Nos. 15-1111, 15-1112

In the Supreme Court of the United States

BANK OF AMERICA CORPORATION, *et al.*,
Petitioners,
v.
CITY OF MIAMI, FLORIDA,
Respondent.

WELLS FARGO & CO., *et al.*,
Petitioners,
v.
CITY OF MIAMI, FLORIDA,
Respondent.

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

BRIEF OF HOUSING SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal scholars, sociologists, economists, demographers, urban planners, historians, and other scholars who study housing policy, housing finance, segregation, and discrimination. The *amici*, listed in the appendix, are university faculty and researchers who have written numerous books and articles on housing markets, mortgage finance, and discrimination in housing and lending. *Amici* file this brief to bring to the Court's attention the empirical evidence of the history - and continuing practice - of mortgage lending discrimination on the basis of race and ethnicity, its contribution to concentrated foreclosures and neighborhood blight, its foreseeable impacts on cities, and the importance of cities' ability to bring suit under the Fair Housing Act in order to prevent and remedy discrimination.

SUMMARY OF ARGUMENT

The City of Miami has alleged a direct injury that is amply supported by empirical social scientific studies of mortgage lending, residential foreclosures, and the costs of those foreclosures to municipalities. Racial and ethnic discrimination, in the form of redlining and reverse redlining by the appellants and other lenders, foreseeably resulted and continues to result in concentrated foreclosures and restricted access to credit for black and Latino borrowers. These concentrated foreclosures directly injured the City of

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

Miami by decreasing its revenues and increasing the expenses it bears to maintain residents' quality of life. Bank mortgage lending policies both before and after the 2008 crisis had, and continue to have, a significant disparate impact on black and Latino borrowers and neighborhoods, perpetuating high levels of residential segregation by race and ethnicity and harming the City's interest in fair housing and its statutory obligation to further it.

ARGUMENT

I. Introduction

The banking industry has asked the Court to erect new barriers to the enforcement of fair lending laws at a critical time, when prevention of discrimination is as important as ever.[2]

Lending discrimination, through redlining of segregated neighborhoods and mortgage denials to creditworthy applicants, made it exceedingly difficult for families in predominantly African American and Latino neighborhoods to acquire and keep homes and

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[2] Racial disparities in wealth and the homeownership gap that largely drives them, have widened since the Great Recession. The median household net worth of white families in 2013 was $142,000; that of nonwhite or Hispanic families was $18,100. Jesse Bricker, et. al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances,* 100 Fed. Res. Bull. 1, 12 (Sept. 2014). The homeownership rate for African-Americans had declined to 41.7% by the 2nd quarter of 2016, compared with 71.5% for non-Hispanic whites. U.S. Census Bureau, *Residential Vacancies and Homeownership in the Second Quarter of 2016*, p. 9 table 7 (Jul. 28, 2016).http://www.census.gov/housing/hvs/files/currenthvspress.pdf.

accumulate wealth throughout most of the twentieth century. *See* Douglas Massey and Nancy Denton, *American Apartheid* 83-114 (1993); Stephen L. Ross & John Yinger, *The Color of Credit: Mortgage Discrimination, Research Methodology and Fair Lending Enforcement* 95-106 (2002). The later targeting of families in those same neighborhoods for high-risk loans not justified by objective credit standards during the lending boom extracted millions of dollars in excess interest and fees for the financial industry. Gregory D. Squires, *Why the Poor Pay More: How to Stop Predatory Lending* 2-12 (2004). The direct and foreseeable consequences of this reverse redlining were increased rates of foreclosure for black and Latino borrowers, concentrated property vacancies and disproportionate declines in home values in predominantly black and Latino neighborhoods. Daniel Immergluck, *Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America's Mortgage Market* 78-84, 101-110 (2009)(hereinafter Immergluck, *Foreclosed*). Today, creditworthy families in predominantly black and Latino neighborhoods are again disproportionately being denied loans and shut out of housing markets, preventing the recovery of the same urban neighborhoods. Bing Bai, Laurie Goodman & Jun Zhu, *Tight credit standards prevented 5.2 million mortgages between 2009 and 2014,* Urban Institute (April 28, 2016), http://www.urban.org/urban-wire/tight-credit-standards-prevented-52-million-mortgages-between-2009-and-2014.

The structure of this brief is as follows. First, we review the social science literature establishing that, after a long and well-documented history of redlining

in this country, identifiable bank policies led to reverse-redlining discrimination in mortgage lending, targeting neighborhoods with a majority of black and Latino residents for high-cost, high-risk products. Second, bank policies encouraging reverse redlining had direct impacts on cities, including concentrated foreclosures, that were well known at least a decade ago, and therefore foreseeable by the appellants. Third, we show that, despite significant changes to mortgage financing practices since the 2008 foreclosure crisis, discrimination on the basis of race and ethnicity in mortgage lending continues in both new forms of redlining and continuing reverse-redlining or product steering. Finally, we highlight cities' significant interests in preventing discrimination in lending and advancing access to fair housing.

II. Appellants' policies enabled discrimination in lending on the basis of race and ethnicity

Beginning in the 1930s and persisting into the 1990s, racial and ethnic discrimination in the real-estate, banking, and insurance industries created and perpetuated residential segregation, blocking black and Latino households from opportunities for residential and economic mobility.[3] *See* Melvin Oliver & Thomas

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[3] This discriminatory practices are often referred to as "redlining" because of the federal Home Owners' Loan Corporation residential security maps that appraised real-estate risk levels and consistently graded neighborhoods that were multiracial or predominantly non-white as high-risk and marking them red. See Gregory D. Squires, *Capital and Communities in Black and White: The Intersections of Race, Class, and Uneven Development* 53 (1994).

