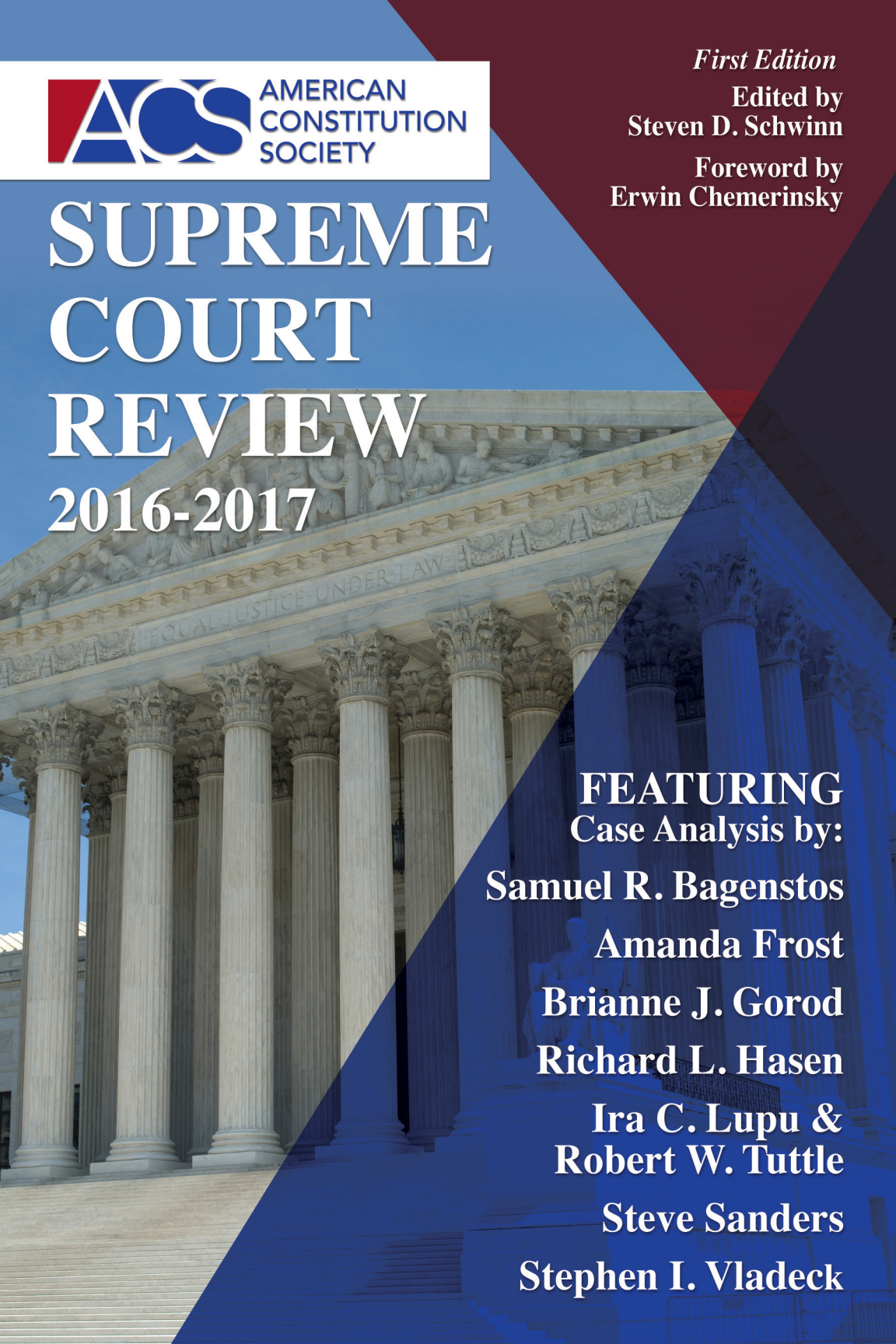
AMERICAN CONSTITUTION SOCIETY
ACS
First Edition
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SUPREME COURT REVIEW
2016-2017
FEATURING
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Bank of America v. Miami: An Important Progressive Victory Due to a Surprising Fifth Vote

Brianne J. Gorod*

It was a banner year at the Supreme Court for the U.S. Chamber of Commerce, which had "one of its highest success rates ever," winning 80% of the merits cases in which it filed *amicus* briefs.[1] As my colleague Brian Frazelle put it, "[t]hose wins allowed the Chamber to consolidate and expand upon earlier landmark victories, quash attempts to carve out exceptions to recent pro-business rulings, and secure important new precedents making it harder for workers, consumers, and others to hold corporations accountable."[2]

But the Chamber had an important loss, too, amidst all the victories. In *Bank of America v. City of Miami*, a case about whether Miami could sue Bank of America and Wells Fargo for allegedly engaging in a practice of predatory lending that lasted over a decade, the Court rejected the banks' argument that Miami could not sue to enforce the Fair Housing Act's protections because it was not an "aggrieved person" within the meaning of that law.[3] The Court's decision was exactly right on that point. Consistent

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[1] Brian R. Frazelle, *Corporate Clout: As the Roberts Court Transforms, the Chamber Has Another Big Term*, Const. Accountability Ctr.: Text & History Blog (July 26, 2017), https://www.theusconstitution.org/text-history/4543/corporate-clout-roberts-court-transforms-chamber-has-another-big-term.

[2] *Id*.

[3] Bank of America Corp. v. City of Miami, 137 S. Ct. 1296 (2017).

with the broad access to the federal courts that our nation's Framers enshrined in Article III of the Constitution, Congress has long relied on private parties to enforce federal laws, particularly civil rights laws. And Congress continued that tradition in the FHA, as its text and legislative history make clear.[4]

The Court's decision in *Bank of America Corp. v. City of Miami* is a big deal not only for Miami, but also for the millions of Americans whose lives were shattered by the 2008 financial crisis. But while the case was definitely a loss for those who were trying to stop this lawsuit in its tracks, it wasn't a total win for Miami either. The Supreme Court concluded that the lower court had applied the wrong standard in determining whether the banks' lending practices were the "proximate cause" of the City's injuries, and thus remanded the case back to that court to reconsider that issue under the proper legal standard.[5] Thus, whether Miami is ultimately able to hold these banks accountable for their alleged violations of the Fair Housing Act remains to be seen.

