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# Things Fall Apart (Next Door)

## DISCRIMINATORY MAINTENANCE AND DECREASED HOME VALUES AS THE NEXT FAIR HOUSING BATTLEGROUND

*Michelle Y. Ewert*<sup>†</sup>

### INTRODUCTION

It is not that United States Supreme Court Justice Clarence Thomas does not like Wanda Onafuwa or Chevelle Bushnell.<sup>1</sup> He has probably never met them. But one thing is clear: if the U.S. Supreme Court considers whether these women have standing under the Fair Housing Act (FHA) to sue Bank of America for discriminatory maintenance of the foreclosed properties located next door to them, Justice Thomas will almost certainly oppose their efforts to protect their civil rights, and the conservatives on the Court would likely agree. In Thomas' dissenting opinion in *Bank of America Corporation v. City of Miami* involving a city that sued a bank for discriminatory maintenance of foreclosed properties, Justice Thomas said “[n]o one suggests that [neighboring] homeowners could sue under the FHA, and I think it is clear that they cannot.”<sup>2</sup> Justice Thomas is wrong. Not only do Ms. Onafuwa and Ms. Bushnell have standing to sue, so do their neighbors down the street and a few blocks over.

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<sup>1</sup> Wanda Onafuwa and Chevelle Bushnell are plaintiffs in a case against Bank of America pending in the United States District Court for the District of Maryland. Along with organizational plaintiffs, these women sued Bank of America for discriminatory maintenance of foreclosed properties located next to their homes. Complaint and Demand for Jury Trial at 4–6, Nat'l Fair Hous. All. v. Bank of Am., Nat'l Assoc. (D. Md. 2018) (No. 1:18-CV-01919-CCB).

<sup>2</sup> *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1312 (2017).

Justice Thomas' error is not a trifle. Neighboring homeowners incur expenses when forced to address conditions problems in poorly maintained, adjacent foreclosed units.<sup>3</sup> Indeed, Bank of America's failure to maintain foreclosed properties next to Ms. Onafuwa and Ms. Bushnell cost them money.<sup>4</sup> Both women experienced rodent infestations coming from the adjacent properties, water from the next-door property leaked into Ms. Onafuwa's basement, and Ms. Bushnell had to pay for a security system and security doors after robbers made both successful and unsuccessful attempts to break into her property from the vacant house.<sup>5</sup> Ms. Onafuwa described the stress of the rodent infestation, saying "I've had nights when I couldn't sleep because I'm worried about rodents."<sup>6</sup> Ms. Bushnell articulated fears about break-ins, saying "It's stressful . . . You get to the point where you're barricading yourself in the house because you have to protect what you have."<sup>7</sup> Unfortunately, the risk of infestations and crime spreading from foreclosed properties are just some of the problems stemming from discriminatory maintenance.

The presence of foreclosed properties also reduces neighboring home values.<sup>8</sup> For many American households, the home is the most significant asset they own.<sup>9</sup> By depressing the value of their homes, banks' actions are leading to the depletion of many families' home equity and, thus, asset base.<sup>10</sup> Ms. Onafuwa and Ms. Bushnell are not alone. They are two of millions of people

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<sup>3</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-31, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 28 (2011), <https://www.gao.gov/assets/590/586089.pdf> [<https://perma.cc/YLN7-U67J>]; Complaint and Demand for Jury Trial, *supra* note 1, at 95–100.

<sup>4</sup> Complaint and Demand for Jury Trial, *supra* note 1.

<sup>5</sup> *Id.* at 94–100.

<sup>6</sup> Lynh Bui, *Squatters, Overgrown Grass, Trashed Lawns: Frustrated Homeowners Sue Banks Claiming Bias*, WASH. POST (Oct. 6, 2018), [https://www.washingtonpost.com/local/public-safety/squatters-overgrown-grass-trashed-lawns-frustrated-homeowners-sue-banks-claiming-discrimination-banks-say-theyre-not-responsible-for-longtime-inequities/2018/10/06/3e14fedc-2176-11e8-94da-ebf9d112159c\\_story.html?utm\\_term=.9bb2fa69176f](https://www.washingtonpost.com/local/public-safety/squatters-overgrown-grass-trashed-lawns-frustrated-homeowners-sue-banks-claiming-discrimination-banks-say-theyre-not-responsible-for-longtime-inequities/2018/10/06/3e14fedc-2176-11e8-94da-ebf9d112159c_story.html?utm_term=.9bb2fa69176f) [<https://perma.cc/M4LR-BGXT>].

<sup>7</sup> *Id.*

<sup>8</sup> Justin P. Steil & Dan Traficonte, *A Flood-Not A Ripple-of Harm: Proximate Cause Under the Fair Housing Act*, 40 CARDOZO L. REV. 1237, 1279 (2019); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 44; Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57, 58 (2006).

<sup>9</sup> Kasey Curtis, *The Burst Bubble: Revisiting Foreclosure Law in Light of the Collapse of the Housing Industry*, 36 W. ST. U. L. REV. 119, 120 (2008).

<sup>10</sup> According to the Center for Responsible Lending, one of the "spillover effects" of the foreclosure crisis is a drop in home equity of neighboring households due to reduced property values. 2013: Update: *The Spillover Effects of Foreclosures*, CTR. FOR RESPONSIBLE LENDING (Aug. 19, 2013), <http://www.responsiblelending.org/mortgage-lending/research-analysis/2013-crl-research-update-foreclosure-spillover-effects-final-aug-19-docx.pdf> [<https://perma.cc/CDY9-LRFN>].

in a similar position. One study from 2013 estimates that over ninety-five million households had lost home equity due to foreclosures in their neighborhoods.<sup>11</sup> When one aggregates the losses suffered by these families the amount of money is staggering: about \$2.2 trillion dollars in property value lost between 2007 and 2012, and over half of that in communities of color.<sup>12</sup> To say that homeowners like Ms. Onafuwa and Ms. Bushnell do not have standing to sue creates a massive windfall for the banking industry at the expense of the life savings of minority families. Because of the loss of home value, in addition to the direct expenses incurred, neighboring homeowners have standing to sue banks that engage in discriminatory maintenance.

This story of discrimination against people of color did not start when Bank of America took over the property next door to Ms. Onafuwa in 2017 or the one next to Ms. Bushnell in 2014.<sup>13</sup> Nor did it begin when Ms. Onafuwa purchased her house in Baltimore, Maryland, in 1988 or when Ms. Bushnell purchased hers in District Heights, Maryland, in 1990.<sup>14</sup> Instead, this story began when Black people were forcibly removed from Africa, when their descendants labored for generations under slavery, and when the grandchildren and great-grandchildren of those enslaved people—despite being free—faced countless barriers to education, housing, and employment.<sup>15</sup> This is the story of profiteering at the expense of people of color and banks that actively practice discrimination, even in 2019.

The mechanisms of discrimination may have evolved over the last hundred years, but the effects remain the same. Early in the twentieth century, households of color were prevented from acquiring homes in certain neighborhoods through racial zoning and restrictive covenants.<sup>16</sup> Later, banks denied them access to mortgages based on discriminatory redlining practices.<sup>17</sup> More recently, banks engaged in predatory lending in communities of

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<sup>11</sup> This study used data collected through the Home Mortgage Disclosure Act (HMDA), the Census Bureau's American Community Survey, and Lender Processing Services, a private company, to determine the spillover effect of foreclosures generally on neighboring property values. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Complaint and Demand for Jury Trial, *supra* note 1, at 93–98.

<sup>14</sup> *Id.*

<sup>15</sup> See generally Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/335U-TCVE>].

<sup>16</sup> See *infra* Section I.C.

<sup>17</sup> “Redlining” is the term used to describe banks’ “practice of refusing to make loans . . . in particular areas.” Fair Housing: Implementation of the Fair Housing Amendments Act of 1988, 53 Fed. Reg. 44992, 44998 (proposed Nov. 7, 1988) (to be codified at 24 C.F.R. pt. 100); see also *infra* Sections I.B. and II.B.

color, flooding them with subprime mortgages, which fueled the 2008 foreclosure crisis and exacerbated racial inequities.<sup>18</sup> Now, in addition to placing Black and Latinx homeowners at greater risk for foreclosure than others, mounting evidence shows that many financial institutions do not invest the same resources in maintaining their foreclosed properties in neighborhoods of color as they do in White neighborhoods.<sup>19</sup> When banks practice discriminatory maintenance of foreclosed properties, it decreases the value of other homes in those neighborhoods.<sup>20</sup> The cycle of banks preying on communities of color for profit continues.

The 2017 U.S. Supreme Court decision in *Bank of America v. City of Miami, Florida*, decided on the eve of the fiftieth anniversary of the Fair Housing Act and the tenth anniversary of the housing crisis, presented an opportunity to explore new solutions to the ongoing housing discrimination against communities of color.<sup>21</sup> This article argues that the FHA offers neighboring homeowners a cause of action against banks that discriminate in their maintenance of foreclosed properties. It expands existing fair housing theory by suggesting protections for people previously seen as outside fair housing law's zone of interest.

This article proceeds in four parts. Part I examines the importance of homeownership in creating wealth and opportunity. It then explores the enormous disparity between Black and White households in homeownership rates and wealth accumulation—the result of a history of discrimination. In particular, this section documents the barriers people of color have faced when trying to access capital, purchase property, and choose where to live.

Part II of this article reviews the evolution of federal fair housing law and its role in helping people of color and other protected classes access housing and economic opportunity. Specifically, it examines case law establishing the right of action for discrimination based on neighborhood characteristics rather than just individual characteristics. It shows how, over the years, courts found that mortgage redlining, reverse redlining, and redlining in insurance and discriminatory appraisals violate the FHA. By the logic of this well-developed case law, this article argues that banks

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<sup>18</sup> See *infra* Section I.C.

<sup>19</sup> *Id.*

<sup>20</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 46; Immergluck & Smith, *supra* note 8, at 11; 2013: Update: *The Spillover Effects of Foreclosures*, *supra* note 10.

<sup>21</sup> See generally *Bank of Am. Corp. v. Miami*, 137 S. Ct. 1296, 1296 (2017). Congress passed the Fair Housing Act in April of 1968. 42 U.S.C. § 3601 (1968). The subprime mortgage crisis lasted from around 2007 to 2010. John V. Duca, *Subprime Mortgage Crisis*, FED. RESERVE HIST. (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/subprime\\_mortgage\\_crisis](https://www.federalreservehistory.org/essays/subprime_mortgage_crisis) [<https://perma.cc/P733-JE4U>].

similarly violate the FHA when engaging in the discriminatory maintenance of foreclosed properties in communities of color.

Part III extends that reasoning, arguing that homeowners whose property values have dropped because of banks' discriminatory maintenance of foreclosed properties in their neighborhoods have a cause of action against those banks under the FHA. This section responds to the argument that loss of economic value of property does not confer standing under the FHA, analogizing the basis for municipal standing in the recent Supreme Court decision in *Bank of America* to that of neighboring homeowners. This section then confirms this analysis by exploring the FHA's legislative history to show that the drafters of the FHA viewed access to housing as a strategy for promoting access to social and economic opportunity. In that context, the FHA's ultimate goal was to combat a broad range of social problems. When the homes of persons of color are devalued because of banks' discriminatory action, there are ripple effects in all other parts of their lives. This article concludes that neighboring homeowners can and should bring claims against banks engaging in discriminatory maintenance of foreclosed properties that reduces the value of other homes in the neighborhood.

The final Part of this article briefly addresses two challenges facing neighboring homeowners wishing to sue banks under the FHA. The first is the question of whether the FHA applies to post-acquisition discrimination or only to discrimination that affects initial access to housing. This section summarizes the arguments scholars make to show how some recent court decisions inappropriately restrict application of the FHA. The second challenge relates to the proximate cause standard to be applied under the FHA. This section discusses the United States Court of Appeals for the Eleventh Circuit's recent decision addressing this issue and the implications for future litigation by neighboring homeowners. Finally, this article advances the fair housing discourse by showing how existing jurisprudence on neighborhood-based discrimination and municipal standing under the FHA can be applied to neighboring homeowners affected by discriminatory maintenance of foreclosed properties.

## I. THE IMPORTANCE OF HOMEOWNERSHIP AND HISTORIC BARRIERS TO ACCESS TO HOUSING

### A. *Race-Based Disparities in Homeownership and Wealth*

Homeownership confers significant benefits to families.<sup>22</sup> Equity in the family home helps homeowners accumulate wealth and weather financial crises.<sup>23</sup> Further, home equity allows homeowners to pursue other goals—such as education or starting a small business—through access to credit.<sup>24</sup> These investments, in turn, produce additional wealth. That wealth can be used by the homeowner to pursue additional opportunities or can be passed on to family members. Indeed, inheritances and inter vivos transfers play an important, ongoing role in helping White people accumulate wealth at a rate unmatched in families of color.<sup>25</sup> In one study that followed families for twenty-five years, thirty-six percent of White people received an inheritance while only seven percent of Black people did.<sup>26</sup> Further, White beneficiaries received about ten times more than Black beneficiaries.<sup>27</sup>

The disparity in homeownership rates and wealth based on race are equally striking.<sup>28</sup> According to the Census Bureau, in 2017 the White (non-Hispanic) homeownership rate was 72.3

<sup>22</sup> See, e.g., Jared Ruiz Bybee, *In Defense of Low-Income Homeownership*, 5 ALA. C.R. & C.L. L. REV. 107, 130 (2013); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511–13 (2007).

<sup>23</sup> See Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1206 (2001); Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America's Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing a Sankofa Model of Transitional Justice*, 5 FLA. A & M U. L. REV. 1, 13 (2009); Maury Gittleman & Edward N. Wolff, *Racial Wealth Disparities: Is the Gap Closing?* 5-6 (Levy Econ. Inst. Working Paper No. 311, 2000).

<sup>24</sup> Iglesias, *supra* note 22, at 521–22; John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188, 195 (2003).

<sup>25</sup> Denton, *supra* note 23, at 1208; Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 380 (2008); Gittleman & Wolff, *supra* note 23, at 1–2.