Shapiro, *Black Wealth / White Wealth* 108-110 (1997). Black home buyers relied primarily on black-owned banks and installment sales contracts for financing before the 1968 Fair Housing Act, and even well into the 1980s. Immergluck, *Foreclosed, supra,* at 47-63; Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership, in Segregation: The Rising Costs for America* 79-121 (James H. Carr & Nandinee K. Kutty eds., 2008). Banks continued to discriminate against qualified minority mortgage applicants at least until the early 1990s, when data reporting required by the Home Mortgage Disclosure Act brought continuing redlining to light and the Justice Department launched enforcement actions against several banks. *Id*. at 84-85.

Just as minority home buyers were finally granted real access to bank mortgage financing, "reverse redlining" emerged to strip their income and home equity. Gregory D. Squires, *Predatory Lending: Redlining in Reverse*, Shelterforce Online (Jan./Feb. 2005). From the 1990s through 2008, with deregulation and the growth of the subprime and nontraditional lending market, discrimination took the form of targeting racial or ethnic minorities for higher priced and risky loans, in other words, reverse redlining. Debbie Gruenstein Bocian, Keith S. Ernest, and Wei Li, *Race, Ethnicity and Subprime Home Loan Pricing*, 60 J. of Econ. and Bus. (2008); Marsha Courchane, *The Pricing of Home Mortgage Loans to Minority Borrowers: How Much of the APR Differential Can We Explain?*, 27 J. of Real Estate Research (2007). Persistent high levels of residential segregation by race and ethnicity enabled financial institutions to create a

structurally segmented mortgage lending market that offered separate and unequal loan products to minority and white neighborhoods and borrowers. Alan M. White, *Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing,* 60 S. Carolina L. Rev. 677, 679-86 (2009); Justin Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 Colum. J. Race & L. 63, 78-80 (2011); Richard Williams, Reynold Nesiba, and Eileen Diaz McConnell, *The Changing Face of Inequality in Home Mortgage Lending*, 52 Soc. Problems 181 (2005).

A. Banks' policies led directly to discriminatory assignment of minority borrowers to high-priced, high-risk mortgages

Mortgage lenders, including the appellants, created incentives for brokers and loan officers to use their discretion to charge higher rates and to impose riskier but more profitable terms, including prepayment penalties, than those for which mortgage applicants qualified. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1259-70 (2002). This pricing discretion systematically disfavored black and Latino borrowers, who had long been denied credit in the past and continued to live in neighborhoods less likely to be served by mainstream banks. White, *supra*, at 690-91. Research has consistently found disparities in the amount of compensation earned by mortgage originators (and disparities in costs charged to borrowers) based on the race and ethnicity of the borrowers. Howell E. Jackson & Laurie Burlingame, *Kickbacks Or Compensation: The*

Case Of Yield Spread Premiums, 12 Stan. J.L. Bus. & Fin. 289, 354 (2007); Susan E. Woodward, U.S. Dep't. Hous. Urb. Dev., *A Study of Closing Costs for FHA Mortgages*, 45-48 (2008). Expert reports offered by both parties in another fair lending case against Wells Fargo demonstrated that African-American mortgage borrowers were steered to lending divisions with higher-priced and riskier loan products, and were charged higher fees by loan brokers, even after controlling for objective credit qualifications. White, *supra*, at 694-698 (summarizing reports in *Walker v. Wells Fargo Bank*, N.A., No. 05-cv-6666 (E.D. Pa. 2008)). Banks, loan officers, and brokers profited when borrowers paid inflated rates. The banks profited from higher interest rates than those justified by the economic risk (which also increased the values of the loan on the secondary market), while the loan officer or broker collected larger compensation. Borrowers, however, suffered from significantly higher costs over the life of the loan that then lead to increased risks of default and foreclosure. Immergluck, *Foreclosed*, *supra*, at 141-43; Justin Steil, Len Albright, Jacob Rugh, & Douglas Massey, *The Social Structure of Mortgage Discrimination: A Qualitative Analysis* (2015) (working paper), http://www.academia.edu/download/38779585/Structural_Context_of_Mortgage_Discrimination_2015_09_14.pdf 2015.

In addition to creating incentives for the origination of loans with wider spreads between the loan's interest rate and the prevailing interest rate, banks encouraged the origination of loans with unfavorable terms for borrowers, such as adjustable rates that increased the risk of foreclosure and prepayment penalties that locked consumers into their loans. Adjustable rates

and prepayment penalties increased the value of mortgage-backed securities and made them more attractive to investors, by shifting the risks of interest rate changes onto the borrower. Explicit and implicit racial and ethnic biases, combined with incentives, resulted in discretion being used by loan officers to steer some black and Latino customers to products that were not only higher cost, but also higher risk. Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments*, 18 Hous. Pol'y Debate 311 (2007); William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, *in The Geography of Opportunity* (Xavier de Souza Briggs ed., 2005); Derek S. Hyra, Gregory D. Squires, Robert N. Renner & David S. Kirk, *Metropolitan Segregation and the Subprime Lending Crisis*, 23 Hous. Pol'y Debate 177 (2013). Investment banks and originators, such as the appellants, often used "forward-settle" agreements to determine in advance a minimum average yield spread or minimum share of high-cost loans that the banks would originate, because pools with high interest rate spreads and loan terms unfavorable to borrowers could bring in more in profits when they were securitized and sold to investors. Kathleen Engel & Thomas Fitzpatrick IV, *Complexity, Complicity, and Liability up the Securitization Food Chain: Investor and Arranger Exposure to Consumer Claims*, 2 Harv. Bus. L. Rev. 345 (2012); Engel and McCoy, *Subprime*, *supra*, at 43-47.