As we wait to see how the rest of this case unfolds, we will also have to wait to see how much it tells us about what we can expect from the Supreme Court going forward. In this 5-3 decision, Chief Justice John Roberts was Miami's lone vote from a conservative Justice, a result that surely surprised many (including me) when the Court's decision was handed down. As I've written previously, Chief Justice Roberts, while very conservative, is not invariably so.[6] But his consistent votes to limit access to the courts during his first decade as Chief Justice made this an exceptionally

[4] *See infra* Part II.

[5] *Bank of America Corp.*, 137 S. Ct. at 1305-06.

[6] Brianne Gorod, Roberts at 10: A Very Conservative Chief Justice Who Occasionally Surprises 8, *available at* https://www.theusconstitution.org/sites/default/files/briefs/Roberts_at_10_12_Capstone.pdf (last visited Oct. 1, 2017) [hereinafter Gorod, *A Very Conservative Chief Justice*].

surprising vote.[7] What accounts for it? Perhaps Roberts was simply persuaded that the Court's prior precedents, and Congress's affirmation of those precedents, compelled this result. But perhaps the Chief Justice, who appears to care deeply about the institutional legitimacy of the Court, was also moved, at least in part, by the desire to avoid the 4-4 split decision that would have otherwise resulted.

Whatever the cause of the Chief Justice's vote in this case, there's little reason to think that his decision in *Bank of America* is a harbinger of a broader change in his votes in access-to-courts cases. After all, he has consistently sided with big business over those who are trying to use the courts to vindicate federal rights. But even so, *Bank of America* remains an important decision in its own right—and an important reminder that progressives should hesitate before counting out Chief Justice Roberts's vote, even in the most unlikely of cases.

I. Background

In 2008, the nation faced one of the greatest economic downturns in its history—millions of Americans lost their jobs and their homes, and millions of American families lost trillions of dollars in net worth.[8] Indeed, the scope of the crisis was so great that it has become known as the "Great Recession."[9] Among the causes of this economic crisis was a practice of pervasive predatory lending in which banks made high-risk, costly loans

[7] *See generally* Brianne Gorod, Roberts at 10: Roberts's Consistent Votes To Close the Courthouse Doors, *available at* https://www.theusconstitution.org/sites/default/files/briefs/Roberts_at_10_04_Access_to_Courts.pdf (last visited Oct. 1, 2017) [hereinafter Gorod, *Roberts's Consistent Votes*].

[8] Brianne J. Gorod, Brian R. Frazelle & Simon Lazarus, Constitutional and Accountable: The Consumer Financial Protection Bureau 4 (2016) (citing S. Rep. No. 111-176, at 9 (2010)), https://www.theusconstitution.org/sites/default/files/20161020_White_Paper_CFPB.pdf.

[9] *Id*.

to homeowners without regard to whether the homeowners would likely be able to repay the loans.[10] As William Brennan, the Director of the Home Defense Program at the Atlanta Legal Aid Society, put it in 1998, this practice of predatory lending—coupled with "investors buying up these shaky mortgages by the thousands"—produced a "house of cards."[11] And in 2008, the entire house of cards came tumbling down. In addition to the millions of individuals who were harmed, so too were cities which not only lost tax revenue, but also had to spend more on municipal services to address blight in neighborhoods affected by the dramatic increase in foreclosures.

One of those cities, Miami, sued both Bank of America and Wells Fargo under the Fair Housing Act ("FHA") for allegedly engaging in a decade-long practice of discriminatory and predatory lending. The FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling . . . because of race,"[12] and "for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race."[13] The FHA also provides that "[a]n aggrieved person may commence a civil action . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach,"[14] defining "aggrieved person" broadly to include anyone who "claims to have been injured by

[10] Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, Reuters (Oct. 4, 2010, 12:19 AM), http://www.reuters.com/article/us-usa-foreclosures-race-idUSTRE6930K520101004.
[11] Kat Aaron, Ctr. For Pub. Integrity, Predatory Lending: A Decade of Warnings (2009), https://www.publicintegrity.org/2009/05/06/5452/predatory-lending-decade-warnings.
[12] 42 U.S.C. § 3604(b) (2015).
[13] 42 U.S.C. § 3605(a) (2015).
[14] 42 U.S.C. § 3613(a)(1)(A) (2015).

a discriminatory housing practice."[15] According to the City's complaints in these two cases, the banks' targeting of minority borrowers for high-risk, costly loans—and their refusal to extend credit to minorities on equal terms with white borrowers—led to unnecessary and premature foreclosures, which in turn cost the City tax revenue and forced it to spend more on municipal services.

The district court dismissed Miami's complaints against both banks. Most significantly, the district court held that Miami did not have standing to sue under the FHA because it was not included within the statute's "zone of interests." It also concluded that Miami could not establish that the banks were the proximate cause of the City's injuries.[16] The Eleventh Circuit reversed. According to that court, Miami had "constitutional standing to pursue its FHA claims," and "the 'zone of interests' for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution."[17] The Eleventh Circuit also concluded that Miami had "adequately alleged proximate cause" because the proper test was whether the defendant could have reasonably foreseen the kind of harm the plaintiff suffered.[18] The Eleventh Circuit held that Miami had satisfied that standard because, among other things, "[t]he complaint alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices 'and their attendant harm,' such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues."[19] The banks

[15] 42 U.S.C. § 3602(i)(1) (2015).
[16] City of Miami v. Bank of America Corp., No. 13-24506, 2014 WL 3362348, at *4-*5 (S.D. Fla. July 9, 2014).
[17] City of Miami v. Bank of America Corp., 800 F.3d 1262, 1266 (11th Cir. 2015).
[18] *Id*. at 1266, 1278-83.
[19] *Id*. at 1282.

asked the Supreme Court to hear the case, and it agreed to do so.

