23 express 21:20 22:5 24:3,7,7 extend 15:16 18:3 36:19 extent 7:2,19 8:18 10:18 13:4 15:20 26:4,8 47:5 49:22,24 53:8 53:17 54:5 <hr/> F F 6:10 facilitating 22:14 fact 30:3 31:16 33:17 35:8 38:7,24 40:17 41:12 43:19 factored 35:17 fail 17:9 fails 4:24 50:24 failure 30:12 fair 4:14 14:2 26:17 28:8 29:11 30:5,13 32:5 33:19 34:13 41:9 42:16 43:9,10 44:8,24 45:10 53:1 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|--------------------------|-------------------------|-------------------------|-------------------------|-----------------------|
| Fairfax 2:4 | forcing 7:16 | Gannon 2:6 3:9 | 54:22 56:7,7 | 28:1 31:10 |
| fall 4:20 15:8 | foreclose 10:23 | 44:13,14,17 | 56:10,14 58:13 | 37:20 47:6 |
| 26:1 30:12 | foreclosure | 45:21,24 46:25 | go 19:18 21:10 | 52:7 |
| falls 27:18 | 16:23 19:17 | 47:4,19,24 | 23:14,23 24:4 | Havens-like |
| family 44:5 | 25:20 26:22 | 48:3,24 49:7 | 30:25 33:10 | 5:15 |
| far 15:15,15 | 32:13 34:11 | 49:10 50:7,18 | 34:21 36:4 | hear 4:3 |
| 17:10 18:3 | 39:16,16 44:1 | 51:9,13,16 | 38:2 46:17 | heard 20:19 |
| 36:19 48:5 | 49:3 54:15 | 52:17 53:8,15 | 48:19 50:25 | 29:16 47:10,10 |
| FARGO 1:14 | foreclosures | 53:23 54:5,16 | goals 14:2 | help 36:21,21 |
| Federal 25:6 | 16:4,5 18:15 | 54:20 | goes 28:21 | 46:18 |
| 57:20 | 18:16 | gardener 49:1,3 | going 12:18 21:5 | high 21:23 |
| feel 21:14 | foresee 36:6 | 56:6 | 22:3,4 26:24 | history 23:11 |
| FHA 5:8 13:10 | foreseeability | gardeners 57:14 | 32:1 33:10 | hold 44:24 |
| 13:12 28:4 | 27:6,6,13 | general 2:7 12:4 | 38:14,20 45:25 | holdings 20:11 |
| 41:10 42:1 | 28:19 36:7 | 23:18 25:11,12 | 47:15 51:7 | 20:21,24 |
| fighting 47:8 | 48:6 | 27:23 55:23 | good 52:4 58:14 | Holmes 26:25 |
| figure 49:15 | foreseeable 36:9 | General's 18:10 | grants 33:20 | 27:1,1 |
| 57:9 | 36:10,13 | 20:20 56:18 | great 36:21 | Holmes' 26:23 |
| filed 29:20 55:15 | forgone 34:21 | generalized 41:6 | grocer 48:25 | home 10:11,15 |
| 58:7 | forms 39:13 | generally 27:18 | grocery 51:11 | 33:15 37:10 |
| filing 28:3 | formulation | 51:6 | groups 28:4 | 47:6 49:1 |
| financial 39:2,5 | 10:9 31:16 | generate 37:13 | guess 15:25 | 53:22 |
| 39:5,11 40:8 | fought 34:13 | generic 39:24 | 20:23 27:3,9 | homeowner |
| 44:4 | found 9:1 32:21 | generically | guidance 37:1 | 54:9 |
| find 34:9 44:1 | 39:9 | 51:14 | guide 21:25 | homeowners |
| fine 10:19 | four 54:25 55:3 | getting 39:15 | | 32:12 |
| finishing 10:24 | framework 47:6 | Ginsburg 5:6,12 | H | Honor 7:19 |
| fired 9:11,12 | frankly 43:1 | 8:15,22 9:15 | happen 8:2 | 21:17 55:3 |
| 21:16,18 22:19 | free 15:1 29:14 | 10:14 15:7 | happened 22:7 | house 22:21 |
| 57:5 | frequently 39:18 | 17:22 18:4 | hard 12:8 35:3 | 23:1,4,4,6 44:2 |
| first 4:4,16 8:25 | friend 29:16 | 22:9 34:23 | 56:2 58:8 | housing 4:14 |
| 10:13,13 20:9 | 35:6 37:18 | 35:1 | harder 51:16 | 5:24 13:15 |
| 25:6,13,18 | 42:15,24 43:23 | Ginsburg's 7:4 | harm 7:9 9:3,4 | 14:2,8 26:17 |
| 55:4 56:23 | 45:4 51:25 | give 12:11 35:19 | 12:20 15:21 | 28:8 29:11,14 |
| fit 29:18 | friends 45:24 | 50:4 | 16:1 52:21 | 30:5,13,23 |