<sup>26</sup> TATJANA MESCHEDÉ, ET AL., WEALTH INEQUALITIES IN GREATER BOSTON: DO RACE AND ETHNICITY MATTER? 7 (2016), <https://www.bostonfed.org/publications/community-development-discussion-paper/2016/wealth-inequalities-in-greater-boston-do-race-and-ethnicity-matter.aspx> [<https://perma.cc/3YEA-PPCS>]; THOMAS SHAPIRO, ET AL., THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE 5 (2013), <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-shapiro-et-al.pdf> [<https://perma.cc/BY6T-9VV2>].

<sup>27</sup> MESCHEDÉ, *supra* note 26, at 7.

<sup>28</sup> Because the relevant Census categories for race and Hispanic origin are labeled “White alone,” “White alone, not Hispanic” or “Non-Hispanic White alone,” “Black alone,” “Hispanic origin (any race)” or “Hispanic or Latino,” and “Not of Hispanic origin” or “Non-Hispanic,” this portion of this article uses that language, although the remainder of the article refers to the Latinx community, which is the current practice amongst scholars. See, e.g., *Housing Vacancies and Homeownership*, tbl. 22 Homeownership Rates by Race and Ethnicity of Householder: 1994 to 2017, U.S. CENSUS BUREAU (2017), <https://www.census.gov/housing/hvs/data/ann17ind.html> [<https://perma.cc/V63M-ELAV>].

percent, the Black homeownership rate was 42.3 percent, and the Hispanic homeownership rate was 46.2 percent.<sup>29</sup> Just prior to the housing crisis in 2007, the homeownership rate was 75.2 percent for White (non-Hispanic), 47.2 percent for Black, and 49.7 percent for Hispanic people.<sup>30</sup> During the housing crisis, homeownership rates dropped more for Black and Latinx households than White households. These continue to be substantially higher in White than in Black and Latinx communities—and the disparity between White and Black households is growing.<sup>31</sup>

The wealth gap is even greater. Census Bureau data from 2013 show that the median net worth for White (not Hispanic) households was \$132,483, for Black households was \$9,211, and for Hispanic households was \$12,458.<sup>32</sup> This means that median net worth for Black households is only seven percent of the White median household net worth. The median net worth of Latinx households is only 9.4 percent of the median net worth of White households. Excluding equity in the family's home, the median net worth for White (not Hispanic) households was \$51,100; for Black households, it was \$2,725 and for Hispanic households, \$5,825.<sup>33</sup> This means that excluding the family home, Black median household net worth is only 5.3 percent and Latinx median household net worth is only 11.4 percent of White median household net worth.<sup>34</sup> This disparity is staggering and unlikely to change anytime soon.

A 2011 Pew Research Center report showed that wealth gaps between White, Hispanic, and Black people had reached their highest levels in twenty-five years.<sup>35</sup> It also documented the impact of the Great Recession and 2008 housing crisis by comparing changes in net worth between 2005 and 2009. During that period, the median net worth for White households fell by sixteen percent; the median net worth for Hispanic households dropped by sixty-six percent, and for Black households, it dropped fifty-three percent.<sup>36</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at tbl. 16. Quarterly Homeownership Rates by Race and Ethnicity of Householder: 1994 to Present, <https://www.census.gov/housing/hvs/data/histtabs.html> [<https://perma.cc/M9N6-TS6R>].

<sup>32</sup> *Wealth, Asset Ownership, & Debt of Households Detailed Tables: 2013* at tbl. 1. Median Value of Assets for Households, by Type of Asset owned and Selected Characteristics: 2013, U.S. CENSUS BUREAU (2013), <https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html> [<https://perma.cc/QC44-L38N>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> RAKESH KOCHHAR, RICHARD FRY & PAUL TAYLOR, WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS, CH. 2 (2011), <http://www.pewsocialtrends.org/2011/07/26/chapter-2-household-wealth> [<https://perma.cc/5ALF-FB3E>].

<sup>36</sup> *Id.*

When home equity was excluded from the calculation, however, median net worth declined by only \$479 for Hispanic households (fourteen percent) and only \$626 for Black households (a thirty-seven percent decline).<sup>37</sup> As one scholar describes this situation, many Black families are “working without a safety net.”<sup>38</sup> The same is true for many Latinx families. Clearly, home value constitutes the most significant part of Black and Latinx household wealth. Given that home value constitutes a much higher percentage of their portfolios than those of White families, protecting home value is crucial for building estates that people of color can leave to their children and grandchildren.<sup>39</sup>

### *B. Limited Access to Capital as a Barrier to Homeownership*

Several race-based factors have created differential access to capital and, therefore, housing. First, Black families have had fewer generations in which to accumulate wealth than their White counterparts as a result of slavery and Jim Crow policies.<sup>40</sup> Second, people of color have historically earned—and continue to earn—less than White people.<sup>41</sup> Third, discriminatory lending policies have prevented many people of color from obtaining credit and thereby building equity through home ownership.<sup>42</sup>

The impact of slavery and Jim Crow policies on wealth accumulation in Black families cannot be overstated. Even after the demise of slavery, freed Black people faced significant barriers to economic success.<sup>43</sup> The sharecropping system afforded little opportunity for economic advancement and many White landowners outright cheated the Black sharecroppers.<sup>44</sup> Neither Congress nor the States redistributed land to the recently freed Black people and laws in some areas prevented them from working independently or owning businesses.<sup>45</sup> During the twentieth century, important

<sup>37</sup> *Id.*

<sup>38</sup> Coates, *supra* note 15.

<sup>39</sup> See generally Gittleman & Wolff, *supra* note 23.

<sup>40</sup> Coates, *supra* note 15.

<sup>41</sup> According to Census data, in 2017, the median income for White (non-Hispanic) households was \$68,125, whereas median income for Black households was \$40,258 and for Hispanic (any race) households was \$50,486. *Housing Vacancies and Homeownership*, *supra* note 28, at tbl. 1. Income and Earnings Summary Measures by Selected Characteristics: 2016 and 2017, <https://www.census.gov/data/tables/2018/demo/income-poverty/p60-263.html> [<https://perma.cc/9ZX7-R3X3>].

<sup>42</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH*, 19-23 (10th ANNIVERSARY ED. 2006); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 105 (1993).

<sup>43</sup> Coates, *supra* note 15.

<sup>44</sup> *Id.*

<sup>45</sup> powell, *supra* note 24, at 196; Thomas, *supra* note 23, at 32–33.

government benefit programs excluded those who were Black.<sup>46</sup> For example, the welfare program was designed to mostly exclude Black families.<sup>47</sup> Social security benefits and unemployment insurance did not apply to domestic or agricultural workers, who were predominantly Black.<sup>48</sup> Consequently, seniors had to spend their savings to support themselves in their old age rather than being able to pass on their savings to their children and grandchildren.<sup>49</sup>

Compounding wealth over the generations drives the wealth gap between Black and White people,<sup>50</sup> and the Native American and Latinx communities have faced their own barriers to passing on wealth.<sup>51</sup> In one study of multigenerational family wealth, researchers found that grandparental wealth played a much larger role in grandchildren's wealth than previously believed.<sup>52</sup> Many grandparents invest in grandchildren in early childhood, including through help with college and down payments, before those grandchildren receive inheritances from their parents, and those early investments in grandchildren's education and homeownership can appreciate over time.<sup>53</sup> Homeownership is one of the most important vehicles for intergenerational wealth transfer.<sup>54</sup> Unfortunately, communities of color have had fewer generations in which to accumulate and transmit wealth than White communities.<sup>55</sup>

Additionally, income disparities affect access to housing and homeownership. Scholars have noted that in the late 1800s and the early 1900s, Black people who were able to secure higher wages were able to access more desirable housing, often living in the same areas as White people.<sup>56</sup> Income was one of the most important determinants of where people could live.<sup>57</sup> Today, Black and Latinx households earn significantly less than White

<sup>46</sup> See generally IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005). In addition to income benefits, some post-war housing programs explicitly excluded Black applicants. OLIVER & SHAPIRO, *supra* note 42, at 4–5, 22.

<sup>47</sup> Coates, *supra* note 15, at 64.

<sup>48</sup> Indeed, a desire to exclude Black people from the Social Security program was the motivating factor for denying coverage for domestic and agricultural workers. See *id.*; Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. Rev. 1540, 1559 (2012); Thomas, *supra* note 23, at 34.

<sup>49</sup> Thomas, *supra* note 23, at 34.

<sup>50</sup> Roithmayr, *supra* note 25, at 382–83.

<sup>51</sup> Thomas, *supra* note 23, at 31, 38–40.

<sup>52</sup> Fabian T. Pfeffer & Alexandra Killewald, *Generations of Advantage. Multigenerational Correlations in Family Wealth*, 96 SOC. FORCES 1411, 1413 (2018).

<sup>53</sup> *Id.* at 1415–16.

<sup>54</sup> *Id.* at 1433–34.

<sup>55</sup> Roithmayr, *supra* note 25, at 380; OLIVER & SHAPIRO, *supra* note 42, at, 5–7.

<sup>56</sup> MASSEY & DENTON, *supra* note 42, at 19–20; Aric Short, *Post-Acquisition Harassment and The Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 251 (2006).

<sup>57</sup> Short, *supra* note 56, at 250–51.

households.<sup>58</sup> Census Bureau data estimate that in 2017, the median income for White (not Hispanic) households was \$65,273, while median income for Black households stood at \$40,258 and for Hispanic households, \$50,486.<sup>59</sup> The income disparity is not as great as the wealth disparity, but it remains striking. Limited income in many households of color continues to make homeownership more difficult.

Finally, redlining has historically prevented many people of color from borrowing capital to purchase homes.<sup>60</sup> Redlining involves the refusal by financial institutions to make loans for properties in communities of color, regardless of the creditworthiness of the loan applicant.<sup>61</sup> In the early twentieth century, the federal government promoted redlining through various policies.<sup>62</sup> In the 1930s, the Home Owners Loan Corporation (HOLC), a federal program that refinanced mortgages at risk of default and gave low-interest loans to people who had lost their homes through foreclosure, color-coded maps based on neighborhood “riskiness.”<sup>63</sup> The HOLC consistently ranked Black neighborhoods as the most risky and coded them with the color red, giving this practice its name.<sup>64</sup>

Public discrimination enabled private discrimination. In the 1940s and 1950s, the Federal Housing Administration, Veterans Administration, and private banks adopted the HOLC maps and used them to determine where to make or guarantee loans.<sup>65</sup> Private banks and government agencies denied mortgages to loan applicants wishing to purchase property in the red areas.<sup>66</sup> As a result, many Black families were unable to access the necessary credit for purchasing homes.<sup>67</sup>

### C. *Limited Access to Place as a Barrier to Homeownership*

In addition to the challenges of accessing capital, some groups faced additional barriers to housing and homeownership based on place. In the early 1900s, many local governments passed exclusionary zoning ordinances restricting where Black people could

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<sup>58</sup> Jessica Semega, et al., *Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/data/tables/2018/demo/income-poverty/p60-263.html> [<https://perma.cc/TJ9C-HPPU>].

<sup>59</sup> *Id.*

<sup>60</sup> Coates, *supra* note 15; MASSEY & DENTON, *supra* note 42, at 51–52.

<sup>61</sup> 53 Fed. Reg. 44998 (Nov. 7, 1988).

<sup>62</sup> MASSEY & DENTON, *supra* note 42, at 51–55; Coates, *supra* note 15.

<sup>63</sup> MASSEY & DENTON, *supra* note 42, at 51.

<sup>64</sup> *Id.* at 51–52.

<sup>65</sup> *Id.* at 52–55.

<sup>66</sup> *Id.* at 51–52; OLIVER & SHAPIRO, *supra* note 42, at 23.

<sup>67</sup> MASSEY & DENTON, *supra* note 42, at 54–55; Coates, *supra* note 15.

purchase or rent homes.<sup>68</sup> Racial animus and a fear of reduced property values drove this exclusionary zoning movement.<sup>69</sup> Baltimore City Mayor J. Barry Mahool justified the city's exclusionary zoning ordinance by saying, "Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White majority."<sup>70</sup> In 1917, however, a unanimous Supreme Court found exclusionary zoning ordinances unconstitutional because they unlawfully interfered with people's property rights.<sup>71</sup>

Once communities could no longer discriminate through zoning ordinances, they turned to private covenants to restrict where racial and religious minorities could live.<sup>72</sup> Throughout the first half of the twentieth century, private agreements between buyers and sellers frequently restricted the sale and rental of property to Black people, as well as those of Asian or Jewish descent.<sup>73</sup> These racially restrictive covenants existed throughout the United States, not just in the South.<sup>74</sup>

In 1948, the United States Supreme Court heard two consolidated cases challenging the use of state courts to enforce racially restrictive covenants.<sup>75</sup> The Supreme Courts of Missouri and Michigan had upheld the enforcement of racially restrictive covenants.<sup>76</sup> On review, the U.S. Supreme Court found that judicial enforcement of these covenants constituted unlawful, discriminatory state action.<sup>77</sup> While the Court did not prohibit the racially restrictive covenants themselves, the government could no longer enforce them.<sup>78</sup>

<sup>68</sup> Christopher Silver, *The Racial Origins of Zoning in American Cities, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 23 (June Manning Thomas & Marsha Ritzdorf ed., 1997).

<sup>69</sup> MASSEY & DENTON, *supra* note 42, at 41.

<sup>70</sup> STEVEN J. HOFFMAN, RACE, CLASS AND POWER IN THE BUILDING OF RICHMOND, 1870-1920, at 174 (2004).

<sup>71</sup> *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

<sup>72</sup> RICHARD H. SANDER, ET AL., MOVING TOWARD INTEGRATION 69-70 (2018).