On May 1, 2017, the Court issued a 5-3 decision, handing Miami a partial win. Importantly, the Court concluded that Miami was within the FHA's "zone of interests" because it was an "aggrieved person" within the meaning of the FHA. Writing for the Court, Justice Breyer explained that the Supreme Court "has repeatedly written that the FHA's definition of person 'aggrieved' reflects a congressional intent to confer standing broadly,"[20] and "in 1988, when Congress amended the FHA, it retained without significant change the definition of 'person aggrieved' that this Court had broadly construed."[21] Although the Court left open the possibility that the reach of "aggrieved person" under the FHA may not be as broad as Article III allows, the Court concluded that it did not matter because "the City's financial injuries fall within the zone of interests that the FHA protects."[22] Tracing the allegations in Miami's complaint—the predatory lending practices that led to a "concentration" of "foreclosures and vacancies," which in turn led to a "decline in African-American and Latino neighborhoods," which in turn "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services"—the Court concluded that "[t]hose claims are similar in kind to the claims" the Court had previously recognized were sufficient to confer standing.[23] In reaching this result, the Court emphasized that it was relying on its past precedents: "The upshot is that the City alleges economic injuries that arguably fall within the FHA's zone of interests, as we have previously interpreted that statute. Principles of *stare decisis* compel our adherence

[20] *Bank of America Corp.*, 137 S. Ct. at 1303.
[21] *Id*.
[22] *Id*. at 1304.
[23] *Id*.

to those precedents in this context. And principles of statutory interpretation require us to respect Congress' decision to ratify those precedents when it reenacted the relevant statutory text."[24]

The Court then turned to the proximate cause question. With respect to that question, the Court concluded that "foreseeability alone is not sufficient to establish proximate cause under the FHA" because "foreseeability alone does not ensure the close connection [between a defendant's unlawful conduct and a plaintiff's harm] that proximate cause requires."[25] According to the Court, "[t]he housing market is interconnected with economic and social life. A violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct. Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel."[26] Thus, the Court concluded, "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'"[27] Rather than try to determine whether such a direct relationship existed in this case, the Court remanded to the Eleventh Circuit to "define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses."[28]

In dissent, Justice Thomas, joined by Justices Kennedy and Alito, would have ruled against Miami on both questions in the case. With respect to the first question, Justice Thomas concluded that "Miami's asserted injuries are 'so marginally related to or inconsistent with the purposes' of the FHA that they fall outside

[24] *Id*. at 1305.
[25] *Id*. at 1305, 1306.
[26] *Id*. at 1306.
[27] *Id*.
[28] *Id*.

the zone of interests . . . that the statute protects."[29] In Justice Thomas's view, "nothing in the text of the FHA suggests that Congress was concerned about decreased property values, foreclosures, and urban blight, much less about strains on municipal budgets that might follow."[30] With respect to the second, Justice Thomas "agree[d] with the Court's conclusions about proximate cause, as far as they go,"[31] but he would have gone much farther. To Thomas, "the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts."[32]

II. Vindicating the FHA

The Court's decision to allow this case to go forward was plainly the right one. Although Bank of America and Wells Fargo argued that Miami could not sue under the FHA because its rights were not "violated directly," that is, it did not "assert it was deprived of equal treatment on the basis of race or ethnicity, and it alleges no loss or damage arising from segregation tied to discriminatory conduct,"[33] that argument fundamentally misunderstands the FHA and the background against which it was enacted, as my colleagues at the Constitutional Accountability Center and I argued in an *amicus* brief we filed in the case.[34]

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[29] *Id*. at 1308 (Thomas, J., dissenting).
[30] *Id*. at 1309.
[31] *Id*. at 1311.
[32] *See id*. ("Miami's own account of causation shows that the link between the alleged FHA violation and its asserted injuries is exceedingly attenuated.").
[33] Brief for Petitioners, *Bank of America Corp.*, 137 S. Ct. 1296 (No. 15-1111), 2016 WL 4473463, at *17; see Brief for Petitioners, *Wells Fargo & Co.*, 137 S. Ct. 1296 (No. 15-1112), 2016 WL 4446486, at *9 ("the City has not asserted *any* injury to an interest in non-discrimination").
[34] Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondent, *Bank of America*, 137 S. Ct. 1296 (No. 15-1111) (Oct. 7, 2016), *available at* https://www.theusconstitution.org/sites/default/files/briefs/Bank_of_America_v_City_of_Miami_Amicus_Final.pdf. The discussion in this part, as well as in *infra* Part III.A. is substantially drawn from this *amicus* brief.

A. Broad Access to the Courts and the Role of Private Parties

When the Framers adopted our enduring charter, they conferred broad power on the federal courts established by Article III of the Constitution,[35] empowering the "judicial department" to "decide all cases of every description, arising under the constitution or laws of the United States."[36] The decision to confer this broad power on the federal courts was a direct response to the federal government's inability to enforce its decrees under the Articles of Confederation, which established a single branch of the federal government and no independent court system.[37] Under the dysfunctional government of the Articles, individuals could not go to court to enforce federal legal protections, leading Alexander Hamilton to lament "the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws."[38]

When the Framers gathered in Philadelphia to draft the new national charter, they made sure to address this problem, creating a new federal judiciary that would have the power to enforce federal legal protections. The Framers understood that "[n]o government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws," and gave to the federal courts "the power of construing the constitution and laws of the Union . . . and of preserving them from

[35] U.S. Const. art. III, § 2, cl. 1 (extending the "judicial Power" to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority").

[36] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).

[37] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 (1987) (explaining that Confederation courts were "pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power").

