UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE DIVISION

MAYOR AND CITY COUNCIL OF BALTIMORE, Plaintiff,	)	
v.	)	No. 1:08-cv-00062-BEL
WELLS FARGO BANK, N.A. and WELLS FARGO FINANCIAL LEASING, INC., Defendants.	)	

PLAINTIFF MAYOR AND CITY COUNCIL OF BALTIMORE'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The motion to dismiss filed by Defendants Wells Fargo Bank, N.A. and Wells Fargo Financial Leasing, Inc. (collectively "Wells Fargo") is a deliberate effort to divert the Court's attention from Defendants' own wrongdoing and portray Plaintiff Mayor and City Council of Baltimore ("Baltimore" or "City") as somehow responsible for its own injuries. This attack is based on extrajudicial "facts" about the sale of tax liens that are outside the complaint and that may not be judicially noticed under Fed. R. Evid. 201. The standard of review on a motion to dismiss does not permit their consideration, and the attack should be rejected on that basis alone.

Even if the Court could consider Defendants' purported "facts," which it cannot, they are fundamentally wrong and misleading. Defendants would have the Court believe that Baltimore has intentionally "unleashed" on its residents a program of tax lien sales that causes thousands of foreclosures for nothing more than small unpaid water bills and the like. Most astonishingly, Defendants fail to inform the Court that tax lien sales are a creature of and required by state law. *See* Md. Code Ann., Tax-Prop. §§ 14-801 to 14-854. Maryland law mandates that Baltimore conduct these sales and include within them any "tax," as defined by state law, that is at least $250, and prescribes nearly the whole of the process and fees associated with it. *See id.* § 14-811. The reckless and misleading assertion that Baltimore bears responsibility for this program is palpably false.

Defendants' contention that 19,000 homeowners have lost their homes to tax lien foreclosures since 2000 is also a fabrication. Even Defendants' own extrajudicial sources show that this figure reflects everyone who enters the process, not people actually foreclosed on due to tax liens. The vast majority resolve their debts and do not lose their homes. Defendants also fail to subtract foreclosures accomplished through Project 5000, a City initiative that uses tax lien foreclosures to obtain title to, and

then rehabilitate, thousands of already vacant and abandoned properties. People are not put out of their homes through Project 5000. To the contrary, the program returns vacant homes to productive use.

Wells Fargo may seek to pursue the irrelevant subject of tax liens in discovery, but the only issue at this stage is the legal sufficiency of the facts as plead in the complaint, which the Court must accept as true. Recognizing that they cannot prevail under this standard, Defendants not only seek to bring in outside and erroneous "facts," but also ignore and misstate the complaint's plain allegations.

Baltimore does not allege, as Defendants contend, that Wells Fargo is somehow solely responsible for the City's troubles, or to use Defendants' hyperbole, a "scapegoat for broad social problems." *See* Mem. Law. Supp. Defs.' Mot. Dismiss Compl. ("Defs.' Br.") at 1. Rather, Baltimore alleges that Wells Fargo is purposefully and intentionally engaged in "reverse redlining" in Baltimore. *See* Compl. ¶¶ 4-5, 46, 64, 66, 74. That is, Wells Fargo targets a variety of predatory lending practices at the City's African Americans and residents of its African-American neighborhoods to make a quick profit because it believes it can successfully exploit those communities. *See, e.g.*, *id.* ¶¶ 25, 27, 29-30, 46. These practices include:

- charging higher interest rates;
- underwriting "2/28" and "3/27" adjustable rate mortgages without regard to whether the borrower can repay the loan after the initial "teaser" rate expires;
- stripping borrowers' equity through unnecessary refinancings;
- allowing mortgage brokers to charge "yield spread premiums" for inflating interest rates;
- requiring substantial prepayment penalties that prevent borrowers from obtaining beneficial refinance loans; and
- charging excessive points and fees that do not correspond to benefits for the borrower.

See id. ¶¶ 26, 45, 47-48. Every court to consider the issue has held that targeting such practices at a

minority community violates the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. ("FHA"). *See, e.g.*, *Barkley v. Olympia Mortgage Co.*, Nos. 04-CV-875 *et al.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000).

The direct consequence of Wells Fargo's discrimination is an unnecessarily high foreclosure rate in Baltimore's African-American neighborhoods. *See, e.g.*, Compl. ¶¶ 46, 64. The unnecessary foreclosures attributable to Wells Fargo's loans and lending practices have caused the City tens of millions of dollars in direct and empirically quantifiable harm. *See id.* ¶¶ 67-70. They reduce property tax revenues because Wells Fargo's foreclosures lower the value of surrounding homes; reduce real estate transfer tax revenues by depressing the real estate market; increase spending on police and fire protection because Defendants' foreclosures lead to vacant and abandoned homes which can become centers of unlawful activity; increase spending to secure foreclosed homes that are abandoned; increase spending to rehabilitate vacant, deteriorating homes; increase spending to handle the administrative and legal processing of Defendants' foreclosures; and increase spending to assist City residents who have lost or are in danger of losing their homes to foreclosures. *See id.* ¶¶ 1, 18-20, 66. Defendants minimize harm to themselves by selling loans on the secondary market. *See id.* ¶¶ 25, 27, 46.

Baltimore seeks to hold Wells Fargo accountable for these and other injuries resulting from its illegal acts, not the acts of any other financial institution. The damages that Wells Fargo is ultimately liable for at the conclusion of this case will be commensurate with the number of loans it has made and the harm resulting from its own illegal practices.

Faced with these allegations, Defendants press five arguments in support of their motion. The first two concern standing. Defendants claim that Baltimore does not allege an injury-in-fact or an injury that is traceable to Wells Fargo's violation of the FHA. *See* Defs.' Br. at 13-15 (injury-in-fact);

id. at 16-23 (traceability). The next two concern the disparate impact on African Americans of Wells Fargo's predatory practices. Ignoring controlling Fourth Circuit precedent, Wells Fargo contends that disparate impact claims are not cognizable under the FHA and that, even if they are, Baltimore has not properly stated a disparate impact claim.[1] *See id.* at 23-29 (cognizability); *id.* at 30-40 (not properly stated). Finally, and solely in a footnote, Defendants argue that Baltimore has not properly stated an intentional discrimination claim. *See id.* at 31 n.11. Each of these arguments is wholly without merit.

With respect to injury-in-fact, Baltimore alleges a straightforward financial injury in the tens of millions of dollars. It further alleges that this injury can be quantified. These allegations of injury are much more specific and concrete than those found adequate in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) ("*Gladstone*"). In *Gladstone*, the Supreme Court held that where racial "steering" by realtors might diminish a town's property tax revenues, and the possible diminution was not even alleged but could only be inferred from the complaint, the town faced injury sufficient to confer standing. *See id.* at 109-11. Here, the actual loss of property tax revenues and other financial harms are alleged explicitly in the complaint, leaving no doubt that the injury-in-fact requirement is met.

With respect to traceability, *Gladstone* is again dispositive. The Supreme Court found the town's loss of revenue adequately traceable to the challenged steering practices because steering might eventually cause white residents to leave the town, which might in turn lower demand for housing, which would lower property values and therefore lower property tax revenues. *See id.* Thus, the mere potential that a critical mass of non-parties would in the future respond to the challenged steering in such a way as to produce the injury satisfied the traceability requirement. Here, Baltimore alleges that Wells

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[1] "A claim of disparate impact, unlike a claim of disparate treatment, does not require a finding of intentional discrimination. Indeed, 'the necessary premise of the disparate impact approach is that some [housing] practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.'" *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) (emphasis added) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988)) (alteration in original).

Fargo's FHA violations have actually caused foreclosures, and that those particular foreclosures have actually caused harm to the City. These allegations are plausible and buttressed by scientific studies discussed in the complaint. They are sufficient under *Gladstone*.

Defendants nevertheless argue that traceability is defeated because third parties play some role in the causal chain here. As shown by *Gladstone*, as well as numerous other Supreme Court and Fourth Circuit opinions, this misrepresents the law. As long as it is likely that Wells Fargo's discriminatory acts contribute to Baltimore's injury, the role of third parties is irrelevant to standing. Moreover, Wells Fargo does not gain immunity under the FHA because other lenders may have engaged in similar practices. Defendants also err by seeking judicial notice of the role of third parties, a matter that is outside the complaint and that must be left for discovery and expert reports.

Defendants also object to traceability based on their misleading presentation about tax lien sales, which they claim shows that Baltimore's injury is self-inflicted. This objection is factually wrong, as explained above, and legally flawed. An injury is only self-inflicted such that traceability is defeated if the injury is completely caused by the plaintiff's personal choices. *See McConnell v. FEC*, 124 S. Ct. 619, 709 (2003); 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3521.5 (2008). Baltimore participates in the tax lien sales because Maryland requires it to, not because of its choice. Moreover, Wells Fargo's speculation that foreclosures on its discriminatory loans are caused by tax lien sales ignores the allegations of the complaint, which must be taken as true. Those allegations directly link unnecessary and avoidable foreclosures to Wells Fargo's bad loans and lending practices. Wells Fargo's assertions about tax liens, as well as those about third parties, are really about the amount of damages, not traceability. This is a subject for discovery, not a motion to dismiss.

With respect to Baltimore's disparate impact claim, Wells Fargo asks the Court to exceed its

authority by overturning Fourth Circuit precedent. Like the ten other Circuit Courts to address the issue, the Fourth Circuit has held that disparate impact claims may be brought under the FHA. *See, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). These decisions have been reaffirmed and applied consistently for over thirty years and are well grounded on the Act's legislative history, purpose, text, administrative construction, and more. Defendants assert that all of these decisions were overturned *sub silentio* by *Smith v. City of Jackson*, 544 U.S. 228 (2005), a case holding that the Age Discrimination in Employment Act ("ADEA") also permits disparate impact claims. Defendants claim that *City of Jackson* somehow announced a new rule about disparate impact based on a narrow, formalistic search for specific words in its text to the exclusion of all else. Contrary to this claim, *City of Jackson* did no such thing. The Supreme Court relied instead on the same kinds of considerations that the Fourth Circuit and the other Circuits have relied on in holding that disparate impact claims are actionable under the FHA, and *City of Jackson* makes clear that they have done so correctly. Every case decided after *City of Jackson* confirms this conclusion.