<sup>73</sup> See, for example, covenant from King County, Washington, stating that "No part of said property hereby conveyed shall ever be used or occupied by any *Hebrew or by any person of the Ethiopian, Malay or any Asiatic Race.*" *Database of 416 Racial Restrictive Covenants from King County Recorder's Office*, RESTRICTIVE COVENANTS DATABASE, (emphasis added) [http://depts.washington.edu/civilr/covenants\\_database.htm](http://depts.washington.edu/civilr/covenants_database.htm) [<https://perma.cc/M882-NXNP>]. See also covenant from Minneapolis, Minnesota, stating that the property could not "be conveyed, mortgaged or leased to any person or persons of *Chinese, Japanese, Moorish, Turkish, Negro, Mongolian or African blood or descent.*" Hannah Jones, *In 1930s Minneapolis, Not Just Anyone Got to be White*, CITYPAGES (July 24, 2018), (emphasis added) <http://www.citypages.com/news/in-1930s-minneapolis-not-just-anyone-got-to-be-white/488931381> [<https://perma.cc/5ABX-8NJE>].

<sup>74</sup> SANDER ET AL., *supra* note 72, at 69-70 (2018); Coates, *supra* note 15.

<sup>75</sup> *Shelley v. Kraemer*, 334 U.S. 1, 4 (1948).

<sup>76</sup> *Id.* at 6-7.

<sup>77</sup> *Id.* at 23.

<sup>78</sup> *Id.* at 13.

In its opinion, the Court described the importance of housing in American life, saying:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.<sup>79</sup>

Through cases like these, the Supreme Court incrementally implemented protections against housing discrimination by public actors. Private discrimination in housing still flourished, however, as individual buyers and sellers chose to implement and honor racially restrictive covenants,<sup>80</sup> landlords continued to refuse to rent to people based on race or religion,<sup>81</sup> realtors engaged in blockbusting and steering,<sup>82</sup> and banks continued to engage in discriminatory lending practices.<sup>83</sup> Further, public discrimination continued through segregation in schools,<sup>84</sup> race-motivated policies that restricted voting rights,<sup>85</sup> and racially-based limitations on marriage.<sup>86</sup> In response, the Civil Rights Movement organized around these issues, leading slowly to legislative change.<sup>87</sup>

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<sup>79</sup> *Id.* at 10.

<sup>80</sup> MASSEY & DENTON, *supra* note 42, at 188.

<sup>81</sup> SANDER ET AL., *supra* note 72, at 69–70.

<sup>82</sup> One scholar describes blockbusting as “spooking whites into selling cheap before the neighborhood became black.” Coates, *supra* note 15; see also SANDER ET AL., *supra* note 72, at 110; Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145, 1151–52 (1998).

<sup>83</sup> SANDER ET AL., *supra* note 72, at 69–70.

<sup>84</sup> In 1964, the Civil Rights Act finally addressed segregation in federally supported public schools. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 246 (1964). Despite the Supreme Court striking down segregation in public education in 1954, widespread discrimination continued. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954), *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); Erica Frankenberg, *Metropolitan Schooling and Housing Integration*, *J. AFFORDABLE HOUS. & CMTY. DEV. L.* 193 (2009).

<sup>85</sup> In 1965, the Voting Rights Act finally outlawed discrimination in voting. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). For a discussion of barriers to voting, see Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 *YALE L.J. F.* 799, 800 (2018); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 *S.C. L. REV.* 689, 702 (2006).

<sup>86</sup> It was not until 1967 that the United States Supreme Court declared bans on inter-racial marriages to be unconstitutional. *Loving v. Virginia*, 388 U.S. 1, 1 (1967).

<sup>87</sup> Following the assassination of President Kennedy and the subsequent 1964 election, President Johnson and legislators supportive of civil rights passed protections against discrimination in employment, education, public accommodations, and voting. SANDER ET AL., *supra* note 72, at 130.

## II. BANKS' DISCRIMINATORY MAINTENANCE OF FORECLOSED PROPERTIES IN NEIGHBORHOODS OF COLOR

As the Civil Rights Movement gained momentum, the fight for equal access to housing became a key focus of organizing efforts. In particular, the Chicago Freedom Movement of the mid-1960s centered on the need for fair housing protections.<sup>88</sup> Between 1966 and early 1968, Congress considered four different versions of fair housing legislation, but none passed both chambers.<sup>89</sup> Tragically, it took a monstrous act of racial hatred to spur political leaders to finally enact federal fair housing legislation.<sup>90</sup> On April 4, 1968, Dr. Martin Luther King, Jr. was assassinated in Memphis, Tennessee.<sup>91</sup> Communities across the country erupted in demonstrations of grief and anger.<sup>92</sup> Following years of failed legislative efforts, Congress finally passed the federal Fair Housing Act less than a week after Dr. King's assassination.<sup>93</sup> President Johnson signed the bill into law on April 11, 1968.<sup>94</sup> As a result, race-based housing discrimination was no longer legal in the United States.<sup>95</sup>

### A. *Implementation of Fair Housing Law*

The FHA prohibits a broad range of discriminatory conduct. Section 3604(a) of the FHA makes it illegal to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>96</sup> Additionally, Section 3604(b) of the FHA prohibits discrimination “against any person in the *terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith*, because of race, color, religion, sex, familial status, or national origin.”<sup>97</sup> Section 3617 makes it illegal to “coerce, intimidate, threaten, or *interfere with any person in the exercise or enjoyment of . . . any right*” granted or protected by the FHA.<sup>98</sup> Finally, courts have

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<sup>88</sup> *Id.* at 131.

<sup>89</sup> *Id.* at 131–35; Robert G. Schwemm, *Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 IND. L. REV. 717, 758–59 (2008).

<sup>90</sup> MASSEY & DENTON, *supra* note 42, at 194.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 58–59, 194.

<sup>93</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, § 801, 82 Stat. 81 (1968); MASSEY & DENTON, *supra* note 42, at 194.

<sup>94</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, § 801, 82 Stat. 81 (1968).

<sup>95</sup> 42 U.S.C. §§ 3604–3606 (1988).

<sup>96</sup> *Id.* § 3604(a) (emphasis added).

<sup>97</sup> *Id.* § 3604(b) (emphasis added).

<sup>98</sup> *Id.* § 3617 (emphasis added).

repeatedly interpreted the FHA to include the perpetuation of segregation as a fair housing violation.<sup>99</sup>

When initially passed, the FHA prohibited discrimination in housing based on race, color, religion, and national origin.<sup>100</sup> The legislation addressed the historic discrimination against Black, Asian, and Jewish people. Congress later expanded fair housing law to include additional protected classes.<sup>101</sup>

Additionally, the understanding of what constitutes discrimination has evolved. Early fair housing cases focused on disparate treatment—discriminatory intent that led to people in a protected class being treated differently because of their protected characteristic. Over time, appellate courts and federal agencies that enforced fair housing law came to recognize disparate impact—the discriminatory effect of facially neutral policies, practices, and procedures—to be as destructive as disparate treatment and also a fair housing violation.<sup>102</sup> Finally,

<sup>99</sup> See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15, 18 (1988); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977).

<sup>100</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, Title VIII, § 804, 82 Stat. 83 (1968).

<sup>101</sup> In 1974, the Housing and Community Development Act added sex as a protected class. Housing and Community Development Act of 1974, Pub. L. No. 93-383, Title VIII, § 808, 88 Stat. 728 (1974). Then, in 1988, the Fair Housing Amendments Act expanded federal protections to include disability and familial status as protected classes. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6, 102 Stat. 1619 (1988). Although the federal protected classes have not changed since 1988, some state and local fair housing laws now include additional protected classes such as age, marital status, gender identity, and sexual orientation. See, e.g., MD. CODE ANN., STATE GOV'T § 20-705 (West 2014) (discrimination “because of race, color, religion, sex, disability, marital status, familial status, sexual orientation, gender identity, or national origin” is illegal); Chicago, Ill., Ordinance 5-8-030(A) (amend. Dec. 14, 2005) (“It shall be an unfair housing practice and unlawful . . . [t]o make any distinction, discrimination or restriction against person . . . predicated upon the . . . gender identity, . . . sexual orientation, marital status, . . . military status or source of income of the prospective or actual buyer or tenant thereof.”); HOWARD COUNTY, MD, CODE, tit. 12 § 12.207 (amend. Apr. 2015) (“*Discrimination/discriminatory* means acting or failing to act, or unduly delaying any action regarding any person(s) because of . . . [a]ge, [o]ccupation, [m]arital status, [p]olitical opinion, [s]exual orientation, [p]ersonal appearance, . . . [s]ource of income, or [g]ender identity or expression in such a way that such person(s) are adversely affected in the area of housing.”).

<sup>102</sup> Both the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) brought cases alleging disparate impact. See, e.g., *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1246 (10th Cir. 1995); *United States v. City of Black Jack*, 508 F.2d 1179, 1181 (8th Cir. 1974). Further, federal circuit courts consistently found disparate impact to be a cause of action under the FHA. See 2922 *Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679–80 (D.C. Cir. 2006); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000); *Pfaff v. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745–46 (9th Cir. 1996); *Mountain Side*, 56 F.3d at 1243, 1250–51; *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Huntington Branch*, 844 F.2d at 934–35; *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–48 (3d Cir. 1977); *Arlington Heights*, 558 F.2d at 1290; *City of Black Jack*, 508 F.2d at 1184.

in 2015, the Supreme Court held that disparate impact claims were cognizable under the FHA.<sup>103</sup> Federal fair housing protections today are much more comprehensive than they were when the FHA was passed fifty years ago.

### B. *Neighborhood-Based Discrimination and the FHA*

People generally think of race-based housing discrimination as a landlord's refusal to rent to people of color, or a bank denying them mortgages or giving them less favorable financial terms than White applicants, but discrimination because of an individual's characteristics represents only one aspect of race-based housing discrimination. Other examples of race-based discrimination stem from neighborhood characteristics rather than that of individual households. An examination of fair housing case law clearly shows that race-based neighborhood discrimination is also unlawful.

Courts have found mortgage redlining, perhaps the most well-known form of neighborhood-based housing discrimination, to violate multiple parts of the FHA. In *Laufman v. Oakley Building and Loan Company*, the plaintiffs sued Oakley for denying a loan application because of the racial composition of the neighborhood location of the house to be purchased.<sup>104</sup> The United States District Court for the Southern District of Ohio explained that redlining was a cause of action under FHA Section 3604 because denying loans based on neighborhood composition had the effect of making unavailable or denying housing.<sup>105</sup> Further, the *Laufman* court determined that mortgage redlining violated Section 3617 because it interfered with the exercise of equal housing opportunity.<sup>106</sup> Other courts similarly found that redlining in mortgages based on the racial composition of the neighborhood violated the FHA.<sup>107</sup>

Today, courts recognize “reverse redlining”—the practice of unfair or predatory mortgages in communities of color—as

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<sup>103</sup> *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

<sup>104</sup> *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 498 (S.D. Ohio 1976).

<sup>105</sup> *Id.* at 493.

<sup>106</sup> *Id.* at 498.

<sup>107</sup> *See, e.g., Cartwright v. Am. Sav. & Loan Ass'n*, 880 F.2d 912, 925 (7th Cir. 1989) (finding that redlining is actionable under Section 3604, although the complainant did not establish that the loan denial was due to race-based redlining); *Old W. End Ass'n v. Buckeye Fed. Sav. & Loan*, 675 F. Supp. 1100, 1102–03, 1105 (N.D. Ohio 1987); *Thomas v. First Fed. Sav. Bank of Ind.*, 653 F. Supp. 1330, 1340 (N.D. Ind. 1987) (finding that neighborhood redlining violated the FHA, although the complainants did not establish that the bank denied the loan because of neighborhood characteristics); *Harrison v. Otto G. Heinzerth Mortg. Co.*, 414 F. Supp. 66 (N.D. Ohio 1976).

also violating the FHA.<sup>108</sup> Examples of reverse mortgage redlining include granting applicants in Black neighborhoods subprime mortgages with unnecessarily high interest rates and fees even though they qualify for prime mortgages.<sup>109</sup> It also includes giving applicants in Black neighborhoods mortgages they could not afford and should not have received.<sup>110</sup> Reverse redlining makes housing “unavailable” under Section 3604 because the unfair terms put borrowers at risk for defaulting on their loans and losing their homes.<sup>111</sup>

Redlining in homeowners’ insurance policies also violates the FHA. This occurs when companies refuse to insure properties in neighborhoods of color or charge those homeowners higher rates.<sup>112</sup> When considering insurance redlining in 1992, the United States Court of Appeals for the Seventh Circuit noted that for years, the United States Department of Housing and Urban Development (HUD) had considered insurance discrimination to be an act that made housing “unavailable” under the FHA.<sup>113</sup> The court went on to find that the language in Section 3604 was “sufficiently pliable” to support such an interpretation.<sup>114</sup> The United States Court of Appeals for the Sixth Circuit reached the same conclusion a few years later.<sup>115</sup> Noting that lenders require mortgage insurance as a condition for obtaining a loan, the court reiterated its prior determination that “Congress intended [Section] 3604 to reach a broad range of activities that have the effect of denying housing opportunities to a member of a protected class.”<sup>116</sup> The United States District Court for the District of Columbia similarly found that

<sup>108</sup> See, e.g., *Steed v. EverHome Mortg. Co.*, 308 F. App’x 364, 368–69 (11th Cir. 2009) (citing *Hargraves v. Capital City Mortg. Corp.*, 140 F. Supp. 2d 7, 20 (D.C. 2000)); *Mayor and City Council of Balt. v. Wells Fargo Bank, N.A.*, No. JFM-08-62, 2011 WL 1557759, at \*3 (D. Md. Apr. 22, 2011); *Woodworth v. Bank of Am. Nat’l Ass’n*, No. 09-3058-CL, 2011 WL 1540358, at \*18 (D. Ore. Mar. 23, 2011); *Diaz v. Bank of Am. Home Loan Servicing*, No. CV 09-9286, 2010 WL 5313417, at \*4 (C.D. Cal. Dec. 16, 2010); *M & T Mortg. Corp. v. White*, 736 F. Supp. 2d 538, 573-74 (E.D.N.Y. 2010); *Davenport v. Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 875–76 (N.D. Cal. 2010); *Williams v. 2000 Homes Inc.*, No. 09-CV-16, 2009 WL 2252528, at \*5 (E.D.N.Y. July 29, 2009); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039, 1045–46 (N.D. Cal. 2009); *Matthews v. New Century Mortg. Corp.*, 185 F. Supp. 2d 874, 886–87 (S.D. Ohio 2002); *Eva*, 143 F. Supp. 2d at 882; *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 892 (N.D. Ill. 2000).