[38] The Federalist No. 21, at 107 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classics 2003) (1788); The Federalist No. 22, at 118 (Alexander Hamilton) ("[l]aws are a dead letter without courts to expound and define their true meaning and operation").

all violation from every quarter[.]"[39] James Madison explained that "[a]n effective Judiciary establishment commensurate to the legislative authority, was essential."[40]

To ensure that courts can function "as a forum for vindicating rights,"[41] Congress has long enacted laws that give private parties an important role in the enforcement of federal law. Indeed, since the very first Congress, lawmakers have given persons a right to sue to redress violations of the nation's laws in the federal courts. Empowerment of these private litigants promotes robust enforcement of the law, securing "important social benefits" that include "deterrence of . . . violations in the future."[42]

Most pertinent here, private litigation is one of the "primary mechanisms" that Congress has used to enforce civil rights legislation,[43] recognizing that enabling private litigation offers an essential supplement to the federal government's enforcement efforts.[44] In numerous statutes, therefore, Congress has "harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large."[45] This approach "supplements

[39] *Cohens*, 19 U.S. at 387-88.

[40] 1 The Records of the Federal Convention of 1787 124 (Max Farrand ed., 1911).

[41] Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. Rev. 1339, 1354 (2012) [hereinafter Johnson, *Equality Directives*].

[42] City of Riverside v. Rivera, 477 U.S. 561, 574-75 (1986).

[43] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. Ill. L. Rev. 183, 186; *see* Johnson, *Equality Directives*, *supra* note 41, at 1346 ("Congress enacts civil rights statutes to promote antidiscrimination and equity goals, and to empower private individuals to enforce those goals through private litigation.").

[44] *See, e.g.*, Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02 (1968) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II."); Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969) ("The achievement of the [Voting Rights] Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the [Section] 5 approval requirements.").

[45] Karlan, *supra* note 43, at 186.

what even an ideally constituted, well-funded, and vigorous public enforcement agency could do," by "engag[ing] the resources of a multitude of private actors in rooting out discrimination."[46] In short, "Congress can vindicate important public policy goals by empowering private individuals to bring suit."[47] The FHA continued the tradition of enlisting private parties in the enforcement of federal law, recognizing that vigorous enforcement by private parties would be necessary to achieve the law's ambitious goals, as the remainder of this Part discusses.

B. The Original Fair Housing Act

The Fair Housing Act was enacted in 1968, following an extended debate about fair housing that was precipitated the previous year by a series of "devastating urban riots that left vast areas of major cities in flames."[48] After the assassination of Martin Luther King, Jr., and "jolted by the repeated civil disturbances virtually outside its door,"[49] Congress responded with ambitious legislation, which declared it "the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."[50] Indeed, the FHA was enacted not

[46] Johnson, *Equality Directives*, *supra* note 41, at 1347; *see City of Riverside*, 477 U.S. at 574-75 ("[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. . . . [A] successful civil rights plaintiff often secures important social benefits . . . . In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.").

[47] Karlan, *supra* note 43, at 186.

[48] Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 Admin. L.J. Am. U. 59, 70 (1993).

[49] Charles McC. Mathias, Jr. & Marion Morris, *Fair Housing Legislation: Not an Easy Row To Hoe*, 4 Cityscape: A J. of Pol'y Dev. and Research 21, 26 (1999), *available at* https://www.huduser.gov/portal/Periodicals/CITYSCPE/VOL4NUM3/mathias.pdf.

[50] Pub. L. No. 90-284, § 801, 82 Stat. 73, 81 (1968); *see* Mathias & Morris, *supra* note 49, at 26 ("The Fair Housing Act was to provide not only greater housing choice but also to promote racial integration for the benefit of all Americans."); 114 Cong. Rec. S3422 (Feb. 20, 1968) (statement of Sen. Mondale) ("America's goal must be that of an integrated society, a stable society free of the conditions which spawn riots . . . . [T]he best way for this Congress to start on the true

simply to ensure that individual victims of housing discrimination could sue. Rather, as its supporters explained, it was enacted to promote "an integrated society" and end "the explosive concentration of Negroes in the urban ghettos."[51]

Despite the FHA's ambitious goal of ending housing segregation in America, the Act relied "primarily . . . on private litigation" for its enforcement.[52] To facilitate this private enforcement, the Act opened the courthouse doors to as wide a range of "aggrieved" plaintiffs as possible—"Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[53]

Just a few years after the law's passage, the Supreme Court acknowledged both the ambitious goal of the FHA and the means it made available to realize that goal,[54] concluding that "the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority."[55]

Indeed, the Supreme Court's first FHA decision recognized that the need to "give vitality" to the Act required allowing all injured parties to help enforce the FHA's promise of fair housing,

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road to integration is by enacting fair housing legislation."); 114 Cong. Rec. H9959 (Apr. 10, 1968) (statement of Rep. Celler) (referring to the aim of "eliminat[ing] the blight of segregated housing").

[51] 114 Cong. Rec. S3422 (Feb. 20, 1968) (statement of Sen. Mondale); 114 Cong. Rec. H9589 (Apr. 10, 1968) (statement of Rep. Ryan).

[52] Robert G. Schwemm, *Private Enforcement and the Fair Housing Act*, 6 Yale L. & Pol'y Rev. 375, 378 (1988).

[53] Pub. L. No. 90-284, § 810(a), 82 Stat. at 73.

[54] *See* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209, 211 (1972) (stating that "the reach of the proposed law was to replace the ghettos by truly integrated and balanced living patterns," but that "complaints by private persons are the primary method of obtaining compliance with the Act" (quotation marks omitted)).

[55] *Id*. at 211 (quotation marks omitted); *see Newman*, 390 U.S. at 402.

consistent with its "broad" definition of "person aggrieved."[56] "In light of the clear congressional purpose in enacting the 1968 Act, and the broad definition of 'person aggrieved,'" the Supreme Court determined that Congress had provided the plaintiffs with "an actionable right to be free from the adverse consequences to them of racially discriminatory practices directed at and immediately harmful *to others*."[57]

In the years that followed, the Court repeatedly adhered to that principle, holding that an array of plaintiffs with diverse indirect injuries could sue to enforce the FHA. For example, the Court allowed white tenants of an apartment complex to sue when, as a result of the owner's discrimination against non-whites, the white tenants lost "the social benefits of living in an integrated community," as well as the "business and professional advantages which would have accrued if they had lived with members of minority groups."[58] The Court also concluded that neighborhood residents who lost "social and professional benefits" due to racial steering committed against others, and who also suffered the "economic injury" of a "diminution of value" of their homes, could sue.[59] Similarly, the Court concluded that a nonprofit fair housing organization that experienced a "drain on [its] resources" and impairment of its "ability to provide counseling and referral services" because of the need to counteract racial steering practices of a realty company was also a proper plaintiff under the FHA.[60]