| five 56:18 | 50:23 | given 14:16 | 53:18 | 32:6 33:19,20 |
| FLORIDA 1:7 | front 9:11 | Gladstone 6:24 | harmed 8:9 | 34:13 37:8 |
| 1:17 | frustrated 29:10 | 7:3,6,11,21 | 13:17,17 30:20 | 41:5,9 42:16 |
| flow 34:16 42:22 | fueled 40:8 | 8:15,24 9:1 | 32:8,8 57:10 | 43:9 44:8,20 |
| 43:19 52:18 | fully 9:20 | 11:13 15:9 | harms 4:20 | 44:24 45:10,13 |
| flows 35:4 | funds 5:23 | 17:11,22 18:5 | 11:17 13:14 | 46:16 48:14 |
| flunk 18:6 | further 38:16 | 18:6 19:25 | 26:5 42:3 | 50:11 51:21 |
| focusing 13:14 | 47:20,22 50:1 | 31:10 32:22 | 52:17 | 52:5 53:1,2,14 |
| follow 15:14 | 50:6 | 34:18,24 37:20 | Havens 5:16 6:1 | 54:17 57:10 |
| 21:19 | | 42:23 44:19 | 6:3,4,11,16,22 | HUD 8:5 12:12 |
| Footnote 45:8 | | 45:7 46:4 | 10:11 11:11 | 14:5 23:18,23 |
| force 11:23 | | 49:12,18 50:9 | 20:1 22:24 | huge 35:14 |
| | G | | | |
| | G 4:1 | | | |

| | | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>huh-uh 55:23 hundreds 35:9 55:16 hurt 9:10 hypothesis 15:16 hypothetical 9:15 22:20 48:1 51:15</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 13:18 21:4 identical 35:13 identified 7:14 9:2,3 identifies 5:14 57:1 identify 4:20 6:12 12:9,25 13:1 26:5 55:6 identifying 8:12 8:13 10:15 III 17:25 20:2,6 21:5,11 23:9 23:15,24 24:20 31:14 41:1 45:1 48:10 impact 55:7 impaired 30:21 implicit 21:21 29:25 46:2 implicitly 22:1 implied 12:11 important 4:13 46:6 51:2,22 58:12 include 38:18 48:15 includes 37:16 53:4 including 6:13 12:17 17:20 57:24 Inclusive 38:10 52:3 inconsistently 43:10</p> | <p>incorporated 38:13 increase 18:16 18:17 increased 6:19 31:1 34:5,8 increasing 55:9 incur 11:6 incurred 37:2 independent 25:11 indicated 38:25 indirect 28:3,18 32:6 42:3 57:23 indirectly 32:8 individual 13:11 43:24 46:12 53:25 individuals 13:16 induce 48:20 industry 43:3 injunctive 11:20 12:10 17:16 29:6 injured 18:12 34:20 44:20 45:15 46:7 49:17 52:1 54:20,23 injuries 28:3 32:9,11 37:17 37:19,21,21 42:14 43:10 49:5 injurious 27:20 injury 4:25 5:2 7:5 8:12,13,24 8:25 9:9 12:25 13:6,7 27:20 30:11 32:12,17 32:19,19 35:4 37:16,25 42:16 42:19 43:21 44:8,25 45:5 49:11</p> | <p>inquiry 27:13 28:22 46:11 insisted 24:3 25:22 instance 42:25 43:21 instances 5:17 53:7,13 integral 43:6 integrated 11:18 16:10 17:3 29:14 30:22 32:20 41:9,19 42:20 integration 46:20 47:14,16 intended 49:15 53:1,2 intent 49:13 interest 6:1 7:20 7:25 9:5 10:6 11:17 13:2,24 15:1,8,9,18,23 17:11,12,13,15 24:9 28:8 32:19 36:1 40:1 41:3,6,9 41:18,20,23 42:5,20 43:11 43:12 50:21,22 51:24 52:9 53:12,17 55:6 57:17 interests 4:18,25 5:4 8:1 10:16 19:21 24:14 25:12 29:19 52:2 interfere 58:6 interpretation 10:3 25:4,8 55:22 57:18,24 intervene 57:19 58:2 intervening 48:6 56:21 involve 51:23</p> | <p>involved 18:8 43:9 50:19 isolated 53:7 issue 6:1 14:1 32:7 33:16 35:24 52:22 issues 33:13 35:17</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Jama 21:24 Jane 25:1 26:15 job 6:5 44:5 Joint 30:18 judicial 22:25 Justice 2:7 4:3 4:10 5:6,12 6:3 6:9,15,23,25 7:4,15 8:4,15 8:22 9:15,22 9:23 10:7,14 10:22 11:5,8 11:12,22 12:3 12:12,13 13:9 14:5,6,15,24 14:25 