Baltimore also properly states a claim for disparate impact. It alleges, *inter alia*, that 8.2% of Wells Fargo's loans in neighborhoods that are 60% or more African-American result in foreclosure, but that the same is true for only 2.1% of its loans in neighborhoods that are 60% or more white, s*ee* Compl. ¶ 39; that Wells Fargo's high-cost loans are located disproportionately in African-American neighborhoods, *see id.* ¶¶ 47-49; and that properties for which Wells Fargo automatically increases or decreases the interest rate are located disproportionately in African-American and white neighborhoods, respectively, *see id.* ¶¶ 50-51. Baltimore further alleges that these disparities are due to various predatory practices that are set forth in the complaint. *See id.* ¶¶ 4-5, 45-46. Defendants baldy assert that these allegations are not true, but such assertions are not properly considered here. Furthermore,

Defendants rely on cases concerning the sufficiency of proof at summary judgment and after trial, which are plainly inapplicable.

Finally, Baltimore plainly and properly bases this suit on intentional discrimination as well as disparate impact, and Wells Fargo's contrary assertion is patently wrong. Baltimore alleges that Defendants purposefully and intentionally engage in reverse redlining by targeting African Americans and residents of African-American neighborhoods with predatory practices, and no more is needed to state an intentional discrimination claim under the FHA.

For all of these reasons, and as set forth in greater detail below, Baltimore respectfully submits that the motion to dismiss should be denied in its entirety.

STANDARD OF REVIEW

I. RULE 12(b)(1)

Defendants' standing arguments challenge the facial sufficiency of the complaint under Fed. R. Civ. P. 12(b)(1).[2] Accordingly, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *see Warth v. Seldin*, 422 U.S. 490,

[2] Though Defendants appear confused over whether their standing challenge is facial or factual, *see* Defs.' Br. at 10-12, it is clearly facial because they do not challenge the truth of any particular factual allegation. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) (facial challenge "contend[s] that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based," while factual challenge "contend[s] that the jurisdictional allegations of the complaint were not true"). The distinction is discussed in detail in *Valentin v. Hospital Bella Vista*, 254 F.3d 358, 362-64 (1st Cir. 2001), a factual challenge addressing the truth of plaintiff's allegation that she was a Florida resident in support of her invocation of diversity jurisdiction. The stricter standard of review applicable to factual challenges – set forth in *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (considering "factual basis"), and *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (relying on *Richmond*) – does not apply here. Even if Defendants' standing argument could be construed as a factual challenge, it would be a challenge to the truth of "jurisdictional facts [that] are intertwined with the facts central to the merits of the dispute" and therefore "appropriately resolved only by a proceeding on the merits." *Adams*, 697 F.2d at 1219; *see United States v. North Carolina*, 180 F.3d 574, 580 (4th Cir. 1999) ("When a factual attack on subject matter jurisdiction involves the merits of a dispute, the proper course of action for the district court is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.") (citations, brackets, ellipsis, and quotation marks omitted).

502 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.") (citation omitted).

II. RULE 12(b)(6)

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all of the factual allegations contained in the complaint." *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. 2007) (citation and quotation marks omitted). The court must also "construe the factual allegations of the complaint in the light most favorable to the plaintiff," *Schweikert v. Bank of America, N.A.*, 521 F.3d 285, 2008 WL 853005, at *2 (4th Cir. 2008) (same), and must "presume that general allegations embrace those specific facts that are necessary to support the claim," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation, brackets, and quotation marks omitted). A Rule 12(b)(6) motion should not ordinarily be granted without first affording the plaintiff an opportunity to amend the complaint. *See, e.g.*, *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999).

Defendants suggest that plaintiffs' burden under Rule 12(b)(6) was made much heavier by *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). *Twombly* stands for nothing of the sort.[3] At most, *Twombly* merely emphasizes that a plaintiff must "allege 'enough facts to state a claim to relief that is *plausible* on its face.'" *Giarratano v. Johnson*, 521 F.3d 298, 2008 WL 771503, at *2 (4th Cir. 2008) (quoting *Twombly*, emphasis supplied by Fourth Circuit). The *Twombly* Court was clear that this is not intended to be an onerous or even a heightened requirement, explaining that it "comports with [the] Court's statements in the years since [1957]." *Twombly*, 127 S. Ct. at 1965, 1969 n.3.

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[3] Indeed, *Twombly* may not even apply here at all. As the Second Circuit explained, its "full force," or perhaps the decision as a whole, may be "limited to the antitrust context." *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007). The Fourth Circuit has not addressed that question. *See Anderson*, 508 F.3d at 188 n.7.

THE FACTS UPON WHICH THE MOTION TO DISMISS MUST BE DECIDED

I. THE ALLEGATIONS OF THE COMPLAINT

Baltimore is facing a severe and unprecedented crisis of residential mortgage foreclosures that is rapidly growing even worse. *See* Compl. ¶¶ 1, 17. Foreclosures are not evenly distributed, though. The City's African-American neighborhoods and homeowners are being hit the hardest, with foreclosure rates significantly higher in minority neighborhoods than in white neighborhoods. *See id.* ¶ 2, 28, 34.

Wells Fargo is a major contributor to the foreclosure crisis in the City's African-American neighborhoods because it deliberately targets these neighborhoods for predatory lending practices that it does not direct at white neighborhoods. *See id.* ¶¶ 3-5, 35-40. Wells Fargo intentionally exploits the City's African-American community for a quick profit by making loans that are not sound, and then selling those loans on the secondary market to avoid the risk to itself of default and foreclosure. *See, e.g.*, *id.* ¶¶ 25, 27, 29-30, 45-46. Wells Fargo's racially targeted, predatory practices include: charging borrowers in African-American neighborhoods higher interest rates than borrowers in white neighborhoods, *see id.* ¶¶ 47-54; failing to adequately consider the ability of African-American borrowers and borrowers in African-American neighborhoods to repay their loans, *see id.* ¶¶ 26(a), 55-57; placing higher interest rate caps on adjustable rate mortgages in African-American neighborhoods than in white neighborhoods, *see id.* ¶¶ 58-60; increasing the interest rate on loans below $75,000, which are located disproportionately in African-American neighborhoods, while decreasing the interest rate on loans above $150,000, which are located disproportionately in white neighborhoods, *see id.* ¶¶ 50-52; targeting African Americans for unnecessary refinance loans that strip borrowers' equity, *see id.* ¶ 26(b); and engaging in many other predatory subprime lending practices when making loans to African Americans and in African-American neighborhoods, *see id.* ¶¶ 26, 41-45; *see also id.* ¶ 41

(independent study found that Wells Fargo engages in predatory lending practices). Wells Fargo engages in these discriminatory practices intentionally and willfully. *See, e.g.*, *id.* ¶ 74. The loans Wells Fargo makes to African Americans and in African-American neighborhoods based on these practices should not be made or should only be made under different terms and conditions. *See, e.g.*, *id.* ¶ 44. Baltimore alleges that these practices constitute reverse redlining and violate the federal Fair Housing Act. *See, e.g. id.* ¶¶ 25, 27, 46, 76.

Substantial evidence shows that Wells Fargo is engaged in reverse redlining in the City: data reported by Wells Fargo pursuant to the Home Mortgage Disclosure Act shows that its high-cost loans are disproportionately located in Baltimore's African-American neighborhoods, *see id.* at ¶¶ 47-49; Wells Fargo pricing sheets show that interest rate increases are targeted at homes in African-American neighborhoods and decreases are targeted at homes in white neighborhoods, *see id.* at ¶¶ 50-52; expert analysis of Wells Fargo's loans in Philadelphia shows that, after controlling for credit factors, African Americans pay more for their loans than similarly situated whites, *see id.* at ¶¶ 53-54; data shows that Wells Fargo frequently originates "2/28" and "3/27" adjustable rate mortgages in African-American neighborhoods, which are particularly susceptible to abuse and account for 30% of Wells Fargo's foreclosures, *see id.* at ¶¶ 55-57; data shows that Wells Fargo incorporates higher caps on adjustable rate loans made in African-American neighborhoods than in white neighborhoods, *see id.* at ¶¶ 58-60; and data shows that Wells Fargo's loans in African-American neighborhoods that go to foreclosure do so much more quickly than its loans in white neighborhoods, *see id.* at ¶¶ 61-63.

As a direct result of its discriminatory practices, Wells Fargo has had more loans result in foreclosure in recent years than any other lender in Baltimore and the foreclosures are concentrated in African-American neighborhoods. *See id.* ¶¶ 3, 10, 36-38. These neighborhoods include Belair Edison,

East Baltimore, Pimlico/Arlington/Hilltop, Southern Park Heights, Greater Rosemont, Sandtown-Winchester/Harlem Park, Greater Govans, and Waverly, all of which are 75% or more African-American. *See id.* ¶ 36. In fact, a Wells Fargo loan in a predominantly (60% or more) African-American neighborhood is nearly four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood. *See id.* ¶ 39. This is a direct result of the unlawful, discriminatory practices described above, not other factors such as credit scores or income. *See id.* ¶ 44-45.

The resulting disproportionately high number of foreclosures on Wells Fargo's loans to African Americans and in Baltimore's majority African-American neighborhoods has cost the City tens of millions of dollars. *See id.* ¶¶ 5-6, 64-70, 73. The unnecessary foreclosures on Wells Fargo loans "cause[] direct and continuing financial harm to the City" in several ways, including:

- Foreclosures on Wells Fargo loans cause the value of nearby homes to decline significantly, which reduces the City's revenue from property taxes. These declines are especially steep because foreclosures in Baltimore are concentrated in distressed and transitional neighborhoods and often lead to abandoned and vacant homes.

- The City loses revenues from real estate transfer taxes because foreclosures on Wells Fargo loans depress the market for home sales.