In short, the originators that made the loans, the commercial and investment banks that packaged them into mortgage-backed securities, and the investment

banks that sold them let a desire for short-term profits triumph over compliance with antidiscrimination laws, ethics, and long-term financial stability.

B. Mechanisms for targeting black and Latino borrowers and neighborhoods

The social science evidence demonstrates that these bank pricing structures encouraged originators to "deliberately [seek] out financially vulnerable borrowers for deceptive sales tactics and predatory mortgages" in black and Latino neighborhoods they knew to have been starved for mortgage financing. Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & Pol'y 121, 122, 124 (2009). But how did originators identify and gain the trust of potential black and Latino borrowers who were then steered into those high-cost loans? In some cases, lenders including Wells Fargo and Countrywide (later acquired by Bank of America) gained the confidence of potential borrowers through the use of trusted intermediaries, such as non-profit organizations and churches. These banks, including appellants, also sought out vulnerable borrowers by obtaining lists of those already using high-cost consumer financial products. Steil, Albright, Rugh, & Massey, *supra*, at 25-27. Where those lists were unavailable or unavailing, Wells Fargo, Bank of America, and other banks created demand for refinancing by encouraging borrowers to take out high cost consumer loans leading to financial stress that the lender pretended to resolve by refinancing unsecured loans into even larger loans secured by the borrowers' homes. *Id.* at 26.

To gain the confidence of borrowers, banks including appellants also strategically exploited social structure and organizational networks within minority communities. For example, promotional materials for Wells Fargo's "emerging markets initiative" stated that as part of the bank's effort to "further penetrate the market" of "recent immigrants, students lacking financial savvy, young families struggling to build assets, [and] victims of past redlining," Wells Fargo "partnered with a small group of trusted local [nonprofit] organizations" which "became extensions of the bank's organizational structure" Wells Fargo, *Compton-Brochure*, 2007 http://emergingmarkets.us/wp-content/uploads/2013/04/Compton-Brochure.pdf. Countrywide similarly steered black and Latino borrowers into higher cost loans. Consent Order, *United States v. Countrywide Financial Corp.* 2-4 (No. 2:11-cv-10540-PSG-AJW C.D. Cal. filed Dec. 28, 2011) https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf.

Wells Fargo staff have reported targeting church leaders in order to gain access to congregants through a trusted intermediary, with the originators providing a donation to a non-profit of the borrower's choice for each new loan, further cementing the relationship between mortgage lenders and local religious and civil society leaders. Steil, Albright, Rugh & Massey. *supra*, at 15. Lenders also bought "leads" from firms that culled public records and gathered consumer information from banks and credit bureaus to create these databases, referred to as "farming kits." Between 2004 and 2006, Countrywide mailed between six and eight million targeted solicitations each month and made tens of thousands of phone calls. Engel &

McCoy, *Subprime*, *supra*, at 28. Many of those targeted as prospects were consumers who were already in financial trouble and in need of refinancing to avoid default. *Id*. To identify potential borrowers for high-cost home equity loans, lenders sometimes turned to data sources that were thought to indicate a lack of financial sophistication combined with a desire for credit. Loan officers were given lists of leads to solicit for high-cost refinance loans, and statements by loan originators indicate that these lists did not represent a random cross-section of the local population but were predominantly African American. Some lists were generated from current or previous borrowers with the bank, while others were obtained by purchasing lists of customers who had financed the purchase of goods, such as furniture or jewelry, at stores in black and Latino communities. Steil, Albright, Rugh & Massey, *supra,* at 27.

In a context of extreme information asymmetries between borrowers and lenders, racial and ethnic segregation facilitated the exploitation of those least able to protect themselves from originators seeking higher compensation and banks seeking higher profits. The dramatic rise in foreclosures in minority neighborhoods was caused by bad loans, not bad borrowers. Kristopher S. Gerardi, et. al., *Decomposing the Foreclosure Crisis: House Price Depreciation versus Bad Underwriting*, (Fed. Res. Bank of Atlanta, Working Paper 2009-25, 2009). Many minority borrowers in high-risk mortgages would have qualified for cheaper, safer loans. Jacob Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 Hous. Pol'y Debate 328 (2013); White, *supra* at 683-686. The dramatic rise in mortgage delinquencies and

foreclosures, to a peak of 15 percent of all mortgages in 2010, resulted not from homeowners suddenly being unwilling to make mortgage payments but from the reckless granting of mortgages that homeowners could not hope to repay at inception, with escalating payments, prepayment penalties to prevent refinancing, fraudulent appraisals, and little or no home equity. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report,* 102-126 (2011); Immergluck, *Foreclosed, supra*, at 135-141; Lei Ding, Roberto Quercia, Wei Li, & Janneke Ratcliffe, *Risky Borrowers or Risky Mortgages Disaggregating Effects Using Propensity Score Models*, 33 J. of Real Estate Research 245 (2011).

C. Banks, Including Appellants, Engaged in Reverse Redlining of City Neighborhoods, starting in the 1990s

The direct and foreseeable consequences of appellants' policies were, first, the concentration of expensive mortgage loans with onerous terms in minority communities that had previously been denied credit, and, subsequently, increased rates of foreclosure for black and Latino borrowers. Adam Levitin & Susan Wachter, *Explaining the Housing Bubble*, 100 Georgetown L. J. 1177 (2012); Daniel Immergluck, *Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America's Mortgage Market* 78-84, 101-110, (2009); Robert B. Avery et al., *New Information Reported under HMDA and Its Application in Fair Lending Enforcement*, 91 Fed. Res. Bull. 344, 351–52 (2005). The map of high-cost mortgages in 2007-2015 in

the Miami metropolitan area [appended in Appendix 2][available at the following link: https://steil.mit.edu/cityofmiamiamicusbrief] illustrate the striking concentration of high-cost mortgage loans in minority neighborhoods.