Finally, the Court concluded that a municipality could sue when racial steering had "manipulate[d] the housing market"

[56] *Trafficante*, 409 U.S. at 212.
[57] Warth v. Seldin, 422 U.S. 490, 512-13 (1975) (emphasis added).
[58] *Trafficante*, 409 U.S. at 208 (noting that plaintiffs also "suffered embarrassment and economic damage in social, business, and professional activities from being 'stigmatized' as residents of a 'white ghetto").
[59] Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 115 (1979).
[60] Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982).

and altered its racial make-up, "replacing what [was] an integrated neighborhood with a segregated one."[61] In describing the potentially "profound" and "adverse" consequences to a municipality of such discrimination, the Court explained that "reduc[ing] the total number of buyers" could cause prices to "be deflected downward," especially "if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents."[62] As the Court explained, "[a] significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."[63] By the early 1980s, therefore, the Supreme Court had permitted a diverse array of plaintiffs who were not themselves discriminated against to seek relief under the FHA, making clear each time that "the only requirement for standing to sue" under the Act was "the Art. III requirement of injury in fact."[64]

C. Amending the FHA

Despite the breadth of the FHA's private cause of action, the original Act proved inadequate to meet the law's ambitious goals because other provisions of the law, including "a short statute of limitations" and "disadvantageous limitations on punitive damages and attorney's fees," ultimately discouraged private actions.[65] As a result, "relatively few fair housing cases [were] filed," with "[t]he number of reported employment discrimination decisions run[ning]

[61] *Gladstone*, 441 U.S. at 109-10.
[62] *Id*. at 110.
[63] *Id*. at 110-11.
[64] *Havens Realty Corp.*, 455 U.S. at 375-76; *accord Gladstone*, 441 U.S. at 109; *Trafficante*, 409 U.S. at 209.
[65] H.R. Rep. No. 100-711, at 16 (1988); *see id.* at 15 (noting that "the primary weakness" that Congress sought to fix by amending the Act was the "limited means for enforcing the law").

five to ten times th[e] amount" of housing discrimination cases.[66]

In light of those problems with the original Act, Congress ultimately responded, "[a]fter nearly a decade of abortive efforts," with "a comprehensive overhaul of the [FHA's] enforcement mechanism,"[67] acknowledging that "[t]wenty years after the passage of the Fair Housing Act, discrimination and segregation in housing continue to be pervasive."[68] In amending the law to address its failure "to provide an effective enforcement system," Congress sought "to fill that void" not only by "creating an administrative enforcement system," but also "by removing barriers to the use of court enforcement by private litigants," thereby establishing "an improved system for civil action by private parties."[69] In doing so, lawmakers explained that their purpose was to remove "disincentive[s] for private persons to bring suits under existing law," in order to create "an effective deterrent on violators."[70]

In attempting to encourage more robust private enforcement, Congress deliberately preserved the language on which the Supreme Court had relied in concluding that the Act's private cause of action extends to all parties injured by illegal housing practices—including municipalities and others indirectly injured by discrimination. Indeed, as early as 1979, the leading bills to amend the FHA added a formal definition of "aggrieved person" identical to the one that ultimately prevailed in 1988, and which replicated the language on which the Supreme Court had previously relied.[71] From the start, fair housing advocates

[66] Schwemm, *supra* note 52, at 381.
[67] Ware, *supra* note 48, at 62.
[68] H.R. Report No. 100-711, at 15.
[69] *Id*. at 13, 33.
[70] *Id*. at 40.
[71] *Compare* 42 U.S.C. § 3602(i), *with* H.R. 5200, 96th Cong. § 4(b) (1979) ("'Aggrieved person' includes any person who claims to have been injured by a discriminatory housing practice or who

supported this definition precisely because—as they explained to Congress—they understood it to preserve and ratify the Supreme Court's interpretation of the term.[72] Opponents of this definition understood the definition in the same way, and opposed it for that reason.[73]

By the time the Act was amended in 1988, everyone understood what the Supreme Court's FHA decisions meant and what Congress's ratification of those decisions would indicate. As one commentator had noted earlier that year, "the Court . . . has made clear that proper plaintiffs under the Act include not only direct victims of housing discrimination, but virtually anyone who is injured in any way by conduct that violates the statute."[74] When lawmakers debated the bill that ultimately passed in 1988, opponents urged Congress not to ratify the Court's interpretation of "aggrieved" persons by reinscribing the statutory language on which it was based. As they warned, "the definition found in the Kennedy/Specter bill, which adopts existing Supreme Court precedent, effectively eliminates any limits on who can sue a real estate broker for an alleged discriminatory housing practice."[75]

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believes that such person will be irrevocably injured by a discriminatory housing practice that is about to occur.").

[72] *See, e.g., Fair Housing Amendments Act of 1979: Hearings on S. 506 before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 96th Cong. 107 (1979) (National Committee Against Discrimination in Housing Memorandum) ("The amendments propose a definition of 'aggrieved person' which essentially tracks the current language of section 810. This definition, which includes 'any person' who has been, or will be, adversely affected by a discriminatory housing practice, adopts the Supreme Court's formulation in *Trafficante*[.]").

[73] *See, e.g., id.* at 433 (Prepared Statement of the National Association of Realtors) ("[T]he National Association vigorously opposes the concept that a person who neither seeks nor has been denied access to housing or the means of acquiring housing should be deemed an 'aggrieved person' under Title VIII. The extension of 'standing' contemplated by the definition of 'aggrieved person' is an invitation for abuse[.]"); *id*. ("The Supreme Court has presented the Congress with an ideal opportunity to aid it in defining the limits of 'standing to sue' under Title VIII . . . . The National Association submits that Congress should amend Section 4(b) of S. 506 to provide that an 'aggrieved person' shall be defined as 'any person who is directly and adversely affected by a discriminatory housing practice.'").