15:4,7 15:15,17,25 16:13,17 17:6 17:14,22 18:4 18:20,25 19:16 19:19 20:7,14 20:23 22:9,19 23:3 24:2,6,23 24:24 25:23 26:23 27:2,21 27:25 28:9,11 28:14,17,20,24 29:3 30:18 31:9,11,24 32:11,23 33:6 33:8,22 34:4 34:23 35:1,16 36:4,17,23 37:5 38:2,18 39:19 40:5,10 40:18 41:17 44:12,17 45:20</p> | <p>46:17 47:2,10 47:22,25 48:24 49:8 50:4,15 51:5,10,15 52:10,11,12 53:6,9,21 54:2 54:12,19,24 56:3,5 57:14 57:15,23 58:8 58:11,18</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>K 2:2 3:3,13 4:8 55:1 Kagan 13:9 14:6 14:15,24,25 15:4,17,25 16:13,17 17:14 19:16,19 20:8 20:14,23 22:19 23:3 24:2 25:23 27:2 45:20 52:11 57:16 Katyal 2:2 3:3 3:13 4:7,8,10 5:7,12 6:9,22 7:1,18 8:22 9:19 10:12 11:2,7,10,24 12:7,21 13:9 13:25 14:24 15:4,18 16:13 16:20 17:8 18:7,24 19:3 19:16,17 20:7 20:16 21:17 22:15 23:25 24:6,23,25 26:2 27:15,22 28:9,12,16,20 34:23 54:25 55:1,3 58:11 keeping 24:8 Kennedy 9:22 10:7,22 11:5,8 11:12,22 12:3</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 15:15 18:20,25 31:24 36:17,23 37:5 40:10,18 50:15 51:5,10 51:15 Kerner 15:10,13 key 4:17 kind 9:7 13:5,13 15:2 17:17 19:4,8 25:18 26:15 27:1 42:9,18 58:7 kinds 30:7 37:10 39:10,12 41:24 56:21 knew 23:7 know 6:14 11:25 12:21 15:19 19:5,11 20:11 21:21 22:22 26:7,17 35:22 36:20,25,25 37:14 38:24 41:22 44:4 54:2 57:25 58:9 | lead 18:14,15,16 18:17 legal 45:12,14 legislation 28:6 legislative 23:10 lending 39:12 let's 34:18 48:25 49:3 53:19 Lexmark 5:5 10:1 19:5 24:9 25:10,17 27:22 36:22 37:1 43:18 46:9 50:13 54:7 56:22 liability 18:22 18:23 19:2 25:13,15 56:23 57:12 lifted 16:8 limit 21:6 32:24 45:25 limitation 24:7 46:2 55:24 limitations 39:7 limited 10:25 11:3 52:13 limiting 22:16 limits 20:2,6,21 21:5,11 23:9 23:15,23 36:6 line 8:19 17:22 17:24 32:15 lines 38:19 link 49:10 literally 7:8 litigation 38:17 57:20 little 25:17 27:11 28:2 loan 43:2,25 53:25 loans 5:22 8:2 18:13,14 29:8 33:15 37:10 39:11,12,15,21 39:22,23,25 | 40:1,6,7 local 14:7 41:11 52:4 lodestars 9:7 logic 33:9 long 19:13 31:21 39:8 long-standing 30:21 look 8:3 16:14 18:9,10 19:6 23:10 24:11,12 25:2 30:2 33:18 34:9 40:3 56:7,24 57:9 looked 24:18 looking 13:11 30:18 looks 5:25 7:3 8:10 9:6 26:20 40:2 lose 26:7 29:12 33:2 losing 40:11,11 loss 8:18 31:1 32:16,25 33:3 42:25 lost 6:17,17 35:8 40:14 49:24,25 lot 13:15 19:20 20:12 23:14 36:8 low 40:2 low-priced 48:20 lower 51:7 Lujan 12:24 | making 11:18 12:22 31:22 manufacturer 54:7 marginally 11:19 43:9 mark 21:23 matter 1:23 57:19 58:21 matters 15:20 45:9 mean 4:15 11:5 12:15 20:5,18 20:24 21:2,16 28:11 32:24 38:4 46:24 47:18 meaning 28:18 28:19 means 20:5 24:7 meant 24:13 measurable 36:11 measure 12:19 16:21,22 17:5 17:7 36:13 measured 12:17 mediate 30:6 members 28:4 Memphis 35:11 38:21 mention 35:8 mentioned 38:11 Miami 1:7,17 4:5 9:3 16:23 29:5 30:20 31:18 33:19 35:10 43:9 58:1 microchip 54:7 million 35:14 millions 35:8,9 55:16 minorities 39:17 48:21 minority 28:4 | 29:7 39:14 minute 43:23 minutely 43:22 minutes 54:25 misconduct 4:23 10:17 37:15 moment 40:24 monetary 29:6 money 35:15 40:11 52:8 monitoring 6:19 morning 4:4 mortgage 43:2 54:14 mortgages 32:13 motion 29:24 motions 35:25 motivated 57:25 motivations 58:1 muck 58:3 multiple 35:25 municipality 8:20 34:19 44:20 58:10 |