Average metropolitan-area black–white and Latino-white segregation levels today remain high (roughly 0.59 and 0.50 respectively in 2010, measured through the dissimilarity index)[4] and residential segregation continues to be one of the characteristic features of American cities. Jorge De la Roca, Ingrid Gould Ellen, & Katherine M. O'Regan *Race and neighborhoods in the 21st century: What does segregation mean today?*, 47 Regional Sci. & Urb. Econ. 138 (2014). Metropolitan area levels of segregation are strongly associated with higher concentrations of high-cost loans. Gregory D. Squires, *Segregation as a Driver of Subprime Lending and the Ensuing Economic Fallout*, in *Fair and Affordable Housing in the US: Trends, Outcomes, Future Directions* 277-288 (Rob Silverman & Kelly L. Patterson eds., 2013); Hyra et al., *supra.* Residential segregation has created "distinct geographic markets that enabled subprime lenders and brokers to leverage the spatial proximity of minorities to disproportionately target minority neighborhoods." Jackelyn Hwang, Michael Hankinson, & Kreg Steven Brown, *Racial and Spatial Targeting: Segregation and Subprime Lending within and across Metropolitan*

[4] The dissimilarity index, which is the most commonly used measure of segregation, quantifies the unevenness with which two different groups (e.g., whites and Latinos) are distributed across neighborhoods within a metropolitan area. It is measured on a scale from 0 to 1.

Areas, 93 Soc. Forces 1081 (2015). Regression analyses of national data have also found that the higher the level of African American and Latino segregation in a metropolitan region, the higher the number and rate of subsequent foreclosures in the region. In fact, "segregation's effect is independent of other economic causes of the crisis, and . . . segregation's explanatory power exceeds that of other factors hitherto identified as key causes" of foreclosures. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 644 (2010).

Lenders' targeting of predominantly black and Latino neighborhoods for high-cost loans translated into discriminatory effects on the black and Latino residents of those neighborhoods. Rigorous quantitative studies have found that African American and Latino borrowers over the past decade were charged higher rates and fees and given riskier loan terms than similarly situated white borrowers. See, e.g. Debbie Gruenstein Bocian, Wei Li, Carolina Reid, & Roberto G. Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, Center for Responsible Lending (2011); Vicki Been, Ingrid G. Ellen, & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending,* 36 Fordham Urban L. J. 361, 393 (2009); Jacob Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 Hous. Pol'y Debate 328 (2013). Even after controlling for credit scores, loan to value ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income, a study of lending between 2004 and 2007 in seven metropolitan areas, including Miami, found that black and Latino

borrowers in each metropolitan area were significantly more likely to receive a high-cost loan than similarly situated white borrowers. Patrick Bayer, Fernando Ferreira, & Stephen L. Ross, *Race, Ethnicity and High-Cost Mortgage Lending*, 8 Am. Econ. J.: Econ. Pol'y 23-26 (2016). The increased incidence of high cost mortgages was attributable to both steering of minorities to specialized high-cost lenders and to differential treatment of equally qualified borrowers by lenders. *Id*.

Banks were also more likely to assign risky mortgage terms, such as prepayment penalties, to black and Latino borrowers than to white borrowers, increasing the likelihood of default. Debbie Gruenstein Bocian & Richard Zhai, *Borrowers in Higher Minority Areas More Likely to Receive Prepayment Penalties on Subprime Loans* (2005). Prepayment penalties prevent many borrowers from refinancing or selling the home when facing default, significantly increasing foreclosure risk. Michael LaCour-Little & Cynthia Holmes, *Prepayment Penalties in Residential Mortgage Contracts: A Cost Benefit Analysis*, 19 Hous. Pol'y Debate 631 (2008); Roberto G. Quercia et al., *The Impact of Predatory Loan Terms on Subprime Foreclosures: The Special Case of Prepayment Penalties and Balloon Payments*, 18 Hous. Pol'y Debate 311 (2007).

A study of Wells Fargo's loans found that after controlling for credit scores, income, occupancy status, loan-to-value ratios, and other background characteristics, black borrowers were charged significantly higher rates and received less favorable loan terms than similarly situated white borrowers.

Jacob S. Rugh, Len Albright, & Douglas Massey, *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 Soc. Probs. 186-218 (2015). Together, these higher cost loans with less favorable terms created a significantly higher likelihood of foreclosure. *Id*.

III. Lending discrimination had a foreseeable and direct negative impact on cities

Discrimination by the appellants had a foreseeable and direct negative economic impact on minority neighborhoods and the cities to which those neighborhoods belong. First, reverse redlining led predictably to concentrated foreclosures in black and Latino neighborhoods that had been targeted for high-cost, high-risk loans. Harold L. Bunce, et. al., *Subprime Foreclosures: The Smoking Gun of Predatory Lending?* (2005); Kristopher S. Gerardi & Paul S. Willen, *Subprime Mortgages, Foreclosures and Urban Neighborhoods* (Fed. Res. Bank of Atlanta Working Paper 2009-1, 2009); Rugh & Massey, *supra*. As discussed below, the likelihood of a high foreclosure rate across loan pools should have been known to the appellants at the time the loans at issue here were made. Second, the concentration of foreclosures in particular neighborhoods led not only to dramatic declines in property values surrounding these clusters of foreclosures but also to an increase in municipal spending to maintain quality of life in areas with high-numbers of foreclosed, abandoned properties. The increased municipal expenditures associated with concentrated foreclosures were well established at the time the loans at issue here were made. Third,

concentrated foreclosures increased residential segregation by race and ethnicity.