[74] Schwemm, *supra* note 52, at 382.

[75] *Fair Housing Amendments Act of 1987: Hearings on S. 558 before the Subcomm. on the*

Legislators rejected those requests. Congress not only kept that language, but also formalized it in a new stand-alone definition.[76]

To be sure, one purpose of adding "aggrieved person" to the FHA's overarching definitions section was to make explicit that "precisely the same class of plaintiffs" may choose to pursue either administrative or judicial remedies, which the Act addressed in separate places.[77] There is no reason, however, to think that when Congress made sure that a single set of "standing requirements" would apply across the entire Act, it was oblivious to what the Supreme Court had repeatedly concluded those "standing requirements" were.

Because lawmakers clearly were aware of how the Supreme Court had construed the term "person aggrieved" under the FHA, "Congress' decision in 1988 to amend the [Act] while still adhering to the operative language . . . is convincing support for the conclusion that Congress accepted and ratified" that interpretation.[78] Indeed, Congress enacted the FHA amendments after rejecting an alternative bill that would have eliminated the definition of an "aggrieved" person previously adopted by the Court, replacing it with a narrower definition restricted to persons who were discriminated against while seeking housing.[79]

Thus, in concluding that cities like Miami are "aggrieved

Constitution of the Comm. on the Judiciary, 100th Cong. 124-25 (1987) [hereinafter "1987 Hearings"] (Prepared Statement of Robert Butters, on Behalf of the National Association of Realtors).

[76] *See* Pub. L. No. 100-430, § 5(b), 102 Stat. 1619, 1619-20 (1988).

[77] *Gladstone*, 441 U.S. at 100-01; *see* H.R. Report No. 100-711, at 23 (noting that in *Gladstone* "the Supreme Court affirmed that standing requirements for judicial and administrative review are identical" and explaining that the bill's new definition was intended "to reaffirm the broad holdings" of *Gladstone* and *Havens*).

[78] Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2520 (2015).

[79] *See* 1987 Hearings, *supra* note 75, at 110 (referring to "the provision contained in Senator Hatch's bill that defines an aggrieved person under the act as one whose bona fide attempt to purchase, sell or lease real estate has been frustrated by a discriminatory housing practice").

persons" within the meaning of the FHA, the Court in *Bank of America* was exactly right, correctly interpreting its past decisions and correctly drawing the proper inference from Congress' affirmation of those decisions.

III. Looking Ahead

A. Practical Importance

While the Court's decision in *Bank of America* did not break significant new legal ground, it is nonetheless quite important. It ensures that cities will be able to continue to sue to enforce the provisions of the FHA, and this is no small thing. Despite advancements that followed the strengthening of the FHA in 1988, "[m]uch progress remains to be made in our Nation's continuing struggle against racial isolation."[80] While "some White neighborhoods have become less homogenous, Black neighborhoods remain largely unchanged."[81]

Much of this stagnation is attributable to the persistence of racial discrimination in "the sale, rental, and occupancy of housing,"[82] and cities like Miami are acutely harmed by this persistence of racial housing discrimination. After all, "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices," and, as the Supreme Court has observed, "'[t]here can be no question about the importance' to a

[80] *Inclusive Cmtys.*, 135 S. Ct. at 2525.

[81] Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. Rev. 2182, 2193 (2013) (citing statistics).

[82] Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 Ind. L. Rev. 507, 508 (2008); *see* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power To Advance Fair Housing*, 13 U. Pa. J. Const. L. 1191, 1196-97 (2011) ("The most comprehensive tests of U.S. metropolitan markets reveal that blacks and Latinos seeking housing encounter discrimination nearly a quarter of the time. . . . [T]he FHA has proven to be a less successful mechanism for remedying housing discrimination than Title VII of the Civil Rights Act of 1964 has in addressing employment discrimination.").

community of 'promoting stable, racially integrated housing.'"[83] Residential segregation and racially biased predatory lending meaningfully affect the cities in which they occur in countless ways: depressing tax revenues, requiring additional municipal services, increasing crime, encouraging flight to the suburbs, and entrenching poverty, to name just a few.[84]

Thus, continued aggressive enforcement of the FHA remains as critical today as it was nearly 50 years ago when the law was enacted. And because the amended FHA "retained the individual cause of action as the primary means of correcting the evils caused by [FHA] violations,"[85] the Act still "depends heavily on requiring private individuals to self-identify as victims of discrimination and bring complaints."[86] In fact, private enforcement remains particularly critical because the "enhanced public enforcement capacity" that was one goal of the 1988 amendments "has not produced greater results," as HUD's "administrative complaint system has historically been plagued by staffing problems and delays,"[87] while the robustness of Department of Justice enforcement has varied over time. And, of course, reliance on government enforcement means that enforcement will likely wane during periods when fair housing is not a priority of the federal government.[88]

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[83] *Gladstone*, 441 U.S. at 111 (quoting Linmark Assocs., Inc. v. Willingboro Tp., 431 U.S. 85, 94 (1977)); *cf. Trafficante*, 409 U.S. at 210-11 (noting that the FHA's proponents had "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered").

[84] *See generally* Brief for the City and County of San Francisco, the City of Los Angeles, and 24 Other Jurisdictions as Amici Curiae in Support of Respondent City of Miami, Florida, *Bank of America*, 137 S. Ct. 1296 (No. 15-1111), 2016 WL 5940646.

[85] Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies To Achieve the Purposes of the Fair Housing Act*, 64 Temp. L. Rev. 909, 915 (1991).

[86] Johnson, *supra* note 82, at 1204.

[87] *Id*. at 1207.