| <hr/> L <hr/> | | | | <hr/> N <hr/> |
| landlords 9:14 10:2 57:13 language 9:21 9:24 19:24 20:2,5 21:8,9 21:10,15 23:16 23:20,22 38:19 56:13 Laughter 38:22 laundry 45:22 law 5:13,14 58:14 laws 4:13 33:13 lawsuit 4:24 18:3 38:17 39:6,8 44:2 47:18 58:2 lawsuits 9:14 22:14 58:7 | | | | N 3:1,1 4:1 narrow 31:15 nation's 4:13 nationwide 16:24 nature 44:5 46:12 NEAL 2:2 3:3 3:13 4:8 55:1 necessarily 45:14 51:23 need 18:16 22:5 38:6 46:17 47:12 needed 39:2 needs 18:17 38:12 negation 21:20 22:5 24:4 neighbor 42:7 |
| | | <hr/> M <hr/> | | |
| | | magazine 46:19 47:14 56:3 main 12:14 25:9 maintain 16:19 16:20 maintaining 15:1 | | |

| | | | | |
|-------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| neighborhood 7:17 11:18 15:3 40:12,15 41:19,21 48:20 48:22 52:25 | 58:15 open 30:22 opening 10:4 30:19 55:22 opens 9:13 operates 30:4 operation 31:6 opinion 9:1,20 9:21,24 12:25 26:24,25 56:6 opponents 38:24 opportunities 29:13 32:21 42:21,21,22 56:20 opportunity 30:2,15 oral 1:23 3:2,5,8 4:8 9:22 29:1 44:14 order 14:22 22:5 52:25 55:8 organizational 6:5 organizations 42:4 original 29:19 29:23 30:8 ought 44:11 outlay 10:17 12:8 outlaying 5:18 outlier 27:23 outside 43:11 owner 41:18 54:1 owners 40:18,19 40:20 | painted 55:12 Palsgraf 18:22 panic 48:20 paragraph 6:10 30:19 55:5 parcel 33:16 43:2 parens 8:6 12:11 14:4,25 32:9 Paroline 27:17 27:22 part 8:25 30:8 33:16 42:10 43:2 54:9 particular 4:22 13:12 16:5 17:3 23:5 41:23 52:21 53:13,18,19,22 passed 13:10,18 paste 10:6 13:3 45:5 pasting 8:14 patriae 8:7 12:11 14:4,25 32:10 patterns 30:23 payments 40:4 Peck 2:4 3:6 28:25 29:1,3 31:4,11 32:3 32:18 33:5,7 33:11 34:1,7 35:1,22 36:4 36:12,20,25 37:7 38:6,23 39:23 40:7,16 40:19 41:22 peculiar 13:12 people 7:16 33:9 49:6 50:20 percent 26:9 58:14 percentage 35:20 person 14:11,12 14:15 24:13,13 | 25:1,4 45:19 58:5 personal 40:21 persons 13:12 14:14 57:18,19 petition 55:14 55:14 Petitioners 1:5 1:15 2:3 3:4,14 4:9 5:3 55:2 phrase 36:18 picked 9:23 pitch 53:10 places 5:15 27:7 plain 25:1 26:15 plaintiff 45:6,15 52:4 plaintiff's 45:14 plaintiffs 32:7 51:23 plausibly 55:7 play 38:16 plead 7:2 pleading 7:24 38:12 pleadings 31:21 31:22 pleads 15:21 please 4:11 5:7 29:4 44:18 52:11 point 11:13 25:9 31:4,4 35:23 57:16 pointed 52:2 pointing 31:3 points 45:3 55:3 police 6:20 11:23 34:6,8 poor 51:6 position 5:13 7:1 8:3 10:10 14:14 33:12 53:10 58:12 possession 52:16 possibility 35:20 36:3 49:4 | possible 31:23 35:22 possibly 26:22 58:2,4 potential 36:14 potentially 36:8 practice 29:7 39:14 48:19 52:5 practices 44:21 45:13 46:16 48:14,14 50:12 51:21 53:3 54:18 precedence 12:23 precedent 27:11 precisely 24:4 predatory 39:22 39:23 40:6,9 prejudice 29:23 presented 35:18 preservation 41:3 preserve 5:13 17:17 preserved 41:21 presumably 32:25 35:16 57:25 pretty 23:11 27:9 31:9 prevailed 35:19 prevent 10:23 prevented 31:22 preventing 16:7 previously 51:18 prices 48:23 primary 54:9 prime 47:16 principles 18:3 19:9 26:1,23 30:12 56:10 prior 19:23 24:18 private 6:5 14:13 |