- The City has to spend extra funds for police and fire protection in anticipation of a rise in criminal and gang activity because abandoned and vacant homes can become centers for squatting, drug use, drug distribution, prostitution, and other unlawful activities.

- The City has to spend extra funds for police and fire protection to respond to each additional instance of unlawful activity.

- The City has to spend extra funds to secure the rising number of abandoned and vacant homes.

- The City has to spend extra funds to acquire and rehabilitate vacant, deteriorating properties.

- The City has to spend extra funds for the administrative and legal processing of foreclosures on Wells Fargo loans, and

- The City has to spend extra funds to provide increased social services and financial assistance to recipients of Wells Fargo loans who are facing or who have lost their homes to foreclosure.

See id. ¶¶ 1, 5, 18-20, 66. Several recent studies demonstrate that the City's damages caused by Wells Fargo's foreclosures can be quantified using empirical data. *See id.* ¶¶ 67-69; Decl. of G. Schlactus ("Decl.") at Exs. 1-3 (studies discussed in complaint).[4]

Baltimore filed this lawsuit to recover the damages attributable to Wells Fargo's discriminatory loans and to enjoin Wells Fargo from continuing to engage in reverse redlining. *See, e.g.*, Compl. ¶¶ 6, 71. Baltimore asserts that Wells Fargo's practices violate the Fair Housing Act, 42 U.S.C. §§ 3604-3605. *See id.* ¶¶ 6, 75-76.

II. DEFENDANTS' ASSERTIONS ABOUT TAX LIENS ARE IRRELEVANT AND MISLEADING

As shown above, the Court in reviewing a motion to dismiss must consider only the allegations of the complaint, accepted as true, and may not look to assertions of fact beyond those allegations. Defendants nonetheless try to direct the Court away from the complaint by relying heavily on what is essentially a counterstatement of facts concerning matters outside the scope of the complaint. By showing that these assertions are false, Baltimore does not suggest that it is in any way appropriate to consider Defendants' assertions of fact; rather, the City seeks only to demonstrate that discovery will prove these assertions are thoroughly misleading and wrong.

Defendants place particular emphasis on tax lien sales, and portray them as an out-of-control process that Baltimore itself has intentionally "unleashed" on its residents with the aim of collecting small delinquencies regardless of how many people lose their homes. *See* Defs.' Br. at 1-2, 4-8, 20-23.

[4] The studies, referenced and relied on in the complaint, are properly considered part of the complaint for purposes of a motion to dismiss. *See, e.g.*, *Schultz v. Braga*, 290 F. Supp. 2d 637, 651 n.8 (D. Md. 2003). Their consideration does not convert a motion to dismiss to a motion for summary judgment. *See, e.g.*, *id.*

They assert that this has resulted in many thousands of foreclosures, "dwarf[ing] any injury the City believes was caused by Wells Fargo," *id.* at 22, and that Baltimore has nonetheless "made a calculated decision to continue the [tax lien sale] process," *id.* at 6. Defendants rely on ten exhibits, most of which are newspaper articles, for these assertions, which have no basis in the complaint.

Legitimate sources that the Court may properly look to on a motion to dismiss, such as the Maryland Code, demonstrate that Wells Fargo's assertions about tax liens are baseless. In an astounding omission, Defendants fail to tell the Court that tax lien sales are a creature of and required by state law. *See* Md. Code Ann., Tax-Prop. §§ 14-801 to 14-854. Maryland mandates that its counties and the City of Baltimore "shall sell . . . all property . . . on which the tax is in arrears." *Id.* § 14-808. A "tax" is defined by state law as "any tax, or charge of any kind due to the State or any of its political subdivisions, or to any other taxing agency, that by law is a lien against the real property on which it is imposed or assessed . . . . includ[ing] interest, penalties, and service charges," *id.* § 14-401(c), and state law further specifies that "[a]ll unpaid taxes on real property shall be, until paid, liens on the real property . . . ," *id.* § 14-404(a). Baltimore is not permitted to withhold properties from a tax lien sale unless the delinquencies total less than $250. *See id.* § 14-811. Local governments have not been allowed to adopt contrary tax lien sale provisions since 1943. *See id.* § 14-851.

State law controls almost every significant aspect of the tax lien sale process. *See id.* §§ 14-801 to 14-854. This process generally includes notice by mail to the property owner of the tax delinquency, *see id.* § 14-812; multiple public notices no less than 30 days later, *see id.* § 14-813; public auction no less than 4 weeks later, *see id.* §§ 14-813(a)(3), 14-817; a six-month period following sale during which the property may be redeemed (*i.e.*, a sale may be undone), *see id.* §§ 14-827, 14-828, 14-833(a); and then an eighteen-month period during which the property may still be redeemed unless the buyer first

successfully forecloses that right through suit, *see id.* §§ 14-827, 14-833. The tax sale purchase is void if no foreclosure suit is filed by the end of this eighteen-month period. *See id.* § 14-833(c). The payments that an owner must make to redeem a property are also fixed by state law. *See id.* §§ 14-828, 14-843. Judge Evelyn O. Cannon, in *In re Attorney's Fees in Tax Sales Foreclosures*, No. 24-C-03-3443 (Cir. Ct. Balt. City Dec. 11, 2007) ("J. Cannon Op."), describes Maryland's tax lien sale process and its history in much greater detail than space permits here. *See* App. Cases Not Generally Reported.

Judge Cannon's opinion also includes a tabulation of suits filed to foreclose the right of redemption. *See id.* at 23 n.26 & App. F. These figures demonstrate that the figures in Defendants' brief are misleading and inaccurate in key respects. Most fundamentally, Defendants would have the Court believe that there is no difference between the number of suits filed and the number of actual foreclosures; twice they assert that there have been 19,000 filings since 2000, and three times they assert that there have been 19,000 actual tax lien foreclosures. *See* Defs.' Br. at 1, 14, 18, 22, 40. Judge Cannon's opinion, however, demonstrates that the vast majority of tax lien foreclosure suits filed do not result in foreclosure. It shows that from January 1, 2003 through September 26, 2007, there were 17,953 filings but only 2,325 judgments foreclosing. *See* J. Cannon Op. at App. F. Moreover, Judge Cannon's data does not account for thousands of properties that are listed in the newspaper but held out of the tax sale because the delinquency is paid in the interim or because the property is redeemed before suit is filed (the exact number must be left to discovery). While Judge Cannon's precise numbers may not be subject to judicial notice and Judge Cannon herself viewed them as incomplete, *see id.* at 23 n.26, the Court may and should take note of the fact that there is significant data from which one could reasonably conclude that relatively few Baltimore properties listed in the newspaper for the tax lien sale actually wind up foreclosed on. Discovery will so demonstrate.

Judge Cannon's opinion also demonstrates that many of the actual foreclosures are part of Baltimore's "Project 5000" program. *See id.* at 9 n.14. As indicated by a public memorandum from the Commissioner of the City's Department of Housing and Community Development, discovery will show that Project 5000 is a program whereby the City uses tax foreclosures to obtain title to thousands of vacant and abandoned properties. *See* Decl. at Ex. 4. Project 5000 allows the City to turn dilapidated and empty homes back into homes that people live in and that benefit the surrounding community, *i.e.*, the opposite of what happens when foreclosures caused by Wells Fargo's discriminatory lending practices lead to abandoned homes. *See id.* While the Court may not take judicial notice of the truth of these matters at this stage of the litigation, it may note the existence of the documents attached hereto, *see, e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001), and that Judge Cannon's opinion and the Commissioner's memorandum provide a compelling basis for believing that their truth will be established through discovery. Because Defendants fail to account for Project 5000 foreclosures on vacant properties, their statistics about the number people who actually lose their homes to tax lien foreclosures are vastly overstated and misleading.

Defendants' attempt to malign Baltimore necessitates the above discussion correcting the record, but we reiterate that it does not alter the fundamental precept that Defendants' assertions are irrelevant to a motion to dismiss because they are outside the scope of the complaint.

ARGUMENT

I. THE COMPLAINT SATISFIES THE CONSTITUTIONAL INJURY-IN-FACT REQUIREMENT FOR STANDING[5]

Constitutional standing doctrine requires a plaintiff to show, *inter alia*, "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant . . .." *American Canoe Ass'n, Inc. v. Murphy Farms, Inc.*, 326 F.3d 505, 517 (4th Cir. 2003) (citation and quotation marks omitted) ("*American Canoe*"). Defendants assert that this requirement is not met for three reasons. First, they contend that Baltimore has to itemize its injury in the complaint on a property-by-property basis. Second, they contend that Baltimore has not been injured because its overall property tax revenues have increased. Third, they argue that the allegations of injury are too vague. While all of these arguments fail, we first demonstrate that, under Supreme Court precedent that Defendants do not address, the injury-in-fact requirement is easily satisfied here.

A. <u>The Complaint Properly Alleges Injury-In-Fact</u>

The injury alleged by Baltimore is simple and commonplace – it is financial. *See, e.g.*, Compl. ¶ 70 ("The damages and costs to Baltimore of the foreclosures caused by Defendants' discriminatory lending practices . . . are in the tens of millions of dollars."). The complaint identifies several categories of financial harm, including reduced property tax revenues, reduced real estate transfer tax revenues, increased spending on police and fire protection, increased spending to secure foreclosed homes that are abandoned, increased spending to rehabilitate vacant, deteriorating homes, increased spending to process foreclosures, and increased spending to assist City residents who have lost or are in danger of losing their homes to foreclosures. *See id.* ¶¶ 1, 18-20, 66.

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[5] As Defendants acknowledge, prudential standing requirements do not apply because Congress has extended standing under the Fair Housing Act to the limits of Article III. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone*, 441 U.S. at 109, 115; *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972); Defs.' Br. at 10 n.3.