Financial industry analyses of credit risk are highly sophisticated. Banks are able to draw on a wealth of proprietary data about neighborhoods and borrowers, from multiple credit bureaus as well as their own experience with potential borrowers. For example, in its 2006 Annual Report writing about its Consumer Portfolio, comprised primarily of residential mortgages, Bank of America wrote:

> Credit risk management for the consumer portfolio begins with initial underwriting and continues throughout a borrower's credit cycle. Statistical techniques in conjunction with experiential judgment are used in all aspects of portfolio management including product pricing, risk appetite, setting credit limits, operating processes and metrics to quantify and balance risks and returns. . . . Statistical models are built using detailed behavioral information from external sources such as credit bureaus and/or internal historical experience. These models are a critical component of our consumer credit risk management process and are used in the determination of both new and existing credit decisions, portfolio management strategies including authorizations and line management, collection practices and strategies, determination of the allowance for credit losses, and economic capital allocations for credit risk.

Bank of America Annual Report, (Oct. 1, 2016), 63 http://media.corporate-ir.net/media_files/irol/71/71595/reports/2006_AR.pdf.

Illustrating how consistent the appellants' practices remained throughout the time period at issue, the 2015 Annual Report sets forth the exact same extensive processes for credit risk management. Bank of America Annual Report, (Oct. 1, 2016), 64 http://media.corporate-ir.net/media_files/IROL/71/71595/AR2015.pdf. While the appellants may not know with certainty the trajectory of any given loan, the wealth of data and sophistication of statistical analysis in their extensive underwriting process enables them to know with a high degree of accuracy what is likely to happen across a particular pool of mortgages, as well as the impact of the performance of that pool on cities.

As banks recognized the increasing likelihood of foreclosure, they did not stop lending but instead shed the risk by accelerating the pace of securitizations and shifting the cost of likely default onto investors. As participants in the mortgage lending industry stated, "a rolling loan gathers no loss." Engel & McCoy, *Supprime*, *supra*, at 65. Long before the foreclosure crisis peaked, well-publicized government and academic studies showed that high-cost mortgages were highly concentrated in communities of color and were causing spatially concentrated high rates of foreclosures. *See* U.S. Dept. of Housing and Urban Development, U.S. Dept. of the Treasury, Predatory Lending Task Force, *Final Report*, at 47-51 (2000) https://www.treasury.gov/press-center/press-releases/Documents/treasrpt.pdf; Dan Immergluck, *Credit to the Community: Community Reinvestment and Fair Lending Policy in the United States,* at 120-21 (2004); National Training and Information Center, *Preying on Neighborhoods: Subprime Mortgage Lending and Chicagoland Foreclosures* (1999).

Miami, like other major U.S. metropolitan areas, is highly segregated by race and ethnicity, so reverse redlining concentrated the impact of foreclosures in those neighborhoods with high numbers of black and Latino residents. Jacob Rugh, *Double Jeopardy: Why Latinos Were Hit Hardest by the US Foreclosure Crisis*, 93 Soc. Forces 1139 (2015). Concentrated foreclosures caused by discriminatory lending therefore have two sets of victims—the homeowners who lose their homes and the communities left with depreciated and abandoned houses. Indeed, foreclosures reduce the value of nearby homes, through direct physical effects on neighborhoods of poor property maintenance and vacant homes, through weak property appraisals based on comparable sales prices, and through the creation of an imbalance of demand and supply in an illiquid neighborhood housing market. John Harding, Eric Rosenblatt, & Vincent Yao. *The Contagion Effect of Foreclosed Properties*, 66 J. Urb. Econ.164 (2009). In some neighborhoods, these spillover effects on prices further pushed down home values, putting even more homeowners at danger of foreclosure because their home values were now worth less than the remaining balance on their mortgages. Economists refer to this as the "financial accelerator" effect. Benjamin Bernanke & Mark Gertler, *Agency Costs, Net Worth, and Business Fluctuations,* 79 Am. Econ. Rev., 14 (1989). Discriminatory lending based on race and ethnicity has also meant a decline in property values and tax revenue, disproportionately affecting neighborhoods and cities with high shares of black and Latino residents.

As early as 2006, research found that foreclosures reduced the value of homes within one-eighth of a mile

by roughly one percent. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 Hous. Pol'y Debate 57 (2006). More recent research confirms that foreclosures have significant causal effects on surrounding property values and estimates that each foreclosure that takes place within five-tenths of a mile lowers the price of a home by one percent. John Y. Campbell, Stefano Giglio & Parag Pathak, *Forced Sales and House Prices*, 101 Am. Econ. Rev. (2011). A host of other studies have found a negative relationship between sales prices of neighboring properties and foreclosures while controlling for property and neighborhood characteristics. *See* Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature,* 95 Econ. Rev. (2010). The independent causal effects of foreclosures on property values, above and beyond general housing market fluctuations, translate into direct negative consequences for municipal revenues. Howard Chernick, Adam Langley, & Andrew Reschovsky, *The Impact of the Great Recession and the Housing Crisis on the Financing of America's Largest Cities*, 41 Regional Sci. & Urban Econ. 372 (2011).