| neighborhood 7:17 11:18 15:3 40:12,15 41:19,21 48:20 48:22 52:25 | O O 3:1 4:1 objects 28:7 obligation 33:18 obviously 8:4 odd 31:21 offered 39:12 oh 7:18 9:19 21:12 okay 21:4,14 old 19:24 one-to-one 5:25 25:18 26:9 50:14 54:6 ones 34:15 52:19 | P P 4:1 Pacific 26:24 page 3:2 6:11 9:1 17:23 18:10,11 30:19 55:6,14 paid 32:1 | | |

| | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| problem 12:14 15:6 22:18 23:20 42:11 | providing 29:7 proximate 4:18 4:25 6:2 7:11 11:15 15:24 16:25 17:9 18:21 19:1 24:1 25:9 27:5 27:5,12,18 28:21 34:24 35:2,4,23 36:18 37:14 42:19 46:5,10 46:18 48:4,7 49:14 50:2 55:23 58:17 | quoting 28:1 <hr/> R <hr/> R 4:1 race 9:12 racial 4:22 7:7 10:17 15:2 16:6,8,11 50:25 52:24 raised 9:22 35:23 rates 40:1 ratification 20:10 21:24 rationale 45:1,2 re-enactment 19:24 read 16:15 17:15 23:3 35:3 reading 27:3 56:13 real 42:4 48:16 50:15,18 51:18 51:19 52:3 really 13:14 21:4 23:10 realm 42:10 43:5 Realtors 7:8 reason 22:20 24:4 43:13 48:11 reasons 8:23 20:7 44:10 56:10,22 REBUTTAL 3:12 55:1 recall 51:22 received 29:10 recodified 44:23 recognize 7:22 7:23 13:23,25 30:10 42:2 44:6 recognized 32:6 34:19 37:22 | 40:25 42:23 46:10 49:12,16 50:8 recognizes 7:21 44:9 reconcile 13:8 reconsideration 29:24 recover 11:1,15 11:17,20 12:3 12:15 14:20 17:20 19:15 26:21 33:3 49:20 50:22 recoverable 36:10 42:18 recovery 16:23 redlining 13:21 13:22 14:17,18 16:2,3 reduce 18:18 56:16 reduction 18:17 44:21 56:8,15 56:19 refer 23:4 references 15:13 referring 15:11 35:3 regardless 31:14 regulations 24:18 rejected 45:7 relationship 5:25 25:19 26:9 27:19 41:12 50:13,14 54:6 relief 17:17 29:6 relieved 21:14 remains 39:14 remand 38:14 remediate 34:11 34:14 remedy 5:1 remember 42:1 51:3 | remind 51:3 removed 5:2 rental 48:16 repeatedly 28:14 32:4 46:10 Report 15:10,13 22:21,21 23:2 23:4,4,6 56:25 56:25 57:3,9 representing 53:16 require 21:19 33:18,21 52:5 required 18:12 requirement 26:4 27:8,19 56:1 requires 12:23 37:14 reserve 27:16 28:23 residential 30:22 residents 30:20 32:10 33:13 41:13,16 54:21 resources 42:17 42:17 respect 6:23 15:8 17:13 37:11 39:4 55:4 Respondent 1:8 1:18 Respondents 2:5 2:9 3:7,11 29:2 44:16 responding 14:21 response 39:3 rest 20:12 restaurant 45:22 result 12:5,5 15:12 17:2 30:1 31:8,13 |
| properly 40:6 properties 8:21 37:12 property 8:17 18:18 32:16,24 33:14,14,25 34:2,3,20 35:9 37:6 40:18,19 40:20,22 41:14 43:1,1 44:21 46:7 48:16,22 49:2,11,17,19 49:22 50:10,10 50:17 52:8,16 52:18 54:8 56:8,15,20 57:1 proponents 28:6 propose 37:3 proposed 37:24 propounded 43:16 protect 37:17,18 protected 37:19 prove 36:3 proved 48:2 provide 41:15 provides 36:21 | proximate-ca... 12:1 18:2,6 19:9 26:1,13 26:23 38:12 46:1,2 55:25 56:9,11 proximately 44:7,8 49:5 purpose 39:6 purposes 5:1 7:11,12 14:16 28:3 put 9:17 11:15 24:20 45:19 puts 51:25 <hr/> Q <hr/> qualified 29:9 question 4:12,14 7:4 17:19 18:2 18:22,25 19:20 19:21 35:18 36:5 37:23 47:11,11 49:13 52:13 quibbling 58:13 quicker 39:16 quote 14:13 21:20 27:17 quote/unquote 51:24 quoted 43:18 | | | |

| | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 37:10,16 44:23 55:10 resulted 8:17 results 54:14 revenue 8:18 54:11 revenues 6:17 8:9 14:22 17:24 31:1 33:2,4 44:22 reverse 13:22 14:18 16:3 20:17 right 18:8 57:19 rights 23:18 45:12,14,16 riskier 29:8 39:15 road 12:1 ROBERT 2:4 3:6 29:1 ROBERTS 4:3 12:13 17:6 28:24 32:11,23 33:6,8,22 34:4 35:16 38:18 39:19 40:5 41:17 44:12 47:2 50:4 53:6 53:9,21 54:2 54:12,19,24 58:18 rule 24:10 25:11 25:12 27:23,24 31:23 run 11:25 running 41:18 49:1 runs 12:14,21 | 26:3,22 saying 7:18 8:8 10:23,24 13:21 14:3,11,17 15:7 16:2 32:19 38:3 40:23 47:1 48:21 51:14 56:14 says 10:2 12:24 15:2,11 20:1 21:9,14 22:22 25:12 45:5 55:6,23 57:3 57:24 scenario 5:9 scheme 12:10 57:17 second 4:19 7:4 10:20 11:4,13 11:16 55:11 56:13 Secretary 23:18 23:23 secure 42:16 see 11:12 18:11 32:15 33:8 34:22 36:1 49:10 52:14 seek 32:1 34:16 55:11 seeking 16:22 25:20 26:16,21 29:6 32:3 35:7 55:16 58:14,15 seeks 5:1 37:16 37:18 seen 26:19 51:18 segregated 11:18 12:4,5 12:16,20 17:2 53:4 57:5 segregation 7:6 7:20 11:4,14 15:6,12,14,21 16:1,6,8,12,21 18:3 26:5,5 | 55:7,9 58:16 selling 48:21 sense 43:15 sentence 33:23 35:3 separate 19:19 35:24 services 6:20 14:23 34:5,8 34:21 41:15 set 39:11 settlement 35:17 36:2 settling 35:12 seven 39:17 shareholder 8:10,11 9:8,9 49:8 shareholders 9:25 shelf 23:12 shops 57:7 side 11:16 12:10 45:4 50:23 51:25 sides 21:1 45:25 significance 28:2 significant 46:6 similarly 52:9 simply 12:20 40:1 situated 49:23 situation 5:16 44:5,6 situational 46:11 sixth-step 25:15 sky 58:17 social 29:12 32:21 42:21 Solicitor 2:6 18:10 20:19 55:23 56:18 somebody 45:12 45:23 47:13 48:19 | sorry 6:3,25 7:15 15:25 19:18 28:16 sort 5:22 14:4 27:10 39:24 54:13 sorts 12:17 Sotomayor 6:3,9 6:15,23,25 7:15 24:6,23 24:24 27:21,25 28:9,11,14,17 28:20 30:18 31:9,12 36:4 48:24 49:8 52:10,12 56:5 57:14 58:8,11 sought 19:7 Southern 26:24 Spears 40:25 special 41:8 species 24:12 25:3 40:25 41:2 specific 6:13 10:15 30:25 37:12 47:7 51:20 specifically 20:1 34:2 45:7 48:18 stability 53:12 stable 30:24 staffer 22:22 stage 18:6 standard 19:8 23:1 28:13 38:12 57:8 standing 8:7 9:18 12:11,23 13:20 14:4 17:25 22:12,13 22:17,24,25 23:9,14,21 24:20 28:22 29:18 31:15,18 32:5 34:25 | 41:1 49:5 start 5:4 32:14 started 27:3 36:5 starting 12:23 22:2 26:23 state 14:7 44:4 stated 46:9 statement 24:10 43:18 45:21 statements 28:1 States 1:1,24 2:8 3:10 44:15 53:3 stating 35:21 Station 2:4 status 32:10 statute 13:13,18 14:12 20:3 24:11,12 25:7 26:12 27:11,12 28:19 37:2,5 37:16,18,20 39:7 41:7 45:19 46:14,15 48:13,13 52:14 52:15 58:5 statute-by-stat... 46:11 statutes 5:24 24:17 46:3,12 steerers 7:7 steering 7:8 step 25:13,18 40:24 56:23 steps 5:2 12:2 18:8,11 43:23 44:3 56:18 store 49:21 51:11 strange 22:9,9 stretches 20:2,5 23:9 strong 30:21 stronger 40:13 structures 34:9 34:10 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

| | | | | |
|-------------------------|--------------------------|-------------------------|--------------------------|-------------------------|