The Supreme Court has held that a less specific complaint that merely implies these kinds of injuries satisfies the injury-in-fact requirement. In *Gladstone*, a municipal corporation sued two local real estate companies and their employees for racial steering[6] in violation of the Fair Housing Act. *See* 441 U.S. at 93-94. The Village alleged that it "has been injured by having [its] housing market . . . wrongfully and illegally manipulated to the economic and social detriment of the citizens of [the] village." *Id.* at 95 (brackets and ellipsis in original; quotation marks omitted). Drawing inferences from this allegation, the Supreme Court held that the Village had alleged an injury sufficient to support standing in large part because "prices may be deflected downward" by the alleged unlawful acts and "[a] significant reduction in property values directly injures a municipality by diminishing its tax base." *Id.* at 110-11; *see also Pennsylvania v. New Jersey*, 426 U.S. 660, 663-64 (1976) (per curiam) (assuming *sub silentio* that reduced tax revenue is an injury-in-fact and limiting standing inquiry to causation).

Numerous lower court opinions likewise demonstrate that allegations like those made by Baltimore easily show injury-in-fact. The Seventh Circuit has held that Fair Housing Act violations by real estate professionals "cause[] a destabilization of the community and a corresponding increased burden on the City [of Chicago] in the form of increased crime and an erosion of the tax base." *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992). Citing *Gladstone*, the court held that these burdens were injuries that conferred standing. *See id.* 1094-95. The Seventh Circuit reiterated this holding in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), where Judge Posner recognized that the issue was "settled" by *Gladstone* and emphasized the Supreme Court's reliance on an "injury . . . to the tax base." *Id.* at 1525. The Sixth Circuit has also held under the FHA that an injury to a city's tax base provides standing, *see Heights Cmty. Congress v. Hilltop*

[6] "[*I*].*e.*, directing prospective homebuyers interested in equivalent properties to different areas according to their race." *Gladstone*, 441 U.S. at 94.

Realty, Inc., 774 F.2d 135, 138-39 (6th Cir. 1985), as have courts in non-FHA cases, *see Warren County v. State of North Carolina*, 528 F. Supp. 276, 282 (E.D.N.C. 1981) (finding injury-in-fact where county's tax base could be affected by opening of toxic waste dump); *Sch. Dist. of Kansas City v. State of Missouri*, 460 F. Supp. 421, 437-38 (W.D. Mo. 1978) (finding injury-in-fact where school district's tax base allegedly was reduced by segregation in surrounding communities).

It is therefore well-established that Baltimore's allegations of injury to its property tax base and related financial harms satisfy the injury-in-fact requirement of Article III.

B. Defendants' Contrary Arguments Ignore Settled Law and the Allegations of the Complaint

Defendants ignore the cases demonstrating that the type of injury alleged by Baltimore establishes injury-in-fact. They instead proffer three unpersuasive reasons why Baltimore has supposedly failed to adequately allege injury-in-fact.

First, Defendants assert that the City might conceivably have provided more details of its injuries on a property-by-property basis. *See* Defs.' Br. at 13. This ignores the allegations identifying the number of foreclosures on Wells Fargo loans in African-American neighborhoods and alleging injury based on these foreclosures. *See* Compl. ¶¶ 38, 65-66, 70. More fundamentally, there is no requirement that a complaint include such a detailed breakdown of a plaintiff's injury. As the Supreme Court held in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), "general factual allegations of injury" adequately support standing at the pleading stage because it is presumed that they "embrace those specific facts that are necessary to support the claim." *Id.* at 561. Indeed, nothing in *Gladstone* or the other cases discussed above holding that a city's financial injury establishes injury-in-fact requires the extent of that injury to be quantified to any degree or alleged on a property-by-property basis in the complaint; rather, only the fact of the injury need be alleged. The sole case Defendants rely on here, *Warth v. Seldin*, 422

U.S. 490 (1975), simply requires a plaintiff to allege an actual, non-speculative interest in the subject of the alleged injury. *See id.* at 508. Thus, for example, Baltimore may not sue over an injury to Annapolis' tax revenues. But it is self-evident that Baltimore has a concrete interest in its own funds, and those funds are the subject of the injury at issue here.

Defendants' argument also fails because significant information that they claim Baltimore must include in the complaint is under Defendants' exclusive control. This includes the identification of each Wells Fargo loan to an African American and in an African-American neighborhood that has been foreclosed on, *see* Compl. ¶ 38, as well as the practices applied by Wells Fargo in underwriting those particular loans. Only after these and related facts are adduced through discovery will Baltimore be able to definitively identify the exact Wells Fargo loans and properties responsible for its injury.

Second, Defendants contend that Baltimore has not really alleged any injury at all because (based on documents outside the complaint that are not properly considered here, *see* sections II.B.2, II.C.1, *infra*) its property values and property tax revenues have grown in recent years. *See* Defs.' Br. at 15. This argument has no merit. Even accepting Defendants' premise, if Baltimore's revenues are rising less than they would absent Wells Fargo's discriminatory acts, then the City has suffered an economic injury that supports standing. *See, e.g.*, *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004) (finding injury-in-fact where plaintiffs alleged they were paid "less than they otherwise would have" been but for illegal conduct). The City's injury is the difference between actual revenues and the revenues the City ought to have received. *See id.* at 618 (damages are "the difference between what they earned and what they would have earned"). Wells Fargo's logic would mean that any company with a year-to-year increase in profits would lack standing to bring any suit against anyone premised on an economic injury. Not surprisingly, Defendants cite no case law in support of this novel

view of standing. Moreover, they fail to account for the City's increased expenditures that the complaint alleges are also caused by foreclosures on Wells Fargo's discriminatory loans, including the costs of increased policing and of processing foreclosure filings, among others. *See* Compl. ¶¶ 18-20, 66.

Third, Defendants assert that Baltimore's allegations are too "vague" to constitute injury-in-fact. Defs.' Br. at 13. Even if the cases discussed above did not require rejection of this assertion – which they do – Baltimore would still have alleged a sufficiently concrete injury because it alleges that "[d]amages suffered by the City of Baltimore as a result of Wells Fargo's foreclosures are fully capable of empirical quantification." Compl. ¶ 67. Baltimore supports this allegation by citing and discussing three studies that analyze the financial costs to cities of foreclosures and demonstrate that these costs can be quantified. *See id.* ¶¶ 67-69; Decl. at Exs. 1-3. Each uses sophisticated statistical and modeling techniques to isolate and calculate the financial harm to a major city of individual abandoned and foreclosed homes.[7] The studies establish that Baltimore's allegation that its injury can be quantified is a "plausible" allegation, at the very least. Baltimore thus alleges a concrete, quantifiable financial injury.

Defendants fail to address these allegations. Their contention that Baltimore's pocketbook injury is too "vague" rests instead on the inapposite and unpublished case of *AtlantiGas Corp. v. Columbia Gas Transmission Corp.*, 210 Fed. Appx. 244 (4th Cir. Dec. 19, 2006) (per curiam).[8] *See* Defs.' Br. at 13-14. The plaintiff there was entitled to payments from and based on the future earnings of a non-party. *See AtlantiGas Corp.*, 210 Fed. Appx. at 246. It argued that the defendants' actions reduced the non-party's

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[7] *See, e.g.*, Decl. Ex. 1 at 58 ("In this article, we measure the impact of foreclosures on nearby property values by using a unique database that combines data on 1997 and 1998 foreclosures with data on neighborhood characteristics and more than 9,600 single-family property transactions in Chicago in 1999. Even after controlling for over 40 characteristics of properties and their respective neighborhoods, we find that foreclosures of conventional single-family loans have a significant impact on nearby property values.").

[8] Defendants' citation to *AtlantiGas Corp.* is in seeming violation of Local Rule 32.1 of the Fourth Circuit, which limits citation of pre-2007 unpublished decisions as precedents to situations where "there is no published opinion that would serve as well . . . ." There is no shortage of published opinions addressing the injury-in-fact requirement for standing.

earnings, and therefore the future payments it was due. *See id.* at 250-51. The court viewed this as too "conjectural and abstract" to constitute an injury-in-fact because it was given no way to determine "what diminution in revenues, if any, is attributable to [the non-party] and what diminution, if any, is attributable to" the defendants. *Id.* at 251. Instead, it "would be forced to guess." *Id.* Here, however, there will be no need to "guess" at Baltimore's damages when it is the proper point in the case to calculate them. Discovery will show exactly which foreclosures on Wells Fargo loans were the product of discriminatory and unlawful lending practices and the precise financial injury to the City caused by those specific foreclosures. Baltimore plainly alleges that this injury can be quantified and supports this allegation by incorporating studies so demonstrating.

Moreover, any difficulty in quantifying a plaintiff's damages goes only to whether they are determinable with "reasonable certainty" and may therefore be awarded after a finding of liability, *e.g.*, *Long v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc.*, 882 F. Supp. 1553, 1562 (D. Md. 1995), or are instead "too speculative for a trier of fact to award," *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1126 (4th Cir. 1995). Defendants cite no valid precedent for the proposition that difficulty in fixing damages goes to standing. Nor do they provide any authority for the proposition that it affects injunctive or declaratory relief.[9]

[9] Defendants also briefly attempt to argue that the discriminatory lending alleged by Baltimore could only have resulted in the City "receive[ing] more property tax revenue that it should have" and having lower costs. Defs.' Br. at 14-15. Although this speculative argument is hard to follow, what is clear is that it fails to "construe the factual allegations of the complaint in the light most favorable to the plaintiff," as the Court must. *Schweikert*, 2008 WL 853005, at *2. Wells Fargo instead draws the least favorable conclusion it can from the allegations, and does so based on assertions about how real estate markets purportedly functions that are properly the subject of expert analysis (if they are even relevant). It is much more reasonable to conclude, as the complaint does, that Defendants' discriminatory lending causes African Americans to lose their homes to foreclosures in disproportionately high numbers, and that this harms, not helps, the City by causing lower revenues and higher costs. *See, e.g.*, Compl. ¶¶ 46, 66. This must be taken as true. *See, e.g.*, *Warth*, 422 U.S. at 501. Moreover, Defendants' here cite only to *DaimlerChrysler v. Cuno*, 547 U.S. 332, 344 (2006), which concerned the inapposite subject of taxpayer standing to challenge governmental tax policy.