In addition to decreased revenues, cities faced increased expenditures from foreclosures. As early as 2005, scholars had estimated the direct increased costs to cities for each foreclosed, abandoned property, including expenditures that cities are forced to make for increased police and fire services, building inspections, sanitation activities, and demolition contracts. William C. Apgar, Mark Duda, & Rochelle Nawrocki Gorey, *The Municipal Cost of Foreclosures:*

A Chicago Case Study, Housing Finance Policy Research Paper 2005-1 (2005); *see also* Dan Immergluck, *Preventing the Next Mortgage Crisis: The Meltdown, the Federal Response, and the Future of Housing in America* (2015). Increased foreclosures predictably lead to increased complaints about property maintenance, vandalism, and crime. A study of property complaints in the City of Boston from 2008 to 2012 found that the typical single-family property was over nine times as likely to receive a complaint when owned by banks following foreclosure compared to when its previous owner was current on his or her mortgage. Lauren Lambie-Hanson, *When Does Delinquency Result in Neglect? Mortgage Distress and Property Maintenance*, Federal Reserve Bank of Boston Public Policy Discussion Paper 13-1 (2013); *see also* Ingrid Gould Ellen, Johanna Lacoe, & Claudia Ayanna Sharygin, *Do Foreclosures Cause Crime?,* 74 J. Urb. Econ. 59 (2013); Vicki Been, Ingrid Gould Ellen, Amy Ellen Schwartz, Leanna Stiefel, & Meryle Weinstein, *Does Losing Your Home Mean Losing Your School?: Effects of Foreclosures on the School Mobility of Children*, 41 *Regional Sci. & Urban Econ.* 407 (2011). As a result, in addition to having a far-reaching negative impact on individuals, foreclosures create significant economic and social costs for neighborhoods, cities, and counties that were well known by the mid-2000s.

Discriminatory lending also foreseeably perpetuates segregation. Recent research has found that not only did black, Latino, and racially integrated neighborhoods have exceptionally high foreclosure rates, foreclosure concentrations were linked to declining shares of whites and expanding shares of

black and Latino residents, because whites had greater resources to leave high foreclosure neighborhoods than nonwhites. Matthew Hall, Kyle Crowder, & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 Am. Soc. Rev. 526 (2015). A study comparing the elevated rates of foreclosures from 2005 to 2009 and the racial and ethnic disparities in those foreclosures to the 2005 foreclosure rate found that the foreclosure crisis significantly increased both black-white and Latino-white levels of residential segregation. *Id.* This increased residential segregation by race and ethnicity harms cities by reducing the welfare of their residents. Higher rates of segregation are associated with wider gaps between blacks and whites and between Latinos and whites in high-school and college graduation rates, in employment rates, in earnings, and in exposure to crime and violence. Justin Steil, Jorge De la Roca, & Ingrid Gould Ellen, *Desvinculado y Desigual: Is Segregation Harmful to Latinos?*, 660 The Annals of the Am. Acad. of Pol. & Soc. Sci. 57 (2015); Ruth D. Peterson & Lauren J. Krivo, *Divergent Social Worlds: Neighborhood Crime and the Racial-Spatial Divide*. (2010).

IV. Lending discrimination continues: overly strict credit as the new redlining

After the 2008 financial crisis, shifts in bank lending practices have made it more and more difficult for minorities to access mortgage loans at all. The recent severe tightening of mortgage credit standards is both unwarranted and discriminatory. Banks are refusing to grant mortgages to many borrowers who would meet Fannie Mae underwriting guidelines and

who would have received mortgages in the period of stable lending before the subprime lending boom. Ben Lane, *Fannie Mae: Mortgage Lenders Unnecessarily Restrict Credit*, Housing Wire (July 28, 2015). The Urban Institute estimates that if 2001 credit standards had been applied in the 2009-2014 period, 5.2 million additional home mortgages would have been approved. Bai, Goodman, & Zhu, *supra*. The excessively strict underwriting means that home purchase loans for African American and Latino borrowers declined 55 percent and 45 percent, respectively, from 2001 to 2012 compared to a 41 percent decline for white borrowers. Laurie Goodman, Jun Zhu, & Taz George, *The Impact of Tight Credit Standards on 2009-2013 Lending* (2015).

Reverse redlining and associated foreclosures contributed to disproportionately large declines in home values for black and Latino homeowners from 2007 to 2011, and contemporary lending policies are now disproportionately leaving black and Latino households out of the housing recovery. In 2014, 23 percent of home purchase mortgage applications by blacks and 18 percent of applications by Latinos were rejected, compared to 11 percent for non-Hispanic whites. For refinance loans, the rejection rates were 45 percent for blacks, 36 percent for Latinos, and 27 percent for non-Hispanic whites. Neil Bhutta, et. al., *The 2014 Home Mortgage Disclosure Act Data*, 101 Fed. Res. Bull. 1, 12 table 4 (Nov. 2015). In the Miami metropolitan area in 2015 Wells Fargo approved 55% of mortgage applications from white borrowers, compared with 29% of applications from black borrowers. The map [in Appendix 3] [the following link https://steil.mit.edu/cityofmiamiamicusbrief] illustrates

the high number of mortgage denials in Miami's minority neighborhoods. Even after controlling for available data on borrower characteristics and creditworthiness, African American and Latino borrowers have been denied credit at a higher rate than white borrowers. Wei Li & Laurie Goodman, *A Better Measure of Mortgage Application Denial Rates* (2014).

Thus, since 2008, minority homebuyers and homeowners face reduced access to mortgage credit and they are much more likely to be restricted to Federal Housing Administration loans that require mortgage insurance and accordingly have higher costs. Neil Bhutta, et al., *The 2014 Home Mortgage Disclosure Act Data*, 101 Fed. Res. Bull. 1, 15 table 5 (Nov. 2015); Skylar Olsen, et al., *A House Divided - How Race Colors the Path to Homeownership*, Zillow Real Estate Analytics Report (2014). In 2014, 68 percent of black home-purchase borrowers and 60 percent of Hispanic white home-purchase borrowers took out a Federal Housing Administration or Veterans Administration loan, compared with about 33 percent of non-Hispanic white home-purchase borrowers. *Bhutta* et al.*, supra*.