| subject 20:15 | Supreme 1:1,24 | 6:13 22:23 | 52:17,23 53:15 | 50:19,21,24 |
| submitted 58:19 | sure 17:8 | 42:3 | 53:16,17 56:2 | 53:19 |
| 58:21 | surprised 9:16 | testers' 6:7 | 56:2 58:8 | transactions |
| subprime 32:13 | survival 36:2 | testify 46:23 | thinking 7:16 | 48:17 51:20 |
| 39:11,21,25 | survive 55:8 | tests 36:7 55:25 | 10:10 23:15 | tried 37:11 |
| 40:6,7 54:14 | survived 35:24 | Texas 13:15 | third 4:24 | tries 30:6 |
| successes 46:20 | suspect 53:23 | Thank 4:10 | Thompson 8:10 | trilogy 45:10 |
| 47:14 | | 28:24 44:12 | 9:8,17,20,23 | troubled 11:12 |
| sue 4:13 5:8,11 | <hr/> T <hr/> | 54:24 58:18 | 9:25 20:12,13 | true 17:21 24:3 |
| 5:15 8:4 10:9 | T 3:1,1 | theory 11:2 | thought 19:4 | 43:23 49:18 |
| 25:4,7 32:10 | take 18:5,9 | 19:10 25:14 | 22:1 29:19,25 | try 17:17 29:24 |
| 42:5 45:23 | 24:18 31:14,15 | 55:19 56:9 | 30:8 53:9 58:4 | 34:14 |
| 51:1 53:6 | 33:21 43:24 | 57:12 | thoughts 20:15 | trying 11:6 |
| 57:13,13,14,22 | 48:25 57:8 | thing 11:13 | three 4:15 19:23 | 14:20 22:23 |
| suffer 32:25 | taken 39:13 | 12:22 14:19 | 19:25 20:7 | 49:15 |
| 37:9 53:18 | takes 30:5 | 35:6 49:18 | 24:19 32:5 | Tuesday 1:21 |
| 54:10 | talk 7:11 9:24 | 57:15 | tied 31:17 34:2,6 | tune 16:24 19:14 |
| suffered 13:2 | 30:3 39:24 | things 4:15 5:18 | 40:17 50:11 | turn 15:24 24:1 |
| 32:13 38:1 | talked 13:14 | 6:13,14 8:9 | ties 41:7 | 36:24 45:3 |
| 57:4,6 | 51:19 | 10:20 12:17 | tightly 37:25 | two 4:17 5:14 |
| sufficient 37:15 | talking 13:4 | 22:22 23:1 | time 13:21 16:7 | 8:19,23 9:7 |
| 43:20 | 14:9 17:10,18 | 36:8 38:7 | 20:20 22:16 | 10:12 22:22 |
| sufficiently | 19:20 25:2 | 48:15,16,17 | 25:6 27:16 | 23:1 29:17 |
| 46:13 48:12 | 35:14 38:25 | 50:1 56:4,21 | 30:10 38:8 | 30:13 39:7 |
| suggest 43:8 | 49:24 54:13 | 57:7 | 39:8 43:17 | 42:14 58:15 |
| 44:10 | talks 17:23 | think 6:23 8:22 | times 39:17 | type 50:3,20 |
| suggested 42:23 | tap 24:5 | 9:6 11:24,25 | Title 24:16 42:2 | 52:21 57:25 |
| 42:24 | tax 6:17 8:9,20 | 12:7,10 14:2 | today 35:18 | types 14:8 31:2 |
| suggesting 36:9 | 13:5 17:21,23 | 15:19,19 16:17 | 44:25 45:4 | 35:13 51:17 |
| 42:13 | 31:1 36:8 37:6 | 17:9,14 18:1,7 | told 55:9 | |
| suggests 13:10 | 44:22 54:10 | 18:20 19:3,4,6 | totally 8:23 | <hr/> U <hr/> |
| 27:11 43:23 | 56:16 | 20:18 21:5,18 | 46:23 56:17 | ultimate 46:8,13 |
| suing 8:16,16 | taxes 32:16,24 | 22:3,17 24:3 | tourism 36:7 | ultimately 17:9 |
| 32:9 | 32:25 33:14,23 | 25:5,25 26:2 | tourist 33:2,3 | unanimous 10:1 |
| suit 16:19,20 | 33:25 34:3,20 | 27:10,17,22 | tourists 12:17 | unanimously |
| 28:3 53:1,25 | 35:9 43:1 | 31:13,24 33:5 | 33:2,24 | 20:13 25:17 |
| suits 46:24 | 55:13 | 36:12,14,20 | traceability | undefined 24:17 |
| 52:14 | tell 5:7,10 23:19 | 37:3,24 38:15 | 48:10 | underlying 9:10 |
| sums 35:14 | tended 29:11 | 38:23 40:16 | tracks 31:9 | 19:7 39:13 |
| superseding | term 39:24 | 41:24 42:10 | traditional | understand 16:1 |
| 36:14 | terms 6:19 11:16 | 43:17,21 45:17 | 26:13 | 19:7 20:4,23 |
| supporting 2:8 | 46:5 48:6,15 | 46:4,8,25 47:4 | traditionally | 31:19 32:14 |