II. THE COMPLAINT SATISFIES THE CONSTITUTIONAL TRACEABILITY REQUIREMENT FOR STANDING

The Constitution also requires that "that the injury fairly can be traced to the challenged action . . . ." *American Canoe*, 326 F.3d at 517 (citation and quotation marks omitted). Defendants contend that this requirement is not met for two reasons – because third parties are involved in foreclosures and their aftermath, and because the injury is purportedly self-inflicted through tax lien sales. Neither reason survives scrutiny. We address both after first explaining why, as with injury-in-fact, *Gladstone* demonstrates that the complaint satisfies the traceability requirement for standing.

A. The Complaint Properly Alleges Traceability

Baltimore straightforwardly alleges that its financial injuries are traceable to Wells Fargo's discriminatory lending practices. The City alleges that Wells Fargo intentionally engages in reverse redlining by targeting predatory lending practices – including higher pricing, failing to properly consider borrowers' ability to repay their loans, and more – at African Americans and residents of Baltimore's African-American neighborhoods. *See, e.g.*, Compl. ¶¶ 26, 44-62. These intentional, discriminatory, and unlawful practices "increase[] the likelihood of foreclosure," *id.* ¶ 49, and have "resulted in a disproportionately high rate of foreclosure on loans to African Americans and in Baltimore's majority African-American neighborhoods," *id.* ¶ 64; *see also id.* ¶¶ 4-6, 52, 54, 57, 60. As set forth above, the complaint alleges that foreclosures injure the City. *See id.* ¶¶ 66, 70. Baltimore further alleges that the foreclosures resulting from Defendants' unlawful reverse redlining "are particularly injurious because they are concentrated in distressed and transitional neighborhoods . . . ." *Id.* ¶ 65. The City supports these allegations by incorporating three studies establishing that urban foreclosures cause specific, empirically quantifiable financial harms to a city government. *See id.* ¶¶ 67-69; Decl. at Exs. 1-3. Thus, Baltimore's complaint alleges that Wells Fargo's discriminatory acts cause there to be many more

foreclosures on African Americans and in African-American neighborhoods than there otherwise would be and that these foreclosures cost the city money.

While these allegations are both direct and supported by rigorous social science, the Supreme Court in *Gladstone* held that the traceability of an injury to a city's purse is satisfied by much more tenuous and contingent connections, and without scientific backing. The Court reasoned that racial steering could ultimately bring about what Judge Posner later described as "tipping," *Dwivedi*, 895 F.2d at 1525, if enough prospective buyers were led to buy homes in other towns and "if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents," *Gladstone*, 441 U.S. at 110. This could then result in a diminished tax base. *See id.* at 110-11. The Court noted that while the defendants' market share "may be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury," this was a subject for a later stage of the litigation after discovery. *Id.* at 114 n.29. At the pleading stage, the plausibility of the connection was sufficient to maintain standing.

Baltimore's traceability allegations are narrower and better-supported than those held sufficient in *Gladstone*. Among other differences, causation in *Gladstone* required a widespread impact on many people to bring the town to the tipping point, after which an injury might occur. But here, Baltimore alleges that each individual foreclosure that the evidence traces to Wells Fargo's discriminatory acts is the cause of an injury because the studies incorporated in the complaint show that each additional foreclosure has specific and demonstrable costs. Accordingly, the complaint adequately alleges traceability.

B. Traceability Is Not Undermined By the Role of Third Parties

Ignoring *Gladstone*, Wells Fargo first objects to traceability by asserting that causation is too attenuated because third parties are involved in foreclosures and their aftermath. *See* Defs.' Br. at 11-12, 18-20. The whole of this argument is based on unfounded speculation that factors other than their discriminatory loans – such as a borrower's illness or potential purchasers' concerns about a weakening economy – might have caused the City's injuries. *See id.* Such speculation says nothing, of course, about what actually caused those injuries, as to which the allegations of the complaint must be taken as true. Any alternative scenarios that Defendants might dream up are simply irrelevant, and there is no requirement that a complaint explicitly negate them.

From their speculations about third parties, Defendants conclude that no foreclosure can ever be traced to predatory practices targeted at a minority neighborhood, and that no injury suffered by the City can ever be traced to a foreclosure. In addition to the speculative nature of Defendants' contentions about third parties, their argument suffers from three fatal flaws.

First, Defendants repeat the error of ignoring the allegations of the complaint that plausibly support each part of the causal chain. Second, Defendants try to evade these allegations through judicial notice of their imagined view of the role third parties supposedly play in every possible foreclosure scenario. Federal Rule of Evidence 201(b) not does permit it, however.

Third, and most important, Defendants misrepresent the law regarding traceability. Defendants' actions need not be the sole cause or even the sole significant cause of Baltimore's injuries to support traceability. So long as it is likely that Defendants' illegal acts contribute to the injuries, traceability is satisfied regardless of whether third parties also play a role. Defendants also misrepresent additional law they cite with reference to the costs to the City of anticipating and responding to increased crime.

Before addressing those issues in full, we note the far-reaching implications of Wells Fargo's view of standing, which further demonstrate its fallacy. Wells Fargo's approach to traceability would effectively eviscerate all lending discrimination laws, including the FHA, the Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*), and others. No one – not a homeowner, a municipality, or anyone else – would ever have standing to challenge steering, reverse redlining, or other discriminatory practices that affect a city or a neighborhood. A defendant could always secure immunity by speculating that a different company or some other factor might have played a role in causing the harm or, as Defendants do here, that no injury would have occurred had the real estate market been stronger or the local property tax rate lower. *See* Defs.' Br. at 12, 39, 40. *Gladstone* and its progeny plainly reject any such proposition, however, and it "would be strange indeed if" a discriminatory lender "were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity." *American Canoe*, 326 F.3d at 520. The fact that every court to consider the issue has held that reverse redlining violates the Fair Housing Act and is actionable likewise shows that Defendants present a fundamentally flawed understanding of the Constitution's traceability requirement. *See, e.g.*, *Barkley v. Olympia Mortgage Co.*, Nos. 04-CV-875 *et al.*, 2007 WL 2437810 (E.D.N.Y. Aug. 22, 2007); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000).

1. **Defendants Ignore the Allegations of the Complaint**

Defendants premise their assertions about the role of third parties by mischaracterizing Baltimore's injuries as falling into three categories: property tax losses; responding to increased incidents of crime; and the expenditure of funds on rehabilitation. *See, e.g.*, Defs.' Br. at 12. The injuries alleged in the complaint actually include multiple types of injuries, most of which Defendants seek to obscure. These include reduced property tax revenues, reduced real estate transfer tax revenues,

increased spending on police and fire protection in anticipation of the likely consequences of foreclosures, increased spending to secure abandoned homes, increased spending to rehabilitate homes, increased spending to process foreclosures, and increased spending to provide assistance to City residents. *See* Compl. ¶¶1, 18-20, 66. Defendants focus on their self-described categories to the exclusion of the injuries actually alleged.

Defendants also ignore the allegations showing that foreclosures do, in fact, cause these injuries regardless of any role played by third parties and that the injuries can be quantified. *See* Compl. ¶¶ 18-20, 66-67. These allegations are well supported by the studies cited in the complaint, which provide a sound, empirical basis to show direct, quantifiable consequences of Wells Fargo's illegal acts. *See id.* ¶¶ 67-69. They establish that the connection between foreclosures caused by Wells Fargo's discriminatory acts and Baltimore's injuries is plausible.

The plausibility of the allegations supporting the other part of the causal chain – between a predatory loan that violates the Fair Housing Act and a foreclosure – is facially apparent. Losing a home to foreclosure can certainly be traced to the practices alleged in the complaint, *e.g.*, failing to consider African-American borrowers' ability to repay a loan, misleading African-American borrowers about the much higher payments they will face after the "teaser rate" on a 2/28 or 3/27 adjustable rate mortgage expires, or stripping African-American borrowers' equity through repeated and unnecessary refinancings. *See, e.g.*, *id.* ¶ 26.

2. Defendants' Argument About the Role of Third Parties Is Based Entirely On Purported "Facts" of Which the Court May Not Take Judicial Notice

Instead of addressing Baltimore's allegations, Defendants try to go outside the complaint by seeking judicial notice of their imagined view of the role of third parties in causing Baltimore's injuries. Defendants offer no source material whatsoever in support of these "facts." They do not even

acknowledge that they are asking for judicial notice, but that is plainly what they seek. The Federal Rules of Evidence prohibit it:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). Defendants' "facts" are "subject to reasonable dispute" and are not "generally known" with Maryland.[10] This renders judicial notice improper.

First, the plausible allegations of the complaint, discussed above, show that the relevance of third parties is, at the least, "subject to reasonable dispute." Wells Fargo may later attempt to raise the role of third parties as a defense to liability based on evidence, but their attempt to do so through judicial notice is an impermissible "effort to bootstrap standing analysis to issues that are controverted on the merits." *Southern California Edison Co. v. FERC*, 502 F.3d 176, 180 (D.C. Cir. 2007) (quoting *Public Citizen v. FTC*, 869 F.2d 1541, 1549 (D.C. Cir. 1989)); *see North Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F.2d 654, 665 (E.D.N.C. 2003) ("transform[ing] standing analysis into a determination of ultimate liability [] has been specifically rejected by the Fourth Circuit").

Second, the role of third parties in lending, foreclosures, and municipal revenues is not "generally known" by the populace of Maryland, as required for judicial notice under Rule 201(b)(1). For example, Defendants' argument requires the Court to hold that the Maryland State Department of Assessments & Taxation's operations are "generally known" because their argument turns in part on that department's role in setting property taxes. *See* Defs.' Br. at 12. Yet relatively few probably even know of this department's existence. Such matters must be established through evidence, not judicial notice. *See, e.g.*, *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.,* 6 F.3d 211, 218-19 (4th Cir. 1993) (reversing

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[10] Part (2) of Rule 201(b) is not at issue because Defendants do not provide any sources in support of their "facts."

district court for taking "judicial notice of the facts that many volunteer fire departments operate in Maryland without governmental intervention at all and that all volunteer fire departments operate in a gray area as to the functions they provide"); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3d Cir. 1993) (reversing district court for taking judicial notice of "rollover problems of vehicles having a high center of gravity;" "[m]ost people probably know little, if anything, about how high centers of gravity cause vehicular accidents"); *Cardio-Med. Assocs., Ltd. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 75-76 (3d Cir. 1983) (reversing district court for taking judicial notice of factors considered by patients when choosing a doctor).