Although bank practices have changed since the financial crisis, there continue to be significant racial and ethnic disparities in mortgage denials and in the issuance of costlier loans, even to otherwise similarly situated borrowers. The overcorrection after the foreclosure crisis means that minorities who are objectively qualified applicants are more likely to be denied loans than their white counterparts. This new bank redlining continues to have a disparate impact on minority home buyers and segregated city

neighborhoods, prevents the recovery and redevelopment of housing markets in those neighborhoods, and perpetuates segregation itself by constricting minority access to mortgage credit.

V. Cities have a direct interest in preventing lending discrimination

Redlining and reverse redlining cause foreseeable harm to neighborhoods and cities, not just to individuals. Foreclosures during the recent crisis were not only numerous, they were highly concentrated geographically, leaving cities like Miami to bear the brunt of their impact.

Levels of residential segregation by race and ethnicity in the United States remain high. Not only do Americans continue to live largely in separate neighborhoods, they also continue to live in unequal ones. Black and Latino exposure to high-performing schools, college-educated neighbors, safety, and other measures of neighborhood advantage are strongly correlated with levels of metropolitan segregation by race. De la Roca, Ellen, & O'Regan, *supra*. The effects of this neighborhood disadvantage mount from one generation to the next. Patrick Sharkey, *Stuck In Place: Urban Neighborhoods and the End of Progress Toward Racial Equality* (2013). Higher levels of segregation in a metropolitan area are consistently associated with worse educational and employment outcomes relative to whites for both African American and Latino residents of that metropolitan area. Ingrid Gould Ellen, Justin Steil, & Jorge De la Roca, *The Significance of Segregation in the 21st Century*, 15 City & Community 8, 9-13 (2016). The associations between segregation and wider racial gaps for both groups are

large, and have increased since 1990. *Id.* Greater metropolitan area residential segregation is also associated with decreased socio-economic mobility for all residents of that metropolitan area. Raj Chetty, Nathaniel Hendren, Patrick Kline, & Emmanuel Saez, *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. Econ. 1553, 1623 (2014). Preventing discrimination that perpetuates segregation is thus of central importance to cities as they seek to improve the wellbeing of their residents and their economic competitiveness.

Not only is it in cities' interests, cities are also required by federal law to address discrimination and segregation. 42 U.S.C. § 5304(b)(2); 42 U.S.C. § 3608(e)(5); 24 C.F.R. § 5.154. The Department of Housing and Urban Development has accordingly determined that the Fair Housing Act requires cities that receive federal funds for housing and urban development to take "meaningful actions to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities that are free from discrimination." 24 C.F.R. § 5.150. Cities are specifically required to "foster[] and maintain[] compliance with civil rights and fair housing laws." 24 C.F.R. § 5.152. These responsibilities are appropriately vested in municipalities because they are the public entities that most directly experience the consequences of discriminatory housing practices, such as redlining or reverse redlining. For individual homeseekers, it is often impossible to know that they have been treated differently than another homeseeker because of their race or ethnicity. Municipal officials, however, may be able to discern the consequences of discriminatory

practices, such as concentrated foreclosures, clusters of abandonment, or increasing segregation and set out to understand their causes.

In sum, the City of Miami is uniquely situated in relation to the discriminatory practices at issue in this case, because it is both forced to bear the direct costs of lending discrimination and it is required by the Fair Housing Act to take steps to address that discrimination. Identifying lending discrimination on the basis of race or ethnicity can be difficult or impossible for any single individual, and effective vindication of the Fair Housing Act's prohibition on discrimination requires that municipalities, such as the City of Miami, that are also direct victims of the discrimination, be able to bring those claims to federal courts.

CONCLUSION

The social science evidence is clear: cities like Miami are direct victims of mortgage redlining and reverse redlining by banks. Appellants' targeting of black and Latino neighborhoods for high-cost loans with risky terms predictably led directly to elevated rates of concentrated foreclosures in those same neighborhoods. These elevated rates of foreclosures in predominantly black and Latino neighborhoods, in turn, directly led to a loss of revenue for, and increased expenditures by, cities. The devastating impacts of these practices on cities, such as the City of Miami, were already well-established by the mid-2000s and thus foreseeable by the appellants. Lending discrimination continues to the present, compounds the injury to the cities, and stands in the way of achieving the goals of the Fair Housing Act.

Cities have not only an interest but an obligation to further fair housing and are well placed to advance the Fair Housing Act's aims of "provid[ing] . . . for fair housing throughout the United States." 42 U.S.C. § 3601. Without the ability to bring suit under the Fair Housing Act to challenge mortgage discrimination, municipalities will be left with fewer crucial tools to combat the kinds of systemic discrimination that the Fair Housing Act was intended to address.

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APPENDIX

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Richard M. Alderman is a Professor Emeritus at the University of Houston Law Center.

Ryan Allen is an Associate Professor of Community and Economic Development at the University of Minnesota.

Elizabeth Anderson is a Professor of Philosophy and Women's Studies at the University of Michigan.

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Nestor Davidson is a Professor of Law and Director of the Urban Law Center at Fordham Law School.