| 3:11 44:16 | test 5:24 19:22 | 47:5,19,20,20 | 50:3 | 50:23 |
| suppose 21:2 | 21:21 22:6,10 | 47:21,22 48:11 | Trafficante | understanding |
| 40:10 | 22:13 43:13 | 49:7 50:1,7,8 | 19:25 28:4 | 27:2,4 |
| supposed 18:18 | 46:8,8,13 | 50:12 51:2,9 | 54:22 | understood |
| 41:15 | testers 5:18 6:4 | 51:13,22 52:12 | transaction | 21:10 22:11 |

| | | | | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| unique 33:11 41:12 United 1:1,24 2:8 3:10 44:15 53:3 university 26:6 unlimited 57:12 unrelated 5:1 unsafe 34:9 upheld 9:18 Urban 33:20 use 21:7,9,15 36:17 usually 18:20 27:5 utilities 57:13 utility 10:2 49:25 50:5 | 8:16,24 58:10 vindicate 41:10 42:5 violated 45:12 45:16 violation 43:20 45:15 violations 31:17 virtue 42:14 visit 12:18 visited 42:8 visiting 33:24 | went 20:19 35:25 weren't 20:11 wonderful 40:2 58:1 word 21:25 24:16 36:18 43:15 words 12:25 24:12 35:18 58:5 work 6:7 45:17 working 43:10 worries 21:7 worry 21:12 38:19 wouldn't 16:21 21:16 35:19 41:17 48:9 53:24 wrecked 46:21 47:15 write 26:11 46:20 48:25 49:4 56:6 writes 46:20 47:13 written 15:5 16:18 38:9 wrong 7:13 18:21 wrote 22:21 25:24 51:5 | 19:20 24:8,14 25:12 29:19 35:25 41:6,14 43:11,12 57:17 zone-of-interest 7:10,12 19:22 21:20 22:6,10 22:13 45:1 zone-of-intere... 4:21 zoning 33:13 | 3 30 18:11 33 55:6 34 55:14 3604(e) 48:18 3610(f) 14:6 3612 57:18 |
| V | W | X | 0 | 4 |
| v 1:6,16 4:5 40:25 Va 2:4 vacancies 18:16 18:17 value 8:21 43:1 49:11,17 50:10 50:16 52:16,18 54:8 56:15,20 values 8:17 18:18 33:14 34:20 37:6 44:21 46:8 49:19,22 50:11 56:8 57:2 various 16:4 version 8:6 26:15 vibrant 41:19 victim 31:25 32:4 45:6 54:9 victims 8:3 32:2 57:22,23 58:2 58:7 view 57:21 VII 24:16 42:2 village 7:9,10 | want 5:13 10:23 12:18 16:25 36:17 39:2 wanted 23:22 47:9 wanting 52:7 wants 10:18 45:23 46:20 Washington 1:20 2:2,7 wasn't 18:25 water 21:23 way 8:21 9:7,14 13:8 14:2,6 19:4 23:4 25:8 25:15,21,21 26:6,24 55:11 55:12 We'll 4:3 we're 17:10 24:7 24:8 32:18 34:7 54:13 58:12,14 we've 17:10 19:20 27:7 28:20 37:3,11 37:11 51:17 55:21 57:15 58:9 weaker 40:13,16 week 26:10 49:2 weight 9:17 WELLS 1:14 | work 6:7 45:17 working 43:10 worries 21:7 worry 21:12 38:19 wouldn't 16:21 21:16 35:19 41:17 48:9 53:24 wrecked 46:21 47:15 write 26:11 46:20 48:25 49:4 56:6 writes 46:20 47:13 written 15:5 16:18 38:9 wrong 7:13 18:21 wrote 22:21 25:24 51:5 | 1 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | 3 30 18:11 33 55:6 34 55:14 3604(e) 48:18 3610(f) 14:6 3612 57:18 |
| | | | 0 | 4 |
| | | | 1 | 4 3:4 44 3:11 |
| | | | 0 | 5 |
| | | | 1 | 55 3:14 |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | 6 |
| | | | | 7 |
| | | | | 8 |
| | | | | 8 1:21 |
| | | | | 9 |
| | | | | 9 45:8 |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:13 1982 45:11 1983 22:2 1988 19:24 20:3 22:17 23:12 24:15 44:23 52:20 58:9 1990 12:24 | |
| | | | 0 | |
| | | | 1 | |
| | | | 10 35:14 10:03 1:25 4:2 100 26:9 58:13 11:03 58:20 110 9:1 17:23 15 31:23 46:23 15-1111 1:5 4:4 15-1112 1:15 186 30:19 55:5 19,300 55:18 1918 26:24 1968 19:24 52:19 1972 45:11 1980 23:1 | |