Judicial notice about how third parties make foreclosure-related decisions may not be invoked here, and the Court may not rely on Defendants' purported and unfounded "facts" about such decision making in considering the instant motion.

3. Defendants' "Facts" About Third Parties, Even if They Could Be Properly Noticed, Would Not Defeat Traceability

a. It Is Well-Established That the Traceability Requirement May Be Satisfied Where Third Parties Play a Role In Causing a Plaintiff's Injuries

Even if Defendants' "facts" about third parties could be considered, those "facts" would not defeat standing because Defendants misconstrue the legal meaning of traceability. Defendants insist that the role of third parties breaks the connection between the discriminatory, unaffordable loans and Baltimore's injuries, but this "wrongly equates injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (quotation marks and citation omitted). As long as there is a "likelihood" that the injury will result, the traceability requirement is met regardless of the role of third parties. *Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (citations omitted).

The Supreme Court's *Gladstone* decision and the other Fair Housing Act cases discussed above demonstrate that Defendants' view of how third parties impact traceability analysis is wrong. *See* section I.A, *supra*. Each case connects unlawful steering to a municipality's financial injuries via the decision making of prospective homebuyers and of residents, and upholds standing.

Clinton, *Bryant v. Yellen*, 447 U.S. 352 (1980), and *United States v. SCRAP*, 412 U.S. 669 (1973), likewise refute Defendants' view of the law. In each, private parties challenged acts of the federal government, and traceability was satisfied because third parties were likely to respond to those acts in a manner that would injure the plaintiffs. *Clinton* considered a constitutional challenge to the Line Item Veto Act. The plaintiff alleged that people who might otherwise sell their business to it were not likely to because the President had vetoed a capital gains tax advantage the sellers would otherwise receive. *See* 524 U.S. at 432. The Court found traceability "easily satisfied. " *Id.* at 433 n.22. *Bryant* addressed the federal government's position that 233,000 acres held by 800 landowners could not be irrigated under a federal statute. *See* 447 U.S. at 365-66 & n.15. The Court held that intervenors who wanted to buy the land cheaply had standing. *See id.* at 366-68. If the land could not be irrigated, it was "likely" that the 800 owners would choose to sell it at low prices. *Id.* at 368. In *SCRAP*, people who used Washington-area lands for recreation challenged a federal order permitting railroads to increase rates. *See* 412 U.S. at 678, 685. Their standing argument was that "a general rate increase would allegedly cause an increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.* at 688. The Court was skeptical of this "attenuated line of causation," but held it sufficient at the pleading stage. *Id.* at 689-90; *see id.* at 689 ("we deal here simply with the pleadings").

Though Wells Fargo relies heavily on *Allen v. Wright*, 468 U.S. 737 (1984), *Allen* reflects the same kind of traceability analysis as *Gladstone*, *Clinton*, *Bryant*, and *SCRAP*. In *Allen*, parents of public school children challenged the IRS's guidelines for determining whether a private school was nondiscriminatory and tax-exempt. *See* 468 U.S. at 739. They alleged that lax guidelines increased the funds available to segregated private schools, reducing the number of white students in public schools, and thereby reducing their children's opportunity to receive a desegregated education. *See id.* at 745-46, 752-53. Even though this chain rested on the decisions of "numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools)," the Court held that the injury "would be fairly traceable to unlawful IRS grants of tax exemption [] if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." *Id.* at 758-59. Standing was only rejected because plaintiffs had "made no such allegation," alleging instead only that four individual schools across seven states might lose an exemption under proper guidelines.[11] *Id.* at 743, 758 & n.23. *Allen* thus focused on the "chain as a whole," like any other traceability case, and did not shortcut its analysis through a rule that the chain is automatically broken if third parties have some significant role in it.[12]

Here, the role of third parties fully supports the chain as a whole because it is likely that they have acted and will continue to act to connect Wells Fargo's discriminatory, unaffordable loans to

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[11] Standing for the tire manufacturers was rejected for a comparable reason in *Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279 (D.C. Cir. 2007), also cited by Defendants. *See* Defs.' Br. at 17. The problem with standing was not that third parties were involved in the "chain of causation," but rather that the links in the chain were not plausible. *See* 489 F.3d at 1290-91.

[12] Moreover, *Allen* rested heavily on the fact that the plaintiffs challenged federal policy, bringing separation of powers concerns to the fore. *See id.* at 759-61. No such challenge is made here, minimizing separation of powers concerns. *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Ruth B. Ginsburg, J.) (distinguishing *Allen* as type of case that "implicate[s] most acutely the separation of powers"). Separation of powers concerns recede from standing analysis even more where, as here, Congress has extended standing to the limits of Article III. *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1337 (D.C. Cir. 1986); *id.* at 1336 (identifying Fair Housing Act as the "premier example").

Baltimore's injuries. It is likely that a victim of reverse redlining will suffer default and foreclosure, and, as the studies cited in the complaint show, it is likely that those involved in the aftermath of a foreclosure will act such that the City suffers specific, quantifiable harm. The Supreme Court's traceability precedents require no more.

Fourth Circuit precedents further show that Wells Fargo misstates traceability law. Wells Fargo asserts that standing is defeated, and it is absolved of responsibility for Baltimore's injuries, by the lawful acts of third parties that are set in motion by Wells Fargo's Fair Housing Act violations. Wells Fargo argues in each of its imagined scenarios that Baltimore must show that Wells Fargo "alone" was the sole cause of the City's injury, *see* Defs.' Br. at 11-12, but even the unlawful acts of third parties do not break causation as long as the defendant's acts likely contribute to the injury. In *American Canoe*, alleged polluters disputed standing by presenting expert testimony that the plaintiffs' injuries could likely be traced to other polluters. *See id.* at 519-20. The court nonetheless found traceability because "defendants' discharges still potentially harmed" the plaintiffs. *Id.* at 520. Judge Luttig observed that "[i]t would be strange indeed if polluters were protected from suit simply by virtue of the fact that others were also engaging in the illegal activity." *Id. See also NRDC, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (though "highly probable" that river was polluted by third parties, traceability satisfied "if it can be shown that [defendant's] discharge *contributes* to the pollution") (emphasis in original); *Piney Run Pres. Ass'n v. County Comm'rs of Carroll County*, 268 F.3d 255, 264 (4th Cir. 2001) (reiterating *Watkins* holding); *South Carolina Wildlife Fed'n v. South Carolina Dep't of Transp.*, 485 F. Supp. 2d 661, 670 (D.S.C. 2007) ("Plaintiffs do not have to prove that defendants' actions are the only cause of their injuries" to show traceability).

Baltimore's traceability allegations need not even conclusively establish Wells Fargo's own role

in causing the injuries. Reversing a summary judgment dismissal, *Watkins* held that traceability need not be shown "to a scientific certainty" and that the Supreme Court's "'fairly traceable' requirement . . . is not equivalent to a requirement of tort causation." *Id.* at 980 n.7 (citation and quotation marks omitted); *see South Carolina Wildlife Fed'n*, 485 F. Supp. at 670 (same). These rules give effect to the Supreme Court's holding that a plaintiff does not have to "negate . . . speculative and hypothetical possibilities" to satisfy Article III. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978) (rejecting speculative challenge to causal link as "not responsive").

Accordingly, standing doctrine does not require Baltimore to show that factors or third parties other than or in addition to Wells Fargo do not play any significant role in causing Baltimore's injuries.[13] The complaint need not establish, to cite just some of Wells Fargo's speculative possibilities, that an illness, a weakening economy, the state government, a tax lien, or gangs were irrelevant. *See* Defs.' Br. at 11-12, 18-20. Rather, Baltimore fully supports standing by plausibly alleging that Wells Fargo's acts likely contribute to its injuries.

b. Wells Fargo's Additional Traceability Arguments About Baltimore's Increased Expenditures For Police and Fire Protection Are Meritless

Defendants add two additional objections to traceability for what they term "crime theory" damages. Both reflect a misreading of the complaint by assuming that crime-related damages only concern the need to respond to specific criminal acts. But the foreclosures and vacancies caused by

[13] To the extent *Frank Krasner Enters., Ltd. v. Montgomery County*, 410 F.3d 230 (4th Cir. 2005) ("*Krasner*"), holds that traceability is cut off if a third party plays a role, as Defendants assert, it is not a valid precedent in the Fourth Circuit. *See* Defs.' Br. at 16, 17. The Fourth Circuit considered parallel facts in *Shanty Town Assocs. v. EPA*, 843 F.2d 782 (4th Cir. 1988), and held traceability satisfied notwithstanding the comparable role of a third party. *Krasner* did not consider *Shanty Town* and found otherwise, but the earlier decision is the law of the circuit. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (*en banc*) ("when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court"). Of course, if *Krasner* stands for the rule Defendants say it does, it is also at odds with Supreme Court precedent.

Defendants' illegal practices force the City to devote increased law enforcement resources as a prophylactic measure. One of the studies discussed in the complaint notes a 6.7% rise in violent crime in neighborhoods with heightened foreclosure rates. *See* Decl. Ex. 1 at 59. This demonstrates that it is reasonably foreseeable that vacant and abandoned homes may become centers of illicit activities. Baltimore must therefore devote significant resources to deterring, not just responding to, a rise in crime.