<sup>109</sup> See, e.g., *Steed v. EverHome Mortg. Co.*, 308 F. App’x 364, 368-69 (11th Cir. 2009).

<sup>110</sup> See, e.g., *City of Memphis v. Wells Fargo Bank, N.A.*, No. 09-2857-STA, 2011 WL 1706756, at \*7 (W.D. Tenn. May 4, 2011).

<sup>111</sup> *Hargraves*, 140 F. Supp. 2d at 20.

<sup>112</sup> *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 290 (7th Cir. 1992).

<sup>113</sup> *Id.* at 300.

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

<sup>115</sup> *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1358 (6th Cir. 1995).

<sup>116</sup> *Id.* at 1359 (quoting *Mich. Prot. & Advocacy Serv., Inc. v. Babin*, 18 F.3d 337, 344 (6th Cir. 1994)).

homeowners' insurance redlining was a cause of action under Section 3604 of the FHA.<sup>117</sup>

A third type of neighborhood-based discrimination that violates the FHA occurs with race-based appraisals. An appraisal textbook widely used until the late 1970s specifically instructed appraisers to decrease the appraised value of properties located in mixed-race neighborhoods.<sup>118</sup> The textbook "categorized different ethnic groups according to their detrimental effect upon property values after their 'infiltration' into the neighborhood."<sup>119</sup> In 1976, the U.S. Attorney's office sued four organizations that promulgated and perpetuated these discriminatory standards.<sup>120</sup> The United States claimed that devaluing properties because of neighborhood composition made housing unavailable under Section 3604 and interfered with the exercise and enjoyment of rights under Section 3617 of the FHA.<sup>121</sup> The case settled before trial.<sup>122</sup> The terms included revising the textbook and supporting materials to make clear that such neighborhood discrimination was unlawful.<sup>123</sup> In another case involving alleged neighborhood-based appraisals, the United States Court of Appeals for the Fifth Circuit discussed this discriminatory textbook and the harms caused by neighborhood-based discriminatory appraisals.<sup>124</sup> The court explained that "[d]iscriminatory appraisal may effectively prevent blacks from purchasing or selling a home for its fair market value. This interferes with the exercise of rights granted by the Fair Housing Act."<sup>125</sup>

It is undisputed that courts recognize race-based neighborhood discrimination as a fair housing violation, having repeatedly invalidated these practices. Scholars and advocates are now considering new ways to apply the FHA in the neighborhood-based discrimination context.

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<sup>117</sup> Nat'l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am., 208 F. Supp. 2d 46, 63 (D.C. 2002).

<sup>118</sup> Hanson v. Veterans Admin., 800 F.2d 1381, 1387 (5th Cir. 1986).

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

<sup>120</sup> United States v. Am. Inst. of Real Estate Appraisers of Nat. Ass'n of Realtors, 442 F. Supp. 1072, 1076 (N.D. Ill. 1977).

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

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1077.

<sup>124</sup> Hanson, 800 F.2d at 1387.

<sup>125</sup> *Id.* at 1386. Although the Court found that race-based appraisals would violate the FHA, the Court affirmed the lower court's finding that the complainants had not established that race was the motivating factor in this particular case. *Id.*

C. *Banks' Failure to Maintain Foreclosed Properties in Neighborhoods of Color*

The foreclosure crisis stemmed in part from predatory lending by banks in neighborhoods of color. In a report to Congress, HUD identified the increase in subprime loans as one of the driving causes of the 2008 foreclosure crisis.<sup>126</sup> HUD described this phenomenon as “risky loans made to risky borrowers.”<sup>127</sup> For many of the loans made during the 2000s, borrowers could not afford the payments at the time the loans were made.<sup>128</sup> Additionally, many non-traditional mortgages, such as interest-only mortgages, allowed borrowers to purchase more expensive homes than they normally could.<sup>129</sup> These risky loans were not evenly distributed throughout the population, however. Rather, banks concentrated these loans in communities of color. Indeed, Black and Latinx families with annual incomes of more than \$200,000 were more likely to receive subprime loans than White families with annual incomes less than \$30,000.<sup>130</sup>

Unfortunately, race-based discrimination by banks continued after the foreclosure crisis, when banks gained possession of the foreclosed properties. Data from across the United States show that banks are not maintaining foreclosed properties in neighborhoods of color to the same extent that they are maintaining foreclosed properties in White neighborhoods.<sup>131</sup> The victimization of these communities continues.

<sup>126</sup> OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS vi (2010), [https://www.huduser.gov/portal/publications/Foreclosure\\_09.pdf](https://www.huduser.gov/portal/publications/Foreclosure_09.pdf) [<https://perma.cc/X585-ANDZ>].

<sup>127</sup> *Id.* at 26.

<sup>128</sup> *Id.* at 22.

<sup>129</sup> *Id.* at 25–26.

<sup>130</sup> Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom*, CITYLAB (Aug. 16, 2013), <https://www.citylab.com/equity/2013/08/blacks-really-were-targeted-bogus-loans-during-housing-boom/6559> [<https://perma.cc/6PYU-4N5D>]; see also Ylan Q. Mui, *For Black Americans, Financial Damage From Subprime Implosion is Likely to Last*, WASH. POST (July 8, 2012), [https://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwnmzWW\\_story.html?utm\\_term=.252c394dee1e](https://www.washingtonpost.com/business/economy/for-black-americans-financial-damage-from-subprime-implosion-is-likely-to-last/2012/07/08/gJQAwnmzWW_story.html?utm_term=.252c394dee1e) [<https://perma.cc/89AR-7ANG>].

<sup>131</sup> See, e.g., NAT'L FAIR HOUS. ALL., ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR 2 (2014), [http://nationalfairhousing.org/wp-content/uploads/2017/04/2014-08-27\\_NFHA\\_REO\\_report.pdf](http://nationalfairhousing.org/wp-content/uploads/2017/04/2014-08-27_NFHA_REO_report.pdf) [<https://perma.cc/M8Z9-M6GX>]; NAT'L FAIR HOUS. ALL., THE BANKS ARE BACK – OUR NEIGHBORHOODS ARE NOT: DISCRIMINATION IN THE MAINTENANCE AND MARKETING OF REO PROPERTIES (2012), <http://nationalfairhousing.org/wp-content/uploads/2017/04/Banks-are-Back-Final-12.3.2012.pdf> [<https://perma.cc/Y4ZJ-M7YX>]; NAT'L FAIR HOUS. ALL., HERE COMES THE BANK, THERE GOES OUR NEIGHBORHOOD: HOW LENDERS DISCRIMINATE IN THE TREATMENT OF FORECLOSED HOMES 2 (2011), <http://nationalfairhousing.org/wp-content/>

## 1. Banks are Engaging in Discriminatory Maintenance

The National Fair Housing Alliance (NFHA) is a consortium of non-profit fair housing organizations, civil rights agencies, and individuals.<sup>132</sup> Its mission is to “eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education, outreach, membership services, public policy initiatives, community development, advocacy, and enforcement.”<sup>133</sup> Since 2009, NFHA and its member organizations have been investigating the maintenance of foreclosed properties, known in the industry as “real estate owned” (REO) properties. Their research concludes that some banks maintain their REO properties in White and mixed-race neighborhoods better than their REO properties in Black and Latinx neighborhoods in the same city.<sup>134</sup>

The data are jarring but not altogether unexpected. The first study, published in April 2011, catalogued over ten thousand REO properties in Connecticut, Maryland, Ohio, and Virginia. It documented maintenance efforts as demonstrated by curb appeal (presence or absence of trash, whether mailboxes were broken or overflowing with mail, and the appearance of grass and shrubbery), structural problems (broken doors or windows, holes in the walls, and damaged porches or stairs), quality of paint and siding, the condition of gutters (cared for, water damaged etc.), and signage and occupancy (presence or absence of “for sale” or “no trespassing” signs, presence of squatters).<sup>135</sup> The study showed that in Connecticut, Maryland and Ohio, REO properties in White or stable, mixed-race neighborhoods scored significantly higher on the maintenance index than homes in Black or Latinx neighborhoods.<sup>136</sup> Foreclosed properties in White neighborhoods were “more likely to have well-maintained lawns, secured entrances, and professional sales marketing,” while foreclosed properties in Black and Latinx neighborhoods were “more likely to have

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uploads/2017/04/There-Goes-Our-Neighborhood-REO-report-2011-for-website.pdf [https://perma.cc/2XNU-EH3P].

<sup>132</sup> *About NFHA*, NFHA, <https://nationalfairhousing.org/about/> [https://perma.cc/H68K-YPWS].

<sup>133</sup> *Mission Statement*, NFHA, <https://nationalfairhousing.org/mission-statement> [https://perma.cc/9YV9-GMTF].

<sup>134</sup> *See supra* note 131.

<sup>135</sup> *See NFHA*, 2011 NFHA REPORT 15 (2011), <https://nationalfairhousing.org/wp-content/uploads/2017/04/There-Goes-Our-Neighborhood-REO-report-2011-for-website.pdf> [https://perma.cc/2XNU-EH3P].

<sup>136</sup> *Id.* at 2.

poorly maintained yards, unsecured entrances, look vacant or abandoned, and have poor curb appeal.”<sup>137</sup>

A second report, released in April 2012, included a similar analysis of over one thousand properties in Arizona, California, Maryland, Pennsylvania, and Washington, DC. The findings were consistent with the earlier study. NFHA found that REO properties in communities of color were eighty-two percent more likely than REO properties in White communities to have broken or boarded windows and forty-two percent more likely to have more than fifteen maintenance problems than those in White communities.<sup>138</sup> Examples of maintenance problems include accumulated mail, damaged steps or fences, graffiti or damaged siding, hanging gutters, and exposed or tampered with utilities.<sup>139</sup>

NFHA’s third study, released in August 2014, corroborated prior findings. NFHA concluded that REOs in White neighborhoods were more likely to have professional-quality “for sale” signs, well-maintained lawns, and secured entrances than REOs in neighborhoods of color.<sup>140</sup> Further, REOs in neighborhoods of color were not maintained to the same standards of the surrounding, occupied housing as the REOs in White neighborhoods.<sup>141</sup> As a whole, “REOs in communities of color were 2.2 times more likely to have . . . trash and debris” on the property, “2.3 times more likely to have unsecured . . . or damaged doors,” twice as likely to have unsecured or damaged windows, and 2.1 times more likely to have holes in the structure of the house than REOs in White neighborhoods.<sup>142</sup> The disparities in some cities were even more dramatic.<sup>143</sup>

Financial institutions deny the allegations of discriminatory maintenance of REOs. Bob Davis, executive vice president for mortgage policy for the American Bankers Association, said “[b]anks take care of these houses to preserve their collateral regardless of where the property is located. Banks operate and are examined under fair lending and fair housing laws to ensure equal treatment across all communities.”<sup>144</sup> A

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<sup>137</sup> *Id.*

<sup>138</sup> THE BANKS ARE BACK – OUR NEIGHBORHOODS ARE NOT: DISCRIMINATION IN THE MAINTENANCE AND MARKETING OF REO PROPERTIES, *supra* note 131, at 2–3.

<sup>139</sup> *See id.* at 17.

<sup>140</sup> *See* ZIP CODE INEQUALITY: DISCRIMINATION BY BANKS IN THE MAINTENANCE OF HOMES IN NEIGHBORHOODS OF COLOR, *supra* note 131, at 2.

<sup>141</sup> *See id.*

<sup>142</sup> *See id.* at 2–3.

<sup>143</sup> *See id.* at 3.

<sup>144</sup> Janel Ross, *Banks Fail to Maintain Foreclosed Homes in Minority Neighborhoods: Report*, HUFFINGTON POST (Apr. 4, 2012), <https://www.huffpost.com/>

spokesperson for Wells Fargo wrote that the bank “conducts all lending-related activities in a fair and consistent manner without regard to race: this includes maintenance and marketing standards for all foreclosed properties for which we are responsible.”<sup>145</sup> Similarly, Andrew Wilson, spokesperson for Fannie Mae, denied the allegations, writing “We are confident that our standards ensure that properties in all neighborhoods are treated equally, and we perform rigorous quality control to make sure that is the case. We remain dedicated to neighborhood stabilization efforts across the nation, including with respect to our maintenance of foreclosed properties.”<sup>146</sup> Bank of America attacked the NFHA reports, calling them “inaccurate and misleading,”<sup>147</sup> and a spokesperson for Safeguard, the property management company for Bank of America, called the pending lawsuit “ill-conceived and disingenuous.”<sup>148</sup>

Despite the financial institutions’ denials of discrimination, additional data demonstrate the harms caused by poorly maintained REOs. If the effects of poor maintenance were confined to the foreclosed properties themselves, the discriminatory maintenance might not matter as much. However, poorly maintained, foreclosed properties clearly have negative effects for surrounding homeowners, community members, and public entities. First, municipalities must spend public resources to maintain neglected, vacant units. A 2011 study released by the Government Accountability Office showed the cost of boarding up and securing properties ranged from \$233 to \$1,400 per property.<sup>149</sup> Officials in Chicago estimated that the city had spent \$875,000 to board up vacant properties

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entry/banks-foreclosed-homes-minorities-banks-reo\_n\_1404134 [https://perma.cc/5EPK-R2YU].

<sup>145</sup> Cora Currier, *Big Banks Slack on Maintaining Foreclosed Homes in Minority Areas, Complaint Charges*, PROPUBLICA (Apr. 16, 2012), <https://www.propublica.org/article/big-banks-slack-on-maintaining-foreclosed-homes-in-minority-areas-complaint> [https://perma.cc/6EYR-QBUZ].