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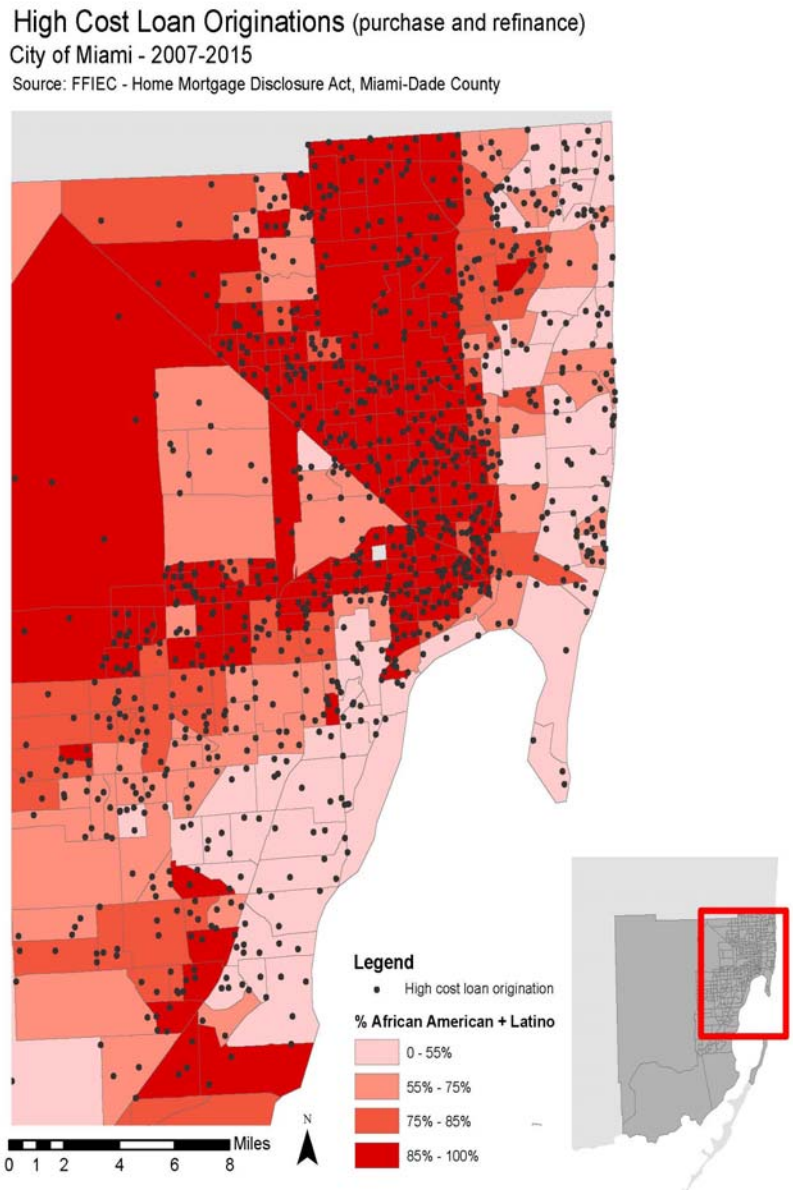
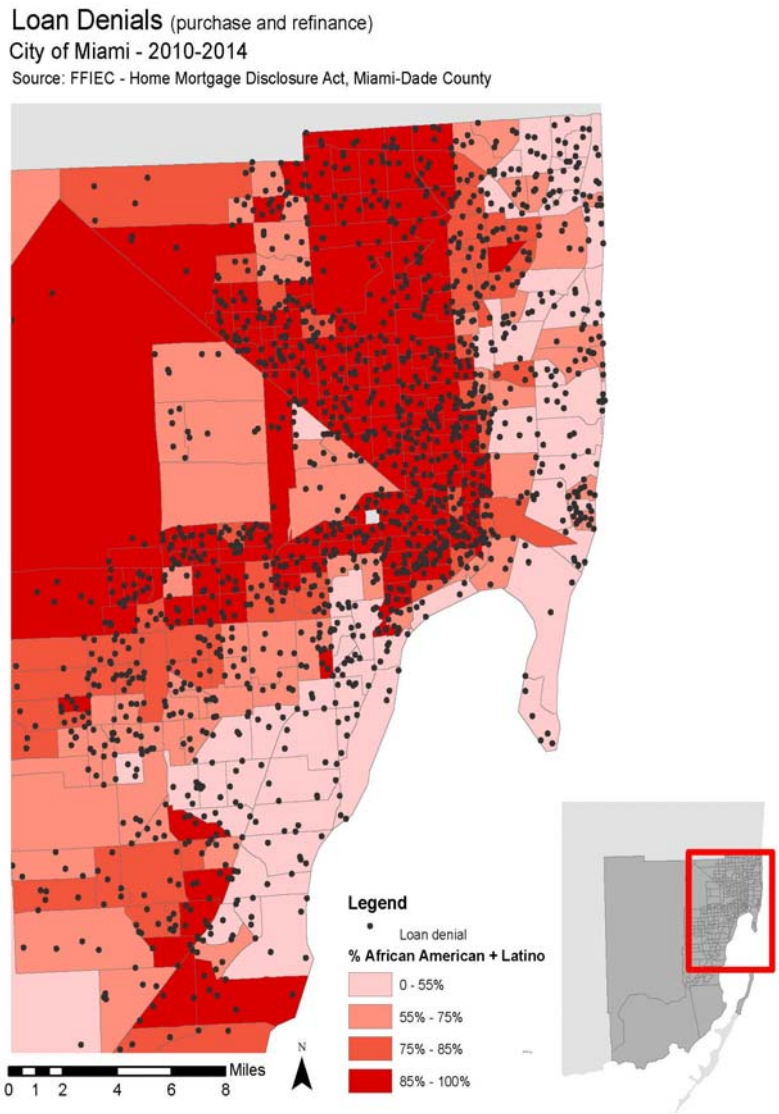
John McHenry Yinger is a Professor of Public Administration and Economics at Syracuse University.

Appendix 2: High Cost Loan Originations



APPENDIX 3: Loan Denials



APPENDIX 4: Foreclosures