Both of Defendants' arguments are also legally meritless. Defendants first assert that where criminal acts play a role in a causation chain, the chain is automatically broken. *See* Defs.' Br. at 19 (relying on *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562 (6th Cir. 2007)). But if such were the rule, then the Fourth Circuit has repeatedly failed to recognize an obvious defect in its own subject matter jurisdiction[14] in cases like *Gantt v. Security, USA, Inc.*, 356 F.3d 547 (4th Cir. 2004) (permitting employee's tort claim to proceed against employer based on kidnapping and rape of employee by third party), *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156 (4th Cir. 1988) (affirming verdict in favor of hotel guests against owners and operators of hotel based on assault and theft by third parties), and *Pressly v. Hutto*, 816 F.2d 977 (4th Cir. 1987) (reversing summary judgment dismissal of inmate's 42 U.S.C. § 1983 claim against prison guard based on assault by another prisoner). Whatever *Alston* means in the Sixth Circuit, standing is not lacking in the Fourth Circuit merely because the causation chain includes third parties' unlawful acts.

Defendants also rely on two cases applying the Delaware and Illinois "municipal cost recovery rule" to preclude recovery by municipalities of costs associated with gun violence caused by the allegedly tortious manufacture and distribution of guns. *See* Defs.' Br. at 19. That rule does not apply here. Indeed, Defendants' cases cite *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d

[14] A federal court has a "duty to inquire, *sua sponte*, whether a valid basis for [Article III] jurisdiction exists, and to dismiss the action if no such ground appears." *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998).

322 (9th Cir. 1983) (applying Arizona tort law), as the "leading authority" and "seminal case" on this state law rule, *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *4 (Del. Super. Ct. Nov. 27, 2002); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1144 (Ill. 2004), and *City of Flagstaff* holds that "a governmental entity may . . . recover the costs of its services . . . . where it is . . . required to effect the intent of federal legislation." 719 F.2d at 324 (citation omitted). Congress has determined that it is required here by providing for the recovery of damages without limitation in the Fair Housing Act. *See* 42 U.S.C. § 3613(c). In addition, Defendants cite no authority for the proposition that this state law rule can limit Article III standing, and other state law cases hold the rule inapplicable to parallel gun violence claims. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149-50 (Ohio 2002); *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *7-8 (Mass. Super. 2000).

C. <u>Baltimore's Injuries Are Not Self-Inflicted Through Tax Lien Sales</u>

Defendants also assert that Baltimore's injuries are self-inflicted and therefore not traceable to Defendants' own discriminatory practices. *See* Defs.' Br. at 20-23. This argument is based entirely on Defendants' request for judicial notice of their deeply flawed "facts" about tax lien sales that are derived from documents outside of and not referenced in the complaint. *See id.* at 3 n.1, 20-23.

As an initial matter, Defendants ignore the allegations of the complaint, and it is fundamental that the complaint's allegations must be accepted as true. *See, e.g.*, *Warth*, 422 U.S. at 501. As shown above, the complaint plainly alleges that a disproportionate number of foreclosures on African Americans and in African-American neighborhoods are caused by Wells Fargo and that these foreclosures – regardless of any caused by other mortgage lenders, Baltimore, or anyone else – cause significant financial harm to the City. *See, e.g.*, Compl ¶¶ 35-40, 64-66, 70. Defendants' assertions about other foreclosures are irrelevant.

Defendants "self-inflicted" argument fails for two additional reasons addressed in greater detail immediately below. First, even if tax liens were somehow relevant, Defendants' assertions about them are not subject to judicial notice under Fed. R. Evid. 201(b). Second, even if the Court could take judicial notice of Defendants' "facts" about tax lien sales, it would not defeat traceability.

1. Defendants' "Self-Inflicted" Argument Is Based Entirely On Purported "Facts" About Tax Lien Sales Of Which the Court May Not Take Judicial Notice

Defendants assert that Baltimore is responsible for the great majority of Baltimore's foreclosures because it conducts tax lien sales, and that this renders its injuries self-inflicted and defeats standing. Defendants seek judicial notice of the truth of these propositions by citing ten exhibits, most of which are newspaper articles. *See* Defs.' Br. at 3 n.1, Exs. G-J, M, N, Z. Federal Rule of Evidence 201(b) clearly prohibits notice of these assertions, however, because they are "subject to reasonable dispute" and are not derived from "sources whose accuracy cannot reasonably be questioned."[15]

As set forth above, Wells Fargo's assertions about tax lien sales are wholly undermined by a review of state law, which requires and controls such sales. *See supra* at 12-14. They are also undermined by documents such as Judge Cannon's opinion, which may not be taken as true at this stage but demonstrate that discovery will further refute Defendants' claims. *See id.* These considerations establish that Defendants have thoroughly misrepresented the truth about tax liens and that there is, at the least, a "reasonable dispute" over the accuracy of Wells Fargo's "facts." This alone defeats judicial notice and shows the need to put Wells Fargo to real proof.

Likewise, Wells Fargo does not rely on sources "whose accuracy cannot reasonably be questioned," as also required by Rule 201(b). Newspapers routinely make errors, yet Defendants rely on

[15] Defendants do not claim that the details about the tax liens on which they rely are "generally known."

them for the whole of their argument. Newspapers may be judicially noticed for general background information (as in the cases cited by Defendants, discussed immediately below) and items like stock prices, but not to resolve disputed facts central to a case. *See, e.g.*, *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 n.4 (4th Cir. 2004) (published stock prices); *but see State v. Canady*, 431 S.E.2d 500, 501-02 (N.C. Ct. App. 1993) (under parallel state rule, court could not take judicial notice of newspaper report of time of sunset and phase of the moon because newspaper is not of indisputable accuracy).

Moreover, judicial notice of documents may not be used to displace the traditional judicial processes for resolving factual disputes with evidence, especially when the factual disputes involve critical issues. The two cases relied on by Defendants to support their claim for judicial notice do not remotely suggest otherwise. *See* Defs.' Br. at 3 n.1. In *Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001), the court took notice of the general fact of the defendant's historical discrimination problems, but made clear that this was only of background interest – "Defendant's past record of discrimination is not at issue here." *Id.* at 578. In *Peters v. Delaware River Port Authority*, 16 F.3d 1346 (3d Cir. 1994), the court observed that, "as would be expected," newspaper articles buttressed the proposition that two states' delegations to a joint agency acted as economic competitors. *Id.* at 1356 & n.12. The issue in the case – "whether party affiliation is an appropriate requirement for the effective performance of the position of" head of that agency, *id.* at 1348 – was quite remote from that general proposition. *Logan* and *Peters* are thus both consistent with the rule that the "more critical an issue is to the ultimate disposition of the case, the less appropriate judicial notice becomes." *Pina v. Henderson*, 752 F.2d 47, 50 (2d Cir. 1985) (citation omitted).

Because Wells Fargo's "facts" about tax lien sales are central to their motion to dismiss yet vigorously disputed, the most the Court may do is take notice of the existence of Wells Fargo's exhibits,

but not the truth of their content. In *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), the defendants' motion to dismiss "rest[ed] almost entirely on factual challenges," and "defendants' factual assertions" were the basis for the trial court's decision to grant the motion. *Id.* at 688. The circuit court reversed, explaining that the trial court erred by relying on "judicial notice of *disputed* facts stated in public records," when it was permitted to notice only the "existence" of those records. *Id.* at 690 (emphasis in original). The trial court compounded this error by favoring the judicially noticed "facts" over the reasonable inferences that could be drawn from the complaint. *See id.* Likewise, *Hennesy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), affirmed the district court's refusal to take judicial notice of the number of employees reported by a company in its own 10-K filing with the SEC. *See id.* at 1354-55. The issue before the court turned on this very number. *See id.* The 10-K could be used for cross-examination, but not to bypass normal evidentiary procedures through judicial notice. *See id.* at 1355.

In short, Defendants' reliance on judicial notice for its argument about tax liens is entirely misguided and impermissible. If Defendants want to argue about the significance of tax liens, they may only try to do so after discovery and with proper evidence. Their attempt to do so now should be rejected as another "'effort to bootstrap standing analysis to issues that are controverted on the merits.'" *Southern California Edison Co.*, 502 F.3d at 180.

2. Defendants' "Facts" About Tax Liens, Even If They Could Be Properly Noticed, Would Not Show That Baltimore's Injuries Are Self-Inflicted

Defendants' objection to traceability based on tax liens would fail even if the Court could take judicial notice of their "facts." If Baltimore were complicit in thousands of foreclosures in recent years – which it was not – it would not constitute the kind of "self-inflicted" injury that can defeat traceability. Rather, it would go only to the calculation of Baltimore's damages.

First, an injury can only be self-inflicted so as to preclude standing if the plaintiff's acts are based on "personal choice." *McConnell v. FEC*, 124 S. Ct. 619, 709 (2003). That was precisely the situation in one of the two cases relied by Defendants. *See Pennsylvania*, 426 U.S. at 664 (injuries to states self-inflicted because "[n]othing required" them to adopt and maintain tax laws that, if rescinded, would eliminate entire injury), *cited in* Defs.' Br. at 20. Regardless of the number and impact of foreclosures stemming from tax lien sales, Baltimore's participation is dictated by state law, as shown above, and is not based on personal choice. *See supra* at 12-14.

Second, "[s]tanding is not defeated merely because the plaintiff has in some sense contributed to his own injury." 13 Charles A.Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3521.5 (2008). Rather, "[s]tanding is defeated only if it is concluded that the injury is so completely due to the plaintiff's own fault as to break the causal chain." *Id.* This point is well made by Defendants' other case. *See Public Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1297 n.3 (D.C. Cir. 2007) (injury to organization's members not self-inflicted; though there are some steps they can take to prevent injury, they cannot control the acts of others that may cause injury), *cited in* Defs.' Br. at 20.

Even if the "facts" asserted by Defendants were accepted, the criteria for a "self-inflicted" injury would not be satisfied. The most those facts could show would be that Baltimore bears responsibility for some foreclosures based on tax liens; they would not eliminate Wells Fargo's responsibility for the many foreclosures that are caused by its own decision to target predatory lending practices at African Americans and African-American communities. Wells Fargo's responsibility for foreclosures based on discriminatory, unaffordable loans is plainly alleged in the complaint and must be accepted as true. *See, e.g.*, Compl. ¶¶ 64. The most Wells Fargo could say, then, is that Baltimore is responsible for a portion of its diminution in property tax revenues and of the other financial injuries that result from foreclosures.