<sup>146</sup> Catherine Dunn, *Fannie Mae Fails to Maintain Foreclosed Homes in Black and Latino Neighborhoods, Discrimination Complaint Alleges*, INT’L BUS. TIMES (May 13, 2015), <https://www.ibtimes.com/fannie-mae-fails-maintain-foreclosed-homes-black-latino-neighborhoods-discrimination-1921137> [https://perma.cc/J7B4-8JYU].

<sup>147</sup> Luz Lazo, *Fair Housing Group: Bank of America Foreclosed Homes in White Neighborhoods Are Better Maintained Than Those in Black and Latino Neighborhoods*, WASH. POST (Aug. 31, 2016), [https://www.washingtonpost.com/news/local/wp/2016/08/31/fair-housing-group-bank-of-america-foreclosed-homes-in-white-neighborhoods-are-better-maintained-than-those-in-black-and-latino-neighborhoods/?utm\\_term=.3dbc8aad5e7](https://www.washingtonpost.com/news/local/wp/2016/08/31/fair-housing-group-bank-of-america-foreclosed-homes-in-white-neighborhoods-are-better-maintained-than-those-in-black-and-latino-neighborhoods/?utm_term=.3dbc8aad5e7) [https://perma.cc/PFS6-YMDR].

<sup>148</sup> Bui, *supra* note 6.

<sup>149</sup> U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 3, at 37.

in 2010 alone while Detroit officials estimated that the city had spent \$1.4 million in about a year to secure vacant properties.<sup>150</sup>

Second, foreclosure leads to higher violent crime rates. One study examining the link between foreclosure and crime found that a one percentage point increase in an area's foreclosure rate leads to a 2.33 percent increase in violent crime.<sup>151</sup> High crime rates decrease quality of life for neighborhood residents and necessitate increased public expenditures for police services. In a complaint against Wells Fargo for its discriminatory maintenance of REO properties, the City of Miami documented the increased demand for "police, fire, and building and code enforcement services" as a result of foreclosures.<sup>152</sup>

Additionally, research on the impact of foreclosed single-family homes shows a statistically significant, negative effect on neighboring home values.<sup>153</sup> Studies place the decrease somewhere between 0.7 percent and ten percent, depending on the city and statistical model used.<sup>154</sup> A Chicago study found that each foreclosure within one-eighth of a mile reduced a home's value by over one percent and each foreclosure within a one-eighth to one-quarter of a mile range reduced a home's value by 0.325 percent.<sup>155</sup> In low and moderate-income areas, the foreclosure effect was even greater. In the latter, each foreclosed property within one-eighth of a mile reduced the value of surrounding homes by 1.44 percent to 1.8 percent.<sup>156</sup> The cumulative effect of multiple foreclosures in an area can devastate property values.

This decrease in property values, however, is especially problematic for neighboring homeowners in communities of color. Although homes are the most important asset for most families, households of color rely even more heavily on home equity as a source of wealth than do White households.<sup>157</sup> Thus,

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<sup>150</sup> *Id.*

<sup>151</sup> This study used census data; business count data from Dun and Bradstreet, a private data analysis company; and statistics from the Chicago Police Department to calculate the effect of single-family foreclosures on property and violent crime rates in Chicago. Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUS. STUDIES 851, 863 (2005).

<sup>152</sup> *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301–02 (2017).

<sup>153</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 44–46 (summarizing results from several studies with different methodologies); DAN IMMERGLUCK & GEOFF SMITH, *THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES* 7 (2005) (determining home values from sales data from the Illinois Department of Revenue and property characteristics from the Cook County Assessor's Office).

<sup>154</sup> U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 3, at 44–46.

<sup>155</sup> *THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES*, *supra* note 153, at 9 (2005).

<sup>156</sup> *Id.*

<sup>157</sup> KOCHHAR, FRY & TAYLOR, *supra* note 35, at ch. 2.

any condition that decreases home values in communities of color is especially troubling. That the decrease results from discrimination is even worse. In sum, banks have harmed homeowners in Black and Latinx neighborhoods by draining local governments of important funds, raising rates of violent crime, and lowering the value of property belonging to homeowners of color through discriminatory housing practices in violation of the FHA.

## 2. Discriminatory Maintenance by Banks Violates the FHA

In 2014, fair housing advocates used existing case law regarding race-based neighborhood discrimination to show that the unequal maintenance of REO properties by banks violates the FHA.<sup>158</sup> Equating discriminatory maintenance to redlining, they showed that the FHA—as currently interpreted—could be used to hold financial institutions liable for discriminatory maintenance of foreclosed properties.<sup>159</sup> This same analysis became the basis for a pending HUD complaint filed against Bank of America by NFHA and more than fifteen local fair housing organizations.<sup>160</sup> This article extends that argument, showing how that analysis is applicable to neighboring homeowners, as well, who might also want to sue banks engaging in discriminatory maintenance.<sup>161</sup>

First, failure to maintain REO properties in neighborhoods of color makes housing unavailable under the FHA.<sup>162</sup> If a property is uninhabitable, potential buyers might assume it is either not for sale or would involve costly repairs to compensate for deferred maintenance.<sup>163</sup> Poor maintenance essentially removes these

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<sup>158</sup> Stephen M. Dane, Tara K. Ramchandani & Anne P. Bellows, *Discriminatory Maintenance of REO Properties as a Violation of the Federal Fair Housing Act*, 17 CUNY L. REV. 383, 387 (2014).

<sup>159</sup> *Id.* at 388–89.

<sup>160</sup> Sixth Amended Fair Housing Complaint at 1–2, Nat'l Fair Hous. All. v. Bank of Am. Corp., No. 04-13-0016-8, Inquiry No. 349549 (HUD Aug. 31, 2016), <https://nationalfairhousing.org/wp-content/uploads/2017/04/Complaint-Against-Bank-of-America-1.pdf> [<https://perma.cc/FJQ5-UV9Y>].

<sup>161</sup> In addition to discriminatory maintenance, banks' failure to advertise their REO properties in neighborhoods of color as actively or positively as those in White neighborhoods runs afoul of the FHA, which prohibits discrimination in the advertising of dwellings. 42 U.S.C. § 3604(c). The regulation implementing this part of the FHA specifically states that “[r]efusing to publish advertising for the sale” or having different terms for advertising because of race is unlawful. 24 C.F.R. § 100.75(c)(4) (2018). The bank practice of posting “warning” signs in neighborhoods of color communicates that they are unsafe or undesirable. Although not the focus of this article, the NFHA studies also documented banks' discriminatory signage.

<sup>162</sup> Dane et al., *supra* note 158, at 390–91; Sixth Amended Fair Housing Complaint, *supra* note 160, at 73.

<sup>163</sup> Dane et al., *supra* note 158, at 391–93.

properties from the housing market.<sup>164</sup> In fact, some unmaintained REO properties fall into such disrepair that they must be demolished, literally making them unavailable.<sup>165</sup>

HUD regulations describing prohibited conduct clearly establish that it is unlawful “to discourage or obstruct choices in a community, neighborhood or development” based on race.<sup>166</sup> The regulations further state that it is illegal to discourage anyone “from inspecting, purchasing or renting a dwelling because of [the] race . . . of persons in a community, neighborhood or development.”<sup>167</sup> When banks fail to maintain foreclosed properties, and those properties become blighted with trash, broken fixtures, unkempt grass and shrubbery, and other signs of decay, the properties become less attractive to potential buyers, who are deterred from acquiring those properties in violation of the federal regulations.<sup>168</sup>

Second, because REO properties are supposed to be available for sale, failure to maintain these homes in neighborhoods of color constitutes discrimination under Section 3604(b).<sup>169</sup> The HUD regulations relating to this section of the FHA specifically list “[f]ailing or delaying maintenance or repairs of sale or rental dwellings” based on race as prohibited discriminatory conduct.<sup>170</sup> When banks maintain REO properties in White neighborhoods but not in neighborhoods of color in the same city, it shows they are choosing to engage in discriminatory maintenance, not that they are unable to perform any maintenance.

Third, discriminatory maintenance of REO properties violates the FHA because it perpetuates segregation. Although not explicitly stated in the FHA, both state and federal courts have consistently recognized the perpetuation of segregation as a fair housing violation under federal law.<sup>171</sup> Historically, perpetuation of

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<sup>164</sup> *Id.* at 393.

<sup>165</sup> Sixth Amended Fair Housing Complaint, *supra* note 160, at 73.

<sup>166</sup> 24 C.F.R. § 100.70(a) (2018).

<sup>167</sup> 24 C.F.R. § 100.70(c)(1) (2018).

<sup>168</sup> Sixth Amended Fair Housing Complaint, *supra* note 160, at 72–73; Dane et al., *supra* note 158, at 392.

<sup>169</sup> Dane et al., *supra* note 158, at 394–95. It is unlawful to discriminate “in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith.” 42 U.S.C. § 3604(b) (2012).

<sup>170</sup> 24 C.F.R. § 100.65(b)(2).

<sup>171</sup> *See, e.g., Huntington Branch*, 844 F.2d at 938 (“[R]efusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the urban renewal area significantly perpetuated segregation”); *Arlington Heights*, 558 F.2d at 1290 (“[I]f [a housing decision] perpetuates segregation and thereby prevents interracial association it will be considered invidious under the Fair Housing Act”); *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (explaining that the goal of the FHA was to promote “open, integrated residential housing patterns and to prevent the increase of segregation”); *United States v. City of Parma*, 494 F. Supp. 1049, 1097 (N.D.

segregation claims have been brought against municipalities that used zoning decisions to block the construction of mixed-race or mixed-income housing in White communities.<sup>172</sup> This sort of claim, however, is applicable to the discriminatory maintenance of REO properties, as well. First, it makes it less likely that other buyers, including White buyers, will purchase in neighborhoods of color.<sup>173</sup> If foreclosed properties in neighborhoods of color are poorly maintained, buyers in general and, in particular, buyers with more purchasing power will likely be deterred. Second, reduced home values in neighborhoods of color decrease the buying power of those homeowners, making it less likely that they will be able to purchase in more affluent, often integrated or White, neighborhoods.<sup>174</sup> As these civil rights advocates explain, discriminatory maintenance by banks ends up “re-entrenching the economic dynamics that maintain racial segregation.”<sup>175</sup>

Another scholar arguing for expanding the application of fair housing law created a framework to help determine whether entities should be held liable under the FHA.<sup>176</sup> The framework considers the degree of control the bad actor has over the housing situation and the duration of the relationship between that actor and the person harmed.<sup>177</sup> The more control the bad actor has to influence the housing situation and the longer the relationship between the actor and the person being harmed, the stronger the basis for holding that bad actor liable.<sup>178</sup> In the case of banks engaging in discriminatory maintenance of REO properties, they exercise a tremendous amount of control over the housing situation. As the lawful owners responsible for maintenance, they have almost exclusive control over the condition of the REO property. When the poor condition of those homes reduces property values within the neighborhood, homeowners are powerless. It can take months or even years to resell these homes, particularly if banks refuse to make needed repairs.<sup>179</sup> Homeowners can only watch as the equity in their own

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Ohio 1980) (finding that the city “consistently ha[d] made decisions which have perpetuated and reinforced its image as a city where blacks are not welcome. This is the very essence of a pattern and practice of racial discrimination.”).

<sup>172</sup> ROBERT G. SCHWEMM, *HOUSING DISCRIMINATION: LAW AND LITIGATION* § 10:7 (2014).

<sup>173</sup> Dane et al., *supra* note 158, at 396.

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

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

<sup>176</sup> See Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 39–50 (2008).

<sup>177</sup> *See id.* at 51–62.

<sup>178</sup> *See id.* at 49.

<sup>179</sup> Not only does the foreclosure process itself drag on for years in some jurisdictions, but banks can be slow to respond to purchase offers after foreclosing on the

homes melts away because the banks are allowing properties they control to deteriorate in ways that damage the property values of people living in the neighborhood. Based on this analysis, it is reasonable to hold banks liable for the effects of their discriminatory maintenance on the most economically vulnerable homeowners in society.

Individual homeowners in neighborhoods being adversely affected by banks' discriminatory maintenance also have a cause of action. Although the HUD complaint filed against Bank of America by the National Fair Housing Alliance and local fair housing organizations included only organizational plaintiffs, on June 26, 2018, two homeowners joined with NFHA and nineteen fair housing organizations to sue Bank of America in federal district court.<sup>180</sup> Courts have established that fair housing organizations have standing to sue, but the same is not true for individual homeowners. To date, there has been no judicial decision that homeowners like Ms. Onafuwa and Ms. Bushnell, whose properties are immediately adjacent to REOs, or other homeowners in the neighborhood, including those on different blocks, have standing to sue under the FHA.

### III. NEIGHBORING HOMEOWNERS AND THE FHA'S AGGRIEVED PERSON STANDARD

To hold banks liable for discriminatory maintenance of foreclosed properties in neighborhoods of color, homeowners must establish that they have standing to sue under the FHA. Federal fair housing law allows an "aggrieved person" to file suit in state or federal court or file a complaint with HUD.<sup>181</sup> The FHA defines an aggrieved person as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur."<sup>182</sup>

In the context of discriminatory maintenance of REO properties, the question is whether neighboring homeowners whose property values are negatively impacted were injured, as contemplated by the FHA. This article argues that access to housing should be understood to include protection of the home's

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property. *See As Number of Foreclosed Homes Grows, So Does Mold*, NPR (July 13, 2011), <https://www.npr.org/2011/07/13/137629788/as-number-of-foreclosed-homes-grows-so-does-mold> [<https://perma.cc/US3Y-QYCB>].

<sup>180</sup> *See generally* Complaint and Demand for Jury Trial, *supra* note 1; Sixth Amended Fair Housing Complaint, *supra* note 160.

<sup>181</sup> 42 U.S.C. §§ 3613(a), 3610(a)(1)(A) (2012).