[88] *Cf.* Jennifer C. Kerr, *Carson Pledges To Fight Homelessness, Despite Deep Proposed Budget Cuts*, The Rundown (July 18, 2017), http://www.pbs.org/newshour/rundown/carson-pledges-fight-

The ability of cities like Miami to bring FHA enforcement actions is particularly critical because despite the law's reliance on private enforcement, it is difficult to "incentiviz[e] individuals to bring complaints."[89] One problem is that "victims of housing discrimination often do not even realize that they have been treated unfairly."[90] Today, "persons who engage in housing discrimination are increasingly unlikely to do so in an overt manner," and "victims generally [are] not trained to detect violations."[91] Moreover, even when individual victims are aware of the discrimination, "the prospect of hiring a lawyer and filing a lawsuit is not appealing to many people, and this problem is especially acute in the housing field," because the "very fact that an individual or a family is in the market for new housing often means that their lives are in a state of flux that makes pausing to file a federal lawsuit a practical impossibility."[92] Furthermore, "as several studies reveal, damages in housing cases are on average too inconsistent and generally too low to alter the behavior of potential discriminators."[93] In many cases, moreover, "the relief that would actually achieve the goal of integration—provision of the denied housing—is of no use to the plaintiff," who "has already found a substitute unit because the need for housing cannot await the litigation's final outcome."[94]

Given these challenges, it is essential that indirectly injured parties like cities be able to sue over "the adverse consequences

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homelessness-despite-deep-proposed-budget-cuts/ (noting that Trump's proposed budget "calls for cutting about $7 billion from the $48 billion HUD budget").

[89] Johnson, *supra* note 82, at 1202-03 ("By all estimates, only a small number of potential victims of housing discrimination make use of the enforcement system.").

[90] Schwemm, *supra* note 52, at 379-80.

[91] Armstrong, *supra* note 85, at 919.

[92] Schwemm, *supra* note 52, at 380.

[93] Johnson, *supra* note 82, at 1203.

[94] Armstrong, *supra* note 85, at 918-19.

to them" of "racially discriminatory practices directed at and immediately harmful to others."[95] When banks engage in widespread but difficult-to-detect discrimination, such as steering minorities toward predatory loans, cities, with their institutional resources, can be effective prosecutors of these systemic abuses. After all, "thwarting discrimination requires a significant threat of complaints and substantial penalties for discrimination,"[96] and cities are well positioned to supply that needed threat—as well as to obtain injunctions protecting individual victims from future harm.[97]

Vigorous enforcement of the FHA is critical because when the prospect of enforcement is weak, chances increase that violators will flout the fair housing laws and perpetuate the racial segregation that has plagued the nation for far too long. Promoting the certainty and adequacy of fair housing enforcement is precisely why Congress opted to open the courthouse doors to "[a]ny person who claims to have been injured by a discriminatory housing practice" when it first passed the FHA in 1968.[98] It is also why Congress in 1988 ramped up the inducements to private enforcement, at the same time that it reinscribed statutory language that the Supreme Court had repeatedly described as extending the right to sue "as broadly as is permitted by Article III of the Constitution."[99]

Thus, the Court's decision in *Bank of America* was clearly important, notwithstanding the fact that it did not break real new legal ground. It made clear that not only cities, but also other

[95] *Warth*, 422 U.S. at 512-13.
[96] Johnson, *supra* note 82, at 1203.
[97] *Cf. Inclusive Cmtys.*, 135 S. Ct. at 2522 (noting that disparate-impact liability "has allowed private developers to vindicate the FHA's objectives and to protect their property rights" by challenging discriminatory measures).
[98] Pub. L. No. 90-284, § 810(a), 82 Stat. at 85.
[99] *Gladstone*, 441 U.S. at 98.

private parties, must be able to enforce the Fair Housing Act to vindicate its important goals. And even though the Court did not adopt as liberal a standard for proximate cause as the Eleventh Circuit did, there is every reason to think that cities like Miami and other private parties will be able to satisfy the standards that lower courts impose to apply that test.

B. A Harbinger of Things To Come?

Although *Bank of America* is clearly an important decision in its own right given its practical consequences for enforcement of a significant federal civil rights law, no one should mistake it as a harbinger for what one can expect from the Roberts Court—and, in particular, its Chief Justice—going forward. As I noted at the outset, this Term was generally a very successful one for big business at the Court and, indeed, big business has enjoyed a very successful decade under the Roberts Court. My organization, the Constitutional Accountability Center, has been tracking the success of the Chamber of Commerce in merits cases at the Court, and the results have been stunning: "since Justice Samuel Alito joined Chief Justice John Roberts on the bench in 2006, the Court has ruled for the Chamber in fully 70% of its cases," "mark[ing] a drastic swing in favor of business compared with earlier decades."[100]

When it comes to access to the courts, the story is largely the same—good for business, but not for those trying to hold businesses accountable in court. As I've written previously, the Roberts Court's track record on access to the courts is "largely, but not entirely, negative."[101] And even as "the record of the

[100] Frazelle, *supra* note 1.
[101] Gorod, *Roberts's Consistent Votes*, *supra* note 7, at 1.

Roberts Court may be mixed on access to the courts, the record of John Roberts is not."[102] As of the time of that writing, Roberts had dissented in "every . . . significant case during his tenure as Chief Justice in which the Court ha[d] refused to limit access to the courts, and he ha[d] always been in the majority when it ha[d] decided to limit such access."[103]

The Chief Justice's votes in this area of law have not been surprising. Even before joining the Court, Roberts's views on access to the courts were well-known. In 1992, John Roberts "wrote an article defending a then-recent Supreme Court decision that limited the ability to sue to prevent injury to the environment."[104] In defending the Court's decision in *Lujan v. Defenders of Wildlife*,[105] Roberts emphasized that he believes standing plays a critical role in defining the proper sphere of the federal courts' operation. To Roberts, standing doctrine "bolster[s]" the "legitimacy of an unelected, life-tenured judiciary in our democratic republic."[106] As he explained it, "[t]he need to resolve such an actual case or controversy provides the justification . . . for the exercise of judicial power itself, 'which can so profoundly affect the lives, liberty, and property of those to whom it extends."[107] Over a decade later at his confirmation hearing to become Chief Justice, it was clear that his views on this topic had not changed. "[J]udges," he said, "should be very careful to make sure they've got a real case or controversy before them, because that is the sole basis for the

[102] *Id*. at 1-2.
[103] *Id*. at 2.
[104] *Id*. (discussing John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219 (1993)).
[105] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[106] Roberts, *supra* note 104, at 1220.
[107] *Id*. (quoting Valley Forge Christian Coll. V. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 473 (1982)).