It could not say that Baltimore is "completely" responsible for the whole of these losses. The injury is therefore not self-inflicted for purposes of Article III. *See St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000) (injury was not self-inflicted, and standing was not lacking, where plaintiff "plainly has alleged that defendants engaged in conduct that contributed to causing his injury").

What Defendants' argument really addresses is damages, not standing. If Defendants can show, consistent with the Rules of Evidence, that the City is responsible for certain foreclosures in Baltimore, then their own responsibility for foreclosure-related damages might be reduced. The same could be true if Defendants can show that the proximate cause of foreclosure on a particular loan originated by Wells Fargo was a tax lien for which the City was responsible, and not unlawful terms and conditions for which Wells Fargo was responsible. But these are issues to be examined through discovery and, unless summary judgment is proper, presented to the trier of fact. *See id.* at 403 ("this is a matter more properly viewed as going to the merits rather than to standing"); *cf. Boleski v. American Export Lines, Inc.*, 385 F.2d 69, 76 (4th Cir. 1967) (discussing situation "where the trier of fact had applied the comparative negligence rule to reduce the plaintiff's damage award by reason of his contributory negligence") (emphasis added). They are not susceptible to resolution on a motion to dismiss.

III. DISPARATE IMPACT CLAIMS ARE COGNIZABLE UNDER THE FAIR HOUSING ACT

Clear Fourth Circuit precedent holds that disparate impact claims are cognizable under the FHA. *See, e.g.*, *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982) (agreeing with Third, Seventh, and Eighth Circuits that "[p]roof of a discriminatory effect is . . . sufficient to prove a violation of" the FHA). The Fourth Circuit is in accord with every one of the ten other United States Courts of Appeals that have addressed the issue. Wells Fargo nonetheless asks the Court to defy binding precedent and hold that the FHA reaches discriminatory treatment claims and not disparate impact claims. *See* Defs.'

Br. at 23-29. Even if the Court had the power to reverse the Fourth Circuit – which it does not – there is no sound justification for doing so.

Defendants' extraordinary request rests on their deeply flawed interpretation of *Smith v. City of Jackson*, 544 U.S. 228 (2005), which holds that the Age Discrimination in Employment Act *does permit* disparate impact claims and makes no mention of the Fair Housing Act. Wells Fargo essentially contends that *City of Jackson* exposes as a grand error the uniform case law finding that disparate impact claims may be brought under the FHA.

While Defendants' view of *City of Jackson* has no merit, we first show that this Court is not empowered to overturn directly controlling Fourth Circuit precedent based on the purported implication of a decision involving a wholly separate statute. We then explain how Defendants misrepresent the analysis and significance of *City of Jackson*. The FHA's purpose, as expressed in legislative history, supports its application to disparate impact claims, and Congress endorsed this judicial construction when it amended the Act in 1988. The text of the Act also compels its application to disparate impact claims – Defendants' contrary assertion notwithstanding – and administrative interpretation of the Act, entitled to great deference, is in accord. Finally, we show that the federal appellate courts' uniform holdings that the FHA reaches disparate impact as well discriminatory treatment claims are based on this myriad of compelling factors, as endorsed by *City of Jackson*, and that post-*City of Jackson* decisions uniformly reject the argument asserted here by Defendants without fail.

A. This Court May Not Reject Directly Controlling Fourth Circuit Precedents That Have Not Been Explicitly Rejected By a Higher Court

Before considering the substance of Defendants' contention, it is essential to recognize the limits of this Court's power to disregard Fourth Circuit precedent. Defendants do not claim that *City of Jackson* explicitly rejects the application of the Fair Housing Act to disparate impact claims. Indeed,

City of Jackson does not even mention the FHA. Defendants nonetheless ask this Court to hold that *City of Jackson* supersedes the Fourth Circuit's decisions in *Town of Clarkton*, *Edwards v. Johnston County Health Department*, 885 F. 2d 1215, 1223 (4th Cir. 1989), and *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 986 (4th Cir. 1984), all holding that disparate impact claims are cognizable under the FHA. Limitations on this Court's power, standing alone, require rejection of that request. Even if Defendants offered a sound reading of *City of Jackson* – which, as shown below, they do not – Fourth Circuit precedent would not empower this Court to ignore *Town of Clarkton*, *Edwards*, and *Turtle Creek* based on the mere implication of a higher court's decision in a case involving a different statute.

The Fourth Circuit addressed the issue of a lower federal court's authority to overturn precedent from a higher court in *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998). The plaintiff argued that three Supreme Court cases had "effectively overruled" an earlier one. *Id.* at 158-59. The Fourth Circuit began its analysis by noting the "limits of our role" as a court below the Supreme Court. *Id.* at 158. It then cited the "unequivocal[]" rule set forth by the Supreme Court "that lower courts are *not* to 'conclude' that the [Supreme] Court's 'more recent cases have, *by implication*, overruled [its] earlier precedent.'" *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)) (emphases and brackets supplied by Fourth Circuit). Instead, the Fourth Circuit was required to follow any Supreme Court precedent with "*direct*" application and leave to the Supreme Court "the prerogative of overturning its own decisions." *Id.* (same). The court concluded, "'unless and until' the Supreme Court has clearly overruled [its earlier decision], we must apply its holding, which "'directly controls' this case." *Id.* at 159 (quoting *Agostini*, 521 U.S. at 237-38).

Columbia Union College, premised on the Fourth Circuit's position beneath the Supreme Court, applies in full to the relation between the District Court and the Fourth Circuit. The Fourth Circuit's

precedents "directly control" the instant motion by holding that disparate impact claims are cognizable under the FHA. Neither those precedents nor the parallel precedents from the other Circuit Courts have been directly rejected by the Fourth Circuit or the Supreme Court; Wells Fargo's only argument is that they were effectively overruled by implication. This Court, therefore, lacks the power to ignore *Town of Clarkton*, *Turtle Creek*, and *Edwards*. "Unless and until" a higher court "clearly overrule[s]" those cases or their equivalents from other Circuits, this Court "must apply" them. *Columbia Union College*, 159 F.3d at 159. The prerogative to do otherwise rests exclusively with the Fourth Circuit.

B. ***City of Jackson*** **Refutes Defendants' Assertion That Whether Disparate Impact Claims Are Actionable Under a Civil Rights Statute Turns Exclusively On a Search For Particular Words In the Statute's Text**

In *City of Jackson*, the Supreme Court held that the ADEA *does permit* disparate impact claims. Defendants nonetheless contend that, because of *City of Jackson*, this Court should reject the Fourth Circuit's repeated holdings (and those of ten other Circuits) that disparate impact claims may be brought under the FHA.

Defendants assert that *City of Jackson* somehow changed the rationale supporting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), in which the Supreme Court held that Title VII allows disparate impact claims. Despite the clear reliance on Congressional purpose in *Griggs*, *see id.* at 429-30, that decision now rests, in Defendants' view, solely on the presence of particular words in the text of Title VII, and not to any degree on the purpose of Title VII or anything else. This means, Defendants continue, that disparate impact claims may not be brought under an anti-discrimination statute unless its language is identical to the language of Title VII. They conclude that, because the language of Title VII and the FHA is not identical, Baltimore cannot state a disparate impact claim under the FHA.

Specifically, Defendants assert that *City of Jackson* means that whether a civil rights statute

allows for a disparate impact claim rests only on a formalistic search for the words "otherwise adversely affect" or nearly identical words. Defs.' Br. at 24-29. They contend that the Supreme Court in *City of Jackson* repudiated its reliance in *Griggs* on anything but a statute's text, read mechanically, in addressing this issue. This, Defendants claim, means that the analogy to Title VII and consideration of congressional purpose in addressing the issue under the FHA are impermissible after *City of Jackson*.

Defendants entirely misconstrue *City of Jackson*. Though the Court was sharply divided as to the result, the analytical approaches of every Justice across three opinions were much broader and comprehensive than Defendants assert. Every Justice relied on:

- the legislative history of the ADEA, *see id.* at 232-33 (Majority); *id.* at 238 (Plurality Plus); *id.* at 248, 253-56 (O'Connor, J.)[16];
- the purpose of the ADEA, including its comparison to the purpose of Title VII, *see id.* at 234, 235 n.5 (Plurality Plus); *id.* at 248, 256-57, 258-59, 262 (O'Connor, J.);
- the text of the ADEA's provision, § 623(a), assertedly providing a disparate impact cause of action, *see id.* at 233 (Majority); *id.* at 235-36 & n.6, 240 (Plurality Plus); *id.* at 248-51 (O'Connor, J.);
- the text of another provision of the ADEA, § 623(f) (the "RFOA" provision), that influenced how § 623(a) should be construed, *see id.* at 233, 240 (Majority); *id.* at 238-39, 240 (Plurality Plus); *id.* at 245-46 (Scalia, J.); *id.* at 251-53, 261, 265-67 (O'Connor, J.); and
- the nature of discrimination based on age as compared to discrimination based on race and other classes protected under Title VII,[17] *id.* at 240-41 (Majority); *id.* at 236 n.7

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[16] The sections of Justice Stevens's opinion that garnered five votes (sections I, II, and IV) are referred to as "Majority." The section of Justice Stevens's opinion that garnered four votes (section III) is referred to as "Plurality Plus" because Justice Scalia "agree[d] with all of the Court's reasoning" in that section, though he did not join it. 544 U.S. 243. Justice Scalia's opinion is referred to as "Scalia, J." Justice O'Connor's opinion, joined by Justices Kennedy and Thomas, is referred to as "O'Connor, J." Chief Justice Rehnquist did not take part in the decision of the case.

[17] The majority explained that "age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. . . . Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII." 544 U.S. at 240-41. Justice O'Connor insisted that these distinctions underlay different Congressional purposes in enacting the ADEA and Title VII, and therefore required the Court to treat them differently with respect to disparate impact claims. *See id.* at 258-59

(Plurality Plus); *id.* at 254-55, 258-59, 261 (O'Connor, J.).

A majority of the Court also relied on and accorded deference to the administrative construction of the ADEA, which endorsed disparate impact claims. *See id.* at 239-40 (Plurality Plus); *