<sup>182</sup> 42 U.S.C. § 3602(i).

value and neighborhood quality of life and, therefore, discriminatory actions that decrease residential property values and deteriorate the community violate the FHA. Some courts have found that the discriminatory provision of municipal services violates the FHA, and such discrimination—which degrades neighborhood quality of life—is similar to banks’ discriminatory maintenance of foreclosed properties.<sup>183</sup> However, in 1984, the Seventh Circuit took a different, incorrect view of what constitutes a fair housing violation in the provision of services.

A. *The Southend Case and the Seventh Circuit’s Limited Understanding of Access to Housing*

The FHA defines a dwelling as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”<sup>184</sup> In prohibiting discrimination regarding dwellings, the FHA must be understood to protect more than initial access to housing, despite the Seventh Circuit decision.

In *Southend*, the Seventh Circuit considered whether a county’s failure to maintain tax delinquent properties in predominantly Black neighborhoods constituted unlawful discrimination under the FHA.<sup>185</sup> In that case, homeowners and not-for-profit organizations in East St. Louis sued St. Clair County for failing to either board up or demolish dilapidated buildings the

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<sup>183</sup> A majority of courts that have addressed the issue suggested that discriminatory provision of municipal services violates the FHA; however, some courts have found that the FHA does not cover this sort of discriminatory conduct. For examples of courts suggesting or finding that discriminatory provision of municipal services violates the FHA, see *Shaikh v. City of Chicago*, 341 F.3d 627, 631–32 (7th Cir. 2003) (suggesting that municipal services such as zoning, police protection, and fire protection are covered by § 3604(b)); *Good Shepherd Manor Found., Inc. v. City of Mommence*, 323 F.3d 557, 565 (7th Cir. 2003) (suggesting that the city would have violated the FHA if it had cut off the water supply because of discriminatory intent); *Edwards v. Johnston Cty. Health Dep’t*, 885 F.2d 1215, 1224–25 (4th Cir. 1989) (suggesting that § 3604(b) might prohibit discriminatory provision of some municipal services); *Southend Neighborhood Improvement Ass’n v. St. Clair Cty.*, 743 F.2d 1207, 1210 (7th Cir. 1984) (stating that Section 3604(b) “applies to services generally provided by governmental units such as police and fire protection or garbage collection”); *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 424 (4th Cir. 1984) (stating that Section 3604(b) “encompasses such things as garbage collection and other services of the kind usually provided by municipalities”); *Lopez v. City of Dallas*, No. 3:03-CV-2223-M, 2004 WL 2026804, at \*9 (N.D. Tex. Sept. 9, 2004) (finding that discriminatory provision of municipal services violated § 3604(b)); *Miller v. City of Dallas*, No. CIV.A.3:98-CV-2955-D, 2002 WL 230834, at \*1, 14 (N.D. Tex. Feb. 14, 2002) (stating that Section 3604(b) covers municipal services such as protection from nuisances and floods); *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1143–44 (N.D. Ill. 1993) (upholding § 3604(b) claim alleging discriminatory termination of police protection).

<sup>184</sup> 42 U.S.C. § 3602(b) (1988).

<sup>185</sup> See generally *Southend*, 743 F.2d 1207.

County had acquired through tax sales.<sup>186</sup> The plaintiffs claimed that the County's actions reduced the value of their own properties and prevented them from accessing loans or making contracts.<sup>187</sup>

Specifically, the plaintiffs argued that the County's actions violated the FHA by making the dwellings "unavailable" and discriminating in the provision of services under Sections 3604(a) and 3604(b).<sup>188</sup> The complaint alleged that

The County of St. Clair, at all times relevant to this action, with respect to property to which it holds a tax deed, and which is located in predominantly black areas, (1) has failed and refused to comply with its statutory obligation to prevent waste on any of the premises involved, and to ensure that the premises are maintained in good condition and repair, that the subject property is preserved, and that the public's safety, with respect to such property, is protected; (2) has failed and refused to comply with its obligations under local ordinances to demolish all unsafe buildings on such property; and (3) has failed and refused to comply with its obligation to maintain that property in such a manner that the health and welfare of residents of the surrounding neighborhood is not endangered.<sup>189</sup>

The Seventh Circuit found that the County did not violate either Section 3604(a) or Section 3604(b) of the FHA. The court interpreted the statute to apply only to literal availability, focusing on discriminatory acts that interfered with the acquisition of housing.<sup>190</sup> The Seventh Circuit went on to say that the FHA "does not protect the *intangible* interests in the already-owned property raised by the plaintiffs [sic] allegations."<sup>191</sup> In other words, the court held that a plaintiff's claim does not extend to intangible, post-acquisition interests. The court then concluded that the FHA "was not designed to address the concerns raised by the complaint."<sup>192</sup> In *Southend*, the Seventh Circuit interpreted the FHA narrowly. This decision is inconsistent with both prior and subsequent Supreme Court decisions, which embraced a broad construction of the FHA and recognized economic harm as conferring standing.

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<sup>186</sup> *Id.* at 1208.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1209–10.

<sup>189</sup> *Id.* at 1209.

<sup>190</sup> *Id.* at 1210.

<sup>191</sup> *Id.* (emphasis added).

<sup>192</sup> *Id.*

## B. *Supreme Court Decisions Contradicting Southend*

A number of Supreme Court decisions that span the life of the FHA confirm a cause of action based on intangible interests.

### 1. Early Cases Established Standing for More Than Denial of Physical Access to Housing

The Supreme Court first addressed the statutory construction of the FHA in 1972, merely four years after the FHA became law. In *Trafficante v. Metropolitan Life Insurance Company*, the Supreme Court heard a case in which tenants (one Black and one White) alleged that discrimination against non-White rental applicants to the complex harmed the tenants in the complex.<sup>193</sup> They were not only denied the benefits of living in an integrated community, but had also missed out on professional opportunities that come from mixed-race contacts, and suffered the embarrassment and stigma of being associated with a “white ghetto.”<sup>194</sup> In determining whether the tenants had standing under the FHA, the Court described the statutory language as “broad and inclusive.”<sup>195</sup>

The Court went on to cite the FHA’s legislative history, noting that senators who supported or drafted the legislation were concerned about harm to the “whole community,” not just the target of the discriminatory act, and that one of the goals of the FHA was to create “truly integrated and balanced living patterns.”<sup>196</sup> In holding that the tenants had standing to sue for discriminatory acts directed against others, the Supreme Court stated that “generous construction” of the complaint-filing provision was the only way to “give vitality” to the FHA.<sup>197</sup> With this decision, the Supreme Court unanimously upheld the right of people who had not been denied physical access to housing to sue for intangible harms experienced through discriminatory conduct directed against others.

Seven years later, the Supreme Court extended the scope of community for standing purposes from the apartment complex addressed in *Trafficante* to a much larger twelve-by-thirteen-block residential neighborhood.<sup>198</sup> In *Gladstone*, the

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<sup>193</sup> See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972).

<sup>194</sup> *Id.* at 206–08.

<sup>195</sup> *Id.* at 209.

<sup>196</sup> *Id.* at 211.

<sup>197</sup> *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (citing *id.* at 212).

<sup>198</sup> See *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 95 (1979).

Court considered a case in which a real estate company was alleged to have steered Black homebuyers to one part of the neighborhood and White homebuyers to another.<sup>199</sup> In explaining its finding that the homeowners had standing under the FHA, the Court said that it perceived “no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood.”<sup>200</sup>

In addition to broadening the geographic scope of the community being harmed by discriminatory conduct, the Supreme Court determined declining home values to be a basis for standing under the FHA. It said that “convincing evidence that the economic value of one’s own home has declined as a result of the conduct of another certainly is sufficient under Art[icle] III [of the Constitution] to allow standing to contest the legality of that conduct.”<sup>201</sup> The Court further explained that

[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. Other harms flowing from the realities of a racially segregated community are not unlikely. As we have said before, “[t]here can be no question about the importance” to a community of “promoting stable, racially integrated housing.” If, as alleged, petitioners’ sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct.<sup>202</sup>

Thus, the Court clearly found that damage to economic interests conferred standing under the FHA.

The Supreme Court again heard the issue of third party standing and neighborhood harm in 1982 and found that the FHA applies to more than the initial acquisition of housing. In *Havens Realty Corporation v. Coleman*, a case involving alleged racial steering in a rental community, the Court defined the indirect injury that gives rise to “neighborhood standing” as “an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff.”<sup>203</sup> The Court again recognized that discriminatory acts against other individuals could lead to injury of surrounding community members.<sup>204</sup> The Court then reaffirmed that the FHA protects “the right to the important social, professional, business

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<sup>199</sup> *Id.* at 94–95.

<sup>200</sup> *Id.* at 114.

<sup>201</sup> *Id.* at 115.

<sup>202</sup> *Id.* at 110–11 (internal citations omitted).

<sup>203</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982).

<sup>204</sup> *Id.*

and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices.”<sup>205</sup> Again, a unanimous Supreme Court defined injury under the FHA to include more than the acquisition of housing, and the benefits of housing to be more than the dwelling’s physical structure.

Throughout these cases, the Supreme Court had developed a body of case law that interprets the FHA expansively so that it covers a wide range of people experiencing a wide range of harms. The people protected include those who live in housing but experienced intangible damages as a result of discriminatory conduct.

## 2. Recent Supreme Court Decision Affirms Standing for Entities Financially Harmed by Discriminatory Maintenance

The Supreme Court continues to find that the FHA protects against injuries beyond access to the physical structure of housing. In 2017, the Supreme Court heard a case in which the City of Miami sued Bank of America and Wells Fargo for predatory lending.<sup>206</sup> Specifically, the City alleged that the banks gave riskier mortgages with less favorable terms to applicants of color than to similarly-situated White applicants, and that these predatory loans led to high rates of default among borrowers of color.<sup>207</sup> The City claimed that the discriminatory lending “(1) ‘adversely impacted the racial composition of the City,’ (2) ‘impaired the City’s goals to assure racial integration and desegregation,’ (3) ‘frustrate[d] the City’s longstanding and active interest in promoting fair housing and securing the benefits of an integrated community,’ and (4) disproportionately ‘cause[d] foreclosures and vacancies in minority communities in Miami.’”<sup>208</sup> The City alleged that it was harmed because the foreclosures decreased property values and led to lower tax revenues.<sup>209</sup> Further, the foreclosures forced the City to increase spending on municipal services to correct unsafe and dangerous conditions on the foreclosed properties.<sup>210</sup> The City’s damages were primarily economic in nature.

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<sup>205</sup> *Id.* at 376.

<sup>206</sup> *See generally* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017).

<sup>207</sup> *Id.* at 1300–01.

<sup>208</sup> *Id.* at 1301 (alteration in original) (citations omitted) (quoting Joint Appendix at 229, 232–33, 413, 416–17, Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296 (2017) (No. 15-1111 & 15-1112), 2016 WL 4502302).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

The banks argued that the City lacked standing under the FHA. They claimed that the City was not an “aggrieved person” because the damages the City allegedly suffered fell outside the “zone of interest” that the FHA was intended to protect.<sup>211</sup> The Supreme Court disagreed. It ruled that “the City’s claimed injuries fall within the zone of interests that the FHA arguably protects.”<sup>212</sup> Thus, the City was an aggrieved person under the statute.<sup>213</sup> The Supreme Court clearly found that the City had standing to bring fair housing claims against banks that had allegedly engaged in discriminatory lending.

In its analysis, the Court cited prior standing decisions and explained that statutory standing requires that a statute “grants the plaintiff the cause of action that he asserts.”<sup>214</sup> More specifically, a statute grants a cause of action if the plaintiff falls within the zone of interest.<sup>215</sup> The Court explicitly concluded that “lost tax revenue and extra municipal expenses” satisfied the standing requirement.<sup>216</sup>

Additionally, the Court noted congressional intent to “confer standing broadly” and referenced its prior statutory interpretations in *Trafficante*, *Gladstone*, and *Havens*.<sup>217</sup> It noted that when Congress last amended federal fair housing law in 1988, it did nothing to limit the definition of “aggrieved person,” despite being aware of Supreme Court precedent interpreting the definition broadly.<sup>218</sup> The Court went on to say that “Congress normally adopts [the Court’s] interpretations of statutes when it reenacts those statute [sic] without change.”<sup>219</sup>

Both congressional intent and prior Supreme Court precedent justified finding that a City that had suffered economic harm as a result of predatory lending and resulting foreclosures was an aggrieved person under the FHA. The situation of neighboring homeowners is similar. They, too, suffer harm when they expend resources to respond to dilapidated REOs. Further, their resource base suffers when their home values decline, just as cities suffer from a decreased tax base due to declining property values.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 1302.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1303.

<sup>217</sup> *Id.* at 1303.

<sup>218</sup> *Id.* at 1303–04.

<sup>219</sup> *Id.* at 1304.

### 3. Thomas' Dissent and the Issue of Neighboring Homeowner Standing

Justice Thomas strongly disagreed with the majority in *City of Miami*. In his dissent, he argued that the City's injuries fell far outside the FHA's intended zone of interest.<sup>220</sup> He described the "quintessential aggrieved person" as being a prospective buyer or renter who experienced discrimination during an attempt to secure housing.<sup>221</sup> He downplayed Supreme Court precedent by writing that prior cases "*suggested* that the interests of a person who lives in a neighborhood or apartment complex that remains segregated (or that risks becoming segregated) as a result of discriminatory housing practice *may be arguably* within the outer limit of the interests the FHA protects."<sup>222</sup> He understated the clear decision of a unanimous Supreme Court in *Trafficante*.<sup>223</sup>

After spending the bulk of his dissent critiquing the majority decision to confer standing on the City, Justice Thomas made a seemingly offhand remark about the standing rights of neighboring homeowners negatively impacted by banks' discriminatory behavior. He said that "[u]nder Miami's own theory of causation, its injuries are one step further removed from the allegedly discriminatory lending practices than the injuries suffered by the neighboring homeowners whose houses declined in value. *No one suggests that those homeowners could sue under the FHA, and I think it is clear that they cannot.*"<sup>224</sup>

Justice Thomas is wrong.

#### C. *Legislative Intent and the Goals of the FHA*

The idea of "home" and benefits it confers are important to Americans, and linked to a variety of interests, including financial security.<sup>225</sup> It is indisputable that the main proponents of the FHA saw access to housing—including homeownership—as a way to promote access to opportunity, and that the ultimate goal of the FHA was to combat a broad range of social problems. Indeed, in one hearing on proposed fair housing legislation,

<sup>220</sup> *Id.* at 1307.

<sup>221</sup> *Id.* at 1309.

<sup>222</sup> *Id.* (emphasis added).

<sup>223</sup> The majority even noted Justice Thomas' understatement, writing "[c]ontrary to the dissent's view, those cases did more than 'sugges[t]' that plaintiffs similarly situated to the City have a cause of action under the FHA. They held as much." *Id.* at 1303 (internal citation omitted).

<sup>224</sup> *Id.* at 1312 (emphasis added).

<sup>225</sup> See Iglesias, *supra* note 22, at 531.

Senator Walter Mondale from Minnesota stated that “[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities.”<sup>226</sup> Senator Edward Brooke from Massachusetts then exhorted the Senate to act, saying “we can and should make it possible for those who can to move to where the better schools and services, the decent homes and jobs are most plentiful. That is the simple purpose of this bill.”<sup>227</sup> The Senators recognized that housing discrimination perpetuated a broad range of social ills. The FHA offered a tool to reverse these negative trends.

In particular, these senators focused on how fair housing was intended to promote access to a quality education. Senator Mondale noted that “housing discrimination has a serious adverse effect on education in the ghettos,” and then went on to say that “[f]air housing is, therefore, more than merely housing. It is part of an educational bill of rights for all citizens.”<sup>228</sup> Senator Mondale further said that fair housing “is absolutely essential to the realistic achievement of such accepted goals as desegregated schools and equal opportunity.”<sup>229</sup> The drafters saw access to quality education as critical for Black communities and intended the FHA to increase access to education.

A second goal of the FHA was to promote access to employment. Senator Mondale described the plight of Black people trapped in inner cities, saying that in the early 1960s, “one-half to two-thirds of all new factories and stores in all areas of the country except the South were located outside the central cities and metropolitan areas. This trend is expected to continue. Jobs can move to the suburbs, but housing discrimination prevents Negroes from following.”<sup>230</sup> Senator Brooke explained that “if Negroes are able to live where they want, then they will be able to get these jobs.”<sup>231</sup> The authors of the FHA saw access to employment as essential for Black communities and intended the FHA to increase access to good jobs.

A third goal of the FHA was to affirm the value of Black people and undo the psychological harm of being second class citizens. In discussing the problems stemming from discrimination, Senator Mondale said

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<sup>226</sup> 114 Cong. Rec. 2274 (1968) (statement of Sen. Mondale).

<sup>227</sup> 114 Cong. Rec. 2280 (1968) (statement of Sen. Brooke).

<sup>228</sup> 114 Cong. Rec. 2276 (1968) (statement of Sen. Mondale).

<sup>229</sup> *Id.*

<sup>230</sup> 114 Cong. Rec. 3421 (1968) (statement of Sen. Mondale).

<sup>231</sup> 114 Cong. Rec. 2282 (1968) (statement of Sen. Brooke).

[i]n each of our comments, we emphasized many of the material aspects of this problem, whether it is the quality of housing or the quality of education, the availability of decent employment, the environment in terms of water, air, and transportation, law enforcement, playgrounds, and all the other aspects of a desirable community; but *I wonder if perhaps more important than any of those is the psychological insult and the impact of that insult upon the ghetto dweller.*<sup>232</sup>

Senator Mondale later went on to say, “It is impossible to gage the degradation and humiliation suffered by a man in the presence of his wife and children when he is told that despite his university degrees, despite his income level, despite his profession, he is just not good enough to live in a white neighborhood.”<sup>233</sup>

Senator Brooke, himself a Black man, pleaded with his colleagues to address what he described as the “psychological impact” of discrimination.<sup>234</sup> He said, “I can testify from personal experience, having lived in the ghetto, what it does to the inside of a man to live in such shameful conditions, to be in an area which has been marked for second-class citizens, in an area which few are able to escape.”<sup>235</sup> The drafters of the FHA recognized the intangible, psychological harm that stemmed from discrimination and intended that the legislation would stop that harm.

It is clear that the FHA offers remedies for a broad range of harms. In the federal district court case filed in June 2018, the individual homeowner plaintiffs sued Bank of America for both fair housing and private nuisance violations.<sup>236</sup> The complaint detailed the particular harms they experienced by being adjacent to the vacant, foreclosed properties.<sup>237</sup> Water leaked into Ms. Onafuwa’s basement from the side of the foreclosed property.<sup>238</sup> Overgrown grass, accumulated trash, and a dilapidated garage next door led to a rodent infestation.<sup>239</sup> A squatter lived in the unsecured house.<sup>240</sup> Ms. Onafuwa’s damages included damage to her home as well as emotional distress and mental anguish.<sup>241</sup>

Similarly, Ms. Bushnell claimed both monetary and emotional damages. Robbers broke into her house through the wall from the vacant, adjacent rowhouse, resulting in more than \$3,000 in damage and loss.<sup>242</sup> After another attempted break-in

<sup>232</sup> 114 Cong. Rec. 2281 (1968) (statement of Sen. Mondale) (emphasis added).

<sup>233</sup> 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).

<sup>234</sup> 114 Cong. Rec. 2282 (1968) (statement of Sen. Brooke).

<sup>235</sup> 114 Cong. Rec. 2281 (1968) (statement of Sen. Brooke).

<sup>236</sup> Complaint and Demand for Jury Trial, *supra* note 1, at 4–5.

<sup>237</sup> *See generally id.*

<sup>238</sup> *Id.* at 95.

<sup>239</sup> *Id.* at 94–95.

<sup>240</sup> *Id.* at 94.

<sup>241</sup> *Id.* at 111.

<sup>242</sup> *Id.* at 98.

from the adjacent, foreclosed house, Ms. Bushnell purchased a security system and security doors.<sup>243</sup> Squirrels entered her attic from the attic next door and she had to hire a trapping service.<sup>244</sup> She had to expend significant personal resources because Bank of America did not maintain its foreclosed property.

Although the complaint did not allege a specific drop in value for either Ms. Onafuwa's or Ms. Bushnell's property, the complaint did allege that "the presence of deteriorated and/or dangerous REOs in a neighborhood affects the home values of surrounding homeowners."<sup>245</sup> The complaint further alleged that "[p]ersons living in communities adversely affected by [Bank of America's] practices and conduct have seen their property values and enjoyment of their homes diminished."<sup>246</sup> Not only do Ms. Onafuwa and Ms. Bushnell have causes of action against Bank of America for damage incurred as a result of Bank of America's discriminatory maintenance, so, too, do other homeowners in the neighborhood. The complaint filed in 2018 is a good start but does not go far enough to pursue remedies for all the people harmed by Bank of America's discriminatory conduct. Other neighbors in the neighborhood whose property values were adversely affected are also aggrieved persons under the FHA.

Indeed, it seems that the legislators who were the strongest proponents of fair housing legislation did not see the physical infrastructure of housing as the final goal. Rather, they focused on the benefits—often financial and intangible benefits—that come from access to housing. They saw housing as a way to increase income through better jobs, to live up to potential through access to quality education, and to confirm people's innate dignity.

This justification for fair housing is consistent with the claim that neighboring homeowners whose property values declined as a result of banks' discriminatory maintenance practices are aggrieved persons under the FHA. When property values fall, those families have less money available to invest in businesses, to finance higher education or transmit to future generations for down payments and other purposes. Their opportunities are stifled, much like the victims of housing discrimination in the 1960s. The FHA confers standing on both.

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 99.

<sup>245</sup> *Id.* at 109.

<sup>246</sup> *Id.*

#### IV. ADDITIONAL ISSUES FACING NEIGHBORING HOMEOWNERS SEEKING RELIEF UNDER THE FHA

Establishing standing—that they are within the zone of interest—is just the first hurdle that neighboring homeowners must overcome in order to succeed in claims against discriminatory banks. In order to succeed on the merits, they must also establish that the FHA applies to post-acquisition discrimination and that the banks were the proximate cause of their injuries. While the issue of post-acquisition discrimination has been addressed at length by scholars so is of less concern,<sup>247</sup> the standard for proximate cause in these FHA cases is still uncertain.

##### A. *The Halprin Case is Not a Barrier to Neighboring Homeowners*

In *Halprin v. Prairie Single Family Homes of Dearborn Park Association*, the Seventh Circuit broke with prior case law and limited the post-acquisition application of the FHA.<sup>248</sup> Since then, other courts have followed suit.<sup>249</sup> However, *Halprin* was wrongly decided.

The *Halprin* case involved Jewish homeowners in a subdivision with a homeowners' association.<sup>250</sup> The president of that association wrote religious slurs on the Jewish homeowners' property, vandalized their plants and holiday lights, and tore down the flyers the homeowners had placed around the neighborhood requesting help in identifying the culprit.<sup>251</sup> The homeowners' association then protected the association's president by destroying meeting minutes as well as an audio recording in which he threatened the Jewish homeowners.<sup>252</sup>

In their complaint, the homeowners alleged that the president and homeowners' association had violated Sections 3604 and 3617 of the FHA.<sup>253</sup> The Seventh Circuit found that

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<sup>247</sup> See generally Oliveri, *supra* note 176; Schwemm, *supra* note 89; Short, *supra* note 56.

<sup>248</sup> *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004). For a discussion of case law prior to *Halprin*, see Oliveri, *supra* note 176, at 12–16.

<sup>249</sup> For a complete overview of cases, see Oliveri, *supra* note 176, at 33. Specific examples include *Cox v. City of Dallas*, 430 F.3d 734, 744 (5th Cir. 2005); *Reule v. Sherwood Valley I Council of Co-Owners, Inc.*, No. CIV.A. H-05-3197, 2005 WL 2669480, at \*4 (S.D. Tex. Oct. 19, 2005); *Lawrence v. Courtyards at Deerwood Ass'n*, 318 F. Supp. 2d 1133, 1143 (S.D. Fla. 2004); *King v. Metcalf 56 Homes Ass'n*, No. 04-2192-JWL, 2004 WL 2538379, at \*3 (D. Kan. Nov. 8, 2004).

<sup>250</sup> *Halprin*, 388 F.3d at 328.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Second Amended Complaint at 19, *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 2002 WL 32676010 (N.D. Ill. Feb. 7, 2002).

defendants had not violated Section 3604 because although that section could be interpreted to include constructive eviction, in which someone was no longer able to live in their house and the housing was thus made unavailable, the prohibition did not apply to post-acquisition harassment of the sort described in the case.<sup>254</sup> The Seventh Circuit interpreted the FHA's legislative history to mean that Congress was only concerned with the acquisition of housing, not treatment once someone obtained housing. The court said

Behind the Act lay the widespread practice of refusing to sell or rent homes in desirable residential areas to members of minority groups. Since the focus was on their exclusion, the problem of how they were treated when they were included, that is, when they were allowed to own or rent homes in such areas, was not at the forefront of congressional thinking. *That* problem—the problem not of exclusion but of expulsion—would become acute only when the law forced unwanted associations that might provoke efforts at harassment, and so it would tend not to arise until the Act was enacted and enforced. *There is nothing to suggest that Congress was trying to solve that future problem, an endeavor that would have required careful drafting in order to make sure that quarrels between neighbors did not become a routine basis for federal litigation.*<sup>255</sup>

The court then went on to say that while the Section 3604 claim failed, the claim under Section 3617 could go forward because the HUD regulation interpreting it seemed to unlink it from Section 3604.<sup>256</sup> Section 3617 makes it illegal to

coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, *any right granted or protected by [S]ection . . . 3606 of [the FHA].*<sup>257</sup>

Under the related regulation, illegal conduct includes “[t]hreatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the race, color, religion, sex, handicap, familial status, or national origin of such persons, or of visitors or associates of such persons.”<sup>258</sup> The regulation makes no mention of the statutory language related to denying housing or making it unavailable, which would predicate a Section 3617 violation on a Section 3604 violation. The Seventh Circuit opined that the regulation likely exceeded the statutory authority by

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<sup>254</sup> *Halprin*, 388 F.3d at 329.

<sup>255</sup> *Id.* (emphasis added).

<sup>256</sup> *Id.* at 330.

<sup>257</sup> *Id.* at 328 (emphasis added).

<sup>258</sup> 24 C.F.R. § 100.400(c)(2) (2016).

separating Section 3617 from Section 3604, but that the defendants had not properly raised that issue below so they forfeited the right to challenge the regulation on appeal.<sup>259</sup>

For two reasons, this opinion appears to create challenges for neighboring homeowners who want to bring FHA claims against banks that fail to maintain REO properties. First, it would seem that the homeowners cannot allege that their housing is being made unavailable or denied or that there is discrimination in the “terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith” since they already acquired their housing and still inhabit it.<sup>260</sup> Second, the *Halprin* case suggests that the regulation interpreting Section 3617 is unconstitutional. Scholars have demonstrated, however, that this decision is flawed.

First, the statutory language seems to show that Congress contemplated the application of the FHA to post-acquisition claims. The definition of a “dwelling” under the statute includes structures that are “occupied as . . . a residence.”<sup>261</sup> In the context of disability protections, the FHA similarly protects against discrimination based on the disability of “a person residing in” the unit.<sup>262</sup> Congress did not limit the FHA to dwellings intended or desired to be occupied as a residence, but rather drafted the FHA to apply to people already living in the home.<sup>263</sup> Further, when Congress amended the FHA for the final time in 1988, it did not clarify that the FHA applied to only the acquisition of housing, despite courts previously applying the FHA to post-acquisition discrimination.<sup>264</sup> If Congress intended the FHA to apply to only pre-acquisition discrimination, it had an opportunity to revise the statute to make that intent clear. It chose not to do so.

Second, because Title VII employment protections apply to current employees facing harassment, not just job applicants, the FHA should also be interpreted to apply to people currently living in housing, and not just people attempting to acquire that housing.<sup>265</sup> The Supreme Court has previously analogized the FHA to Title VII of the 1964 Civil Rights Act for purposes of determining

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<sup>259</sup> *Halprin*, 388 F.3d at 330.

<sup>260</sup> 42 U.S.C. § 3604(b) (1988).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> Short, *supra* note 56, at 213–17.

<sup>264</sup> Fair Housing Amendments Act of 1988 (Pub. L. 100-430, 102 Stat. 1619); Oliveri, *supra* note 176, at 32.

<sup>265</sup> Oliveri, *supra* note 176, at 24–25; Schwemm, *supra* note 89, at 720–21 (2008); Short, *supra* note 56, at 240.

standing, and other courts have followed suit.<sup>266</sup> Because employment law is well-settled regarding application to current employees, the same certainty should be read into the FHA.<sup>267</sup>

Additional arguments justify the claim that *Halprin* was wrongly decided. Notably, both the Department of Justice and HUD have taken the position that the FHA applies to post-acquisition discrimination and that *Halprin* was incorrectly decided.<sup>268</sup> For purposes of this article, it is sufficient to note that although *Halprin* presents some challenges to neighboring homeowners wishing to sue banks under the FHA, good legal arguments exist to overcome those challenges. Those arguments are well-developed in existing literature.<sup>269</sup> The same is not true for the question of what constitutes “proximate cause” under the FHA.

### *B. Proximate Cause as an Unsettled Area of Fair Housing Law*

When the Supreme Court issued its 2017 decision in *Bank of America Corporation v. City of Miami*, it focused most of its opinion on the issue of standing and whether the City fell within the FHA’s zone of interest.<sup>270</sup> At the end of its decision, it briefly addressed the issue of causation under the FHA.<sup>271</sup> The Eleventh Circuit had determined that the banks’ discriminatory lending had proximately caused the City’s damages—lost tax revenue and increased expenditures on municipal services.<sup>272</sup> The Supreme Court disagreed.

In reaching its decision, the Eleventh Circuit relied on tort law to interpret proximate cause. The Eleventh Circuit noted that the Supreme Court had previously likened a FHA claim for damages to a tort action, subject to general tort rules.<sup>273</sup> It then cited a recent United States Court of Appeals for the Ninth Circuit decision in which the court explained that “[t]he doctrine of proximate cause serves merely to protect defendants from

<sup>266</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972).

<sup>267</sup> For a more detailed analysis of the basis for using Title VII to interpret the FHA for post-acquisition protection, see Schwemm, *supra* note 89, at 758–59 (2008); Short, *supra* note 56, at 240–44.

<sup>268</sup> Schwemm, *supra* note 89, at 729.

<sup>269</sup> See generally Oliveri, *supra* note 176, at 32; Schwemm, *supra* note 89; Short, *supra* note 56.

<sup>270</sup> *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301–05 (2017).

<sup>271</sup> *Id.* at 1305–06.

<sup>272</sup> *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015), *vacated and remanded sub nom.* *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

<sup>273</sup> *Id.* at 1279 (citing *Meyer v. Holley*, 537 U.S. 280, 285 (2003); *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

*unforeseeable* results of their unlawful conduct.”<sup>274</sup> The Eleventh Circuit then found that the City had made an “adequate showing” of foreseeability, based on the data presented.<sup>275</sup>

On review, the Supreme Court reaffirmed its prior analysis that a damages claim under the FHA was like a tort action.<sup>276</sup> However, it found that “foreseeability” did not indicate a close enough connection to meet the proximate cause standard.<sup>277</sup> It explained that “[t]he housing market is interconnected with economic and social life.”<sup>278</sup> An allegedly discriminatory act could have far-reaching ripple effects and “[n]othing in the [FHA] suggests that Congress intended to provide a remedy wherever those ripples travel.”<sup>279</sup> Because the Eleventh Circuit had used the wrong test, the Supreme Court did not determine whether the City had satisfied the proximate cause requirement. Further, the Court concluded its opinion without determining what proximate cause required in this context, leaving that issue for the lower courts. The Supreme Court did hold, however, that there had to be “some direct relation between the injury asserted and the injurious conduct alleged.”<sup>280</sup>

On remand, the City filed amended complaints against Bank of America and Wells Fargo, but the district court denied leave to amend and dismissed the case, again finding that the City could not adequately establish proximate cause.<sup>281</sup> On review for a second time (“*Miami II*”), the Eleventh Circuit held that the district court had erred in dismissing the cases, finding that the City had plausibly alleged that the banks’ discriminatory lending and maintenance practices led to a reduction in tax revenue despite failing to show a direct relation between the banks’ actions and the municipal expenditures for public services.<sup>282</sup> The Eleventh Circuit made clear that it was not finding that the City had *actually* established proximate cause; rather, it had pled it sufficiently regarding the tax revenue claim to *survive a motion to dismiss*, and that the City should be allowed to proceed with its complaints accordingly.<sup>283</sup> It is too early to know how the district court or appellate courts will interpret the evidence once the case goes to trial.

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<sup>274</sup> *Id.* at 1282 (citing *Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) (quotations omitted) (emphasis added)).

<sup>275</sup> *Id.*

<sup>276</sup> *City of Miami*, 137 S. Ct. at 1305.

<sup>277</sup> *Id.* at 1306.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (citing *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 268 (1992)).

<sup>281</sup> *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260 (11th Cir. 2019).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

Although the Eleventh Circuit's decision in *Miami II* deals with a less strict standard,<sup>284</sup> its analysis offers one approach to determining proximate cause. Two parts of the court's analysis are particularly relevant to neighboring homeowners' ability to establish proximate cause. First, the Eleventh Circuit found that the City showed "some direct relation" between the banks' alleged misconduct and the City's loss in tax revenue through decreased home values.<sup>285</sup> The amended complaints referenced regression analysis showing the relationship between the banks' lending practices, foreclosure rates and processes in communities of color, and changes in property value.<sup>286</sup> The court found that the City "plausibly alleged a calculable harm and has made more than a formulaic recitation of how the causation requirement will be met," stating further that it would be up to experts at trial to determine whether the regression analysis actually proved what the City claimed.<sup>287</sup> Thus, it is clear that the Eleventh Circuit at least considers statistical analysis of aggregate data potentially sufficient to prove a causal relationship between banks' discriminatory conduct and financial loss due to decreased property values. While individual homeowners would likely lack the training and data to perform statistical analysis themselves, they could join lawsuits brought by fair housing programs and cities who have the resources and expertise to do that analysis.

Although the *Miami II* holding deals with cities' ability to sue banks for predatory lending and discriminatory maintenance, dicta in the decision highlights a challenge facing neighboring homeowners also wishing to sue under the FHA. The court clearly contemplates neighboring homeowners suing for decreased

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<sup>284</sup> The court said, "For this case to proceed past a motion to dismiss, we need not find that the Banks' actions in fact proximately caused the plaintiff's injuries; we must find that the City plausibly alleged that they did so." *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> The complaint explained the regression analysis as follows:

Routinely maintained property tax and other data allow for the precise calculation of the property tax revenues lost by the City as a direct result of particular [bank] foreclosures. Using a well-established statistical regression technique that focuses on effects on neighboring properties, the City can isolate the lost property value attributable to [the Banks'] foreclosures and vacancies from losses attributable to other causes, such as neighborhood conditions. This technique, known as Hedonic regression, when applied to housing markets, isolates the factors that contribute to the value of a property by studying thousands of housing transactions. Those factors include the size of a home, the number of bedrooms and bathrooms, whether the neighborhood is safe, whether neighboring properties are well-maintained, and more. Hedonic analysis determines the contribution of each of these house and neighborhood characteristics to the value of a home.

*Id.*

<sup>287</sup> *Id.*

property value, but expressed concern about using regression analysis to document individual household harm instead of aggregate, neighborhood or city-wide harm.<sup>288</sup> The court did not say neighboring homeowners *could not* prove loss of their individual property value due to banks' actions; rather, the court said they would have "*substantially more difficulty* plausibly alleging that they could calculate damages attributable to the Banks' actions with a reasonable degree of certainty."<sup>289</sup> Thus, while neighboring homeowners could pursue litigation against banks engaging in predatory lending and discriminatory maintenance, they would have to develop a rigorous method for showing how the banks' actions led to their particular property's decline in value. While likely not feasible on their own, neighboring homeowners could partner with fair housing programs and their statistical experts to develop such strategies.

At this point, only one appellate court has had the opportunity to consider what constitutes proximate cause under the FHA, and that was only at the motion to dismiss stage, and only a few district courts have issued opinions involving the proximate cause standard.<sup>290</sup> The standard is still unclear. In the absence of more specific Supreme Court guidance or decisions from multiple circuit courts, scholars and advocates are left to propose different approaches to proximate cause and then wait for appellate review.

A recent article proposes adopting a tort law "scope of liability" approach to proximate cause liability under the FHA.<sup>291</sup> The authors note that the Supreme Court has historically taken an "expansive view" of what constitutes sufficient causation and found that the FHA protects people suffering from the

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<sup>288</sup> The court stated that "[c]onceivably the banks could face suits by many homeowners who were discriminated against, or who lost property value because their neighbors' houses were foreclosed on." *Id.* However, it went on to say that "the regression analysis that can isolate the impact of redlining on the neighborhood scale could not solve this problem on the individual level because of the diversity of individual circumstances." *Id.*

<sup>289</sup> *Id.* (emphasis added).

<sup>290</sup> Nat'l Fair Hous. All. v. Deutsche Bank, No. 18 C 0839, 2018 WL 6045216 (N.D. Ill. Nov. 19, 2018) (granting motion to dismiss without prejudice and ordering plaintiffs to file amended complaint showing a statistical disparity in REO maintenance); County of Cook v. HSBC N. Am. Holdings Inc., 314 F. Supp. 3d 950, 954 (N.D. Ill. 2018) (granting motion to dismiss county's claims that the bank's actions increased costs for social services and demolishing homes and led to decreased tax revenue and other revenue due to abandoned, foreclosed, and vacant properties because proximate cause was not sufficiently pled in this particular complaint); City of Philadelphia v. Wells Fargo & Co., No. CV 17-2203, 2018 WL 424451, at \*6 (E.D. Pa. Jan. 16, 2018) (denying motion to dismiss because city "plausibly [pled] proximate cause for its non-economic injuries" related to its interest in integration and promoting fair housing).

<sup>291</sup> See generally Steil & Traficonte, *supra* note 8.

“continuing effect” of discriminatory conduct.<sup>292</sup> The authors then suggest a “scope of liability” standard in which the test for proximate cause is “whether the harm for which damages are sought was a result of one of the risks that made the defendant’s conduct a violation of the [FHA].”<sup>293</sup>

Under this approach, a plaintiff must establish that the harm experienced was “a realization of some risk that falls within the duty that the [FHA] imposes on the defendant.”<sup>294</sup> The authors then argue that the economic and non-economic harms cities have experienced due to banks’ discriminatory maintenance of REOs fall within the scope of liability approach to proximate cause.<sup>295</sup> The cities should thus be able to recover under the FHA.

Courts might adopt the Eleventh Circuit’s approach, or the scholars’ approach, or something entirely different. One fair housing scholar noted the trend in federal courts narrowing coverage of civil rights antidiscrimination laws.<sup>296</sup> How this will play out in the context of the FHA is yet to be determined, especially since the composition of the Supreme Court will likely change in the next few years before these decisions make their way through the system.

Regardless of the approach courts adopt, a neighboring homeowner attempting to sue a bank for discriminatory maintenance of REOs in their neighborhood would have to show a clear connection between the bank’s discriminatory acts and the particular homeowner’s reduction in property value. The mechanics of that analysis are beyond the scope of this article or this author’s expertise. However, the growing collaboration between fair housing advocates and social scientists and the increased reliance on data to understand fair housing trends suggests that such analysis is possible. Further, for neighboring homeowners like Wanda Onafuwa and Chevelle Bushnell—who suffered out-of-pocket expenses directly related to the conditions of the units next door—the proximate cause is clear. These women, at a minimum, would be able to recover from the bank for its discriminatory conduct.

## CONCLUSION

In the introduction to the 1968 Kerner Report, commissioned by President Lyndon B. Johnson in response to

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<sup>292</sup> *Id.* at 1264.

<sup>293</sup> *Id.* at 1266.

<sup>294</sup> *Id.* at 1271.

<sup>295</sup> *Id.* at 1282.

<sup>296</sup> Schwemm, *supra* note 89, at 720.

the racial unrest of the mid-1960s, the Kerner Commission wrote that “What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.”<sup>297</sup> What was true of central cities in the 1960s continues to be true for neighborhoods of color today. The financial institutions that previously denied access to capital unleashed predatory mortgages on communities of color and now engage in destructive, discriminatory maintenance of foreclosed properties in Black and Latinx neighborhoods.

The drafters of the FHA saw access to housing as a way to promote access to opportunity and enacted the FHA to combat a broad range of social problems. Access to housing should be understood to include protection of the home’s value and neighborhood quality of life. When banks engage in discriminatory maintenance of foreclosed properties in neighborhoods of color, neighboring homeowners face limited opportunity as a result of decreased home values and degraded physical environment. It follows, then, that discriminatory actions that decrease residential property values and deteriorate the community violate the FHA. Because the Supreme Court interprets the FHA broadly and the legislative history shows that Congress was concerned with a broad range of harms being experienced by people of color when it passed the FHA, neighboring homeowners have standing to sue banks for unequal maintenance of foreclosed properties in neighborhoods of color.

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<sup>297</sup> KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968). The purpose of the Commission was to study the causes of violence and racial unrest and propose public policy solutions to prevent future violence. MASSEY & DENTON, *supra* note 42, at 3–4. The report identified residential segregation as one of the leading causes of racial inequality. *Id.* at 4.