legitimacy of them acting in the manner they do in a democratic republic."[108]

In his first decade on the Court, Roberts repeatedly voted to limit access to the courts across a range of issue areas. In *Massachusetts v. EPA*, for example, he dissented from Justice John Paul Stevens's 5-4 opinion for the Court holding that Massachusetts had standing to challenge EPA's refusal to regulate greenhouse gas emissions under the Clean Air Act.[109] In his dissent, in language that echoed his earlier statements about the important role that standing doctrine plays in limiting the sphere of judicial authority, Roberts emphasized that demonstrating "particularized injury" was key to showing that there is a "'real need to exercise the power of judicial review.'"[110] Thus, in Roberts's view, the very scope of the danger presented by global warming meant that no one could bring a claim in court to address that danger: "Global warming is a phenomenon 'harmful to humanity at large,' and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."[111]

Roberts also voted with the Court's majority in a series of decisions that "channel[ed] more claims into arbitration and [made] it more difficult for injured individuals to use the class action device in the arbitral forum,"[112] and in other decisions that made it more difficult for plaintiffs to sufficiently plead a claim

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[108] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 342 (2005) [hereinafter Confirmation Hearing], *available at* https://www.judiciary.senate.gov/imo/media/doc/GPO-CHRG-ROBERTS.pdf.

[109] Massachusetts v. EPA, 549 U.S. 497 (2007).

[110] *Id*. at 541 (Roberts, C.J., dissenting) (quoting *Warth*, 422 U.S. at 508).

[111] *Id*. (internal citation omitted) (quoting Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in part)).

[112] Gorod, *Roberts's Consistent Votes*, *supra* note 7, at 9.

for relief.[113] He also dissented in cases involving suits against states, making clear his view that "the exception to state sovereign immunity should be an exceedingly narrow one, even if that means individuals are unable to access the federal courts to prevent unconstitutional state action."[114] All of this led me to conclude that "[u]nless there is a marked change in the years to come, Chief Justice Roberts's legacy when it comes to access-to-courts issues will be one of closing the courthouse doors as much as possible."[115] Indeed, even as I elsewhere praised Roberts for sometimes putting "law over ideology," I pointed to "access to the courts" as one area in which "it is often easy to predict his vote, no matter how strongly the law might point in the opposite direction."[116]

What then to make of the Chief Justice's vote in *Bank of America*? As I have also written before, Roberts cares deeply "about the institutional legitimacy of the Court and his reputation as its Chief Justice"[117]—he has expressed concern that the Court not be seen as a "political body"[118]—and those concerns can lead him, at least occasionally, to put "law over ideology."[119] Indeed, while Roberts "remains unquestionably conservative . . . he is becoming less invariably so," and there have been a number of "significant, divided cases in which Roberts parted ways with at least some of his conservative colleagues to vote with the Court's more progressive members."[120]

As the Court decided *Bank of America*, it was beginning a new Term, short one justice, the result of Senate Republicans'

[113] *Id*. at 12-13.
[114] *Id*. at 15.
[115] *Id*. at 15-16.
[116] Gorod, *A Very Conservative Chief Justice*, *supra* note 6, at 1.
[117] *Id*.
[118] *Id*. at 8.
[119] *Id*. at 1.
[120] *Id*. at 8.

unprecedented refusal to even hold confirmation hearings on President Obama's nominee to fill Justice Antonin Scalia's seat. In doing so, Republicans in the Senate were sending exactly the message the Chief Justice had repeatedly said he didn't want sent: that judges are nothing more than politicians in robes. And 4-4 decisions breaking down purely on lines defined by the party of the president who appointed the justice would not only amplify that message, but also underscore the extent to which the Court was unable to fully function while its ninth seat remained vacant.[121] Against that background, it seems conceivable that the Chief Justice was eager to find a resolution in *Bank of America* that could garner a majority of the Court.

And, significantly, the Court's decision in *Bank of America* was, in some ways, tailor-made for the Chief Justice. As I described earlier, it was, although significant in its practical implications, narrow in its legal analysis, relying on past Supreme Court precedents and Congress's decision to ratify those decisions. In that way, it actually echoed Chief Justice Roberts's comments in a slightly different context at his confirmation hearing. In discussing when a court should conclude that a statute provides a cause of action that allows individuals with standing to sue, Chief Justice Roberts repeatedly stated that "[a]ll of these issues go to the question of what Congress intended to do."[122] Thus, while Chief Justice Roberts deserves praise for reaching the correct decision in *Bank of America*, it is unlikely that this case will prove to be a turning point in the Chief Justice's views on access to the courts.

[121] Constitutional Accountability Ctr. & People for the Am. Way Found., Material Harm to Our System of Justice: The Consequences of an Eight-Member Supreme Court 3-6 (2016), *available at* https://www.theusconstitution.org/sites/default/files/briefs/20160521_Issue_Brief_CAC_PFAW_Material_Harm_to_Our_System_of_Justice.pdf.

[122] Gorod, *Roberts's Consistent Votes*, *supra* note 7, at 4.

Nonetheless it is a reminder: even when it might seem most reasonable to count the Chief Justice out, he can still surprise you.

Conclusion

Some cases make a lasting impact in the pages of the U.S. Reports by announcing major shifts in legal doctrine. But a case doesn't need to do that to be significant. The Court's decision in *Bank of America & Wells Fargo v. City of Miami* didn't break significant new legal ground, but it was nonetheless important, making clear that cities can continue to bring suit to try to vindicate the goals of the Fair Housing Act. Given how important that law is, this is no small thing. It was also an important reminder that Chief Justice Roberts, as conservative as he is, will occasionally surprise, even in areas where one might least expect it. But when it comes to access to the courts and business cases more generally, there's little reason to think that progressive votes from the Chief Justice will become less surprising and more common in the near future. After all, while this Term's progressive victory in *Bank of America* was a loss for big business, it came amidst many other votes by the Chief Justice for big business—this past Term and in the many that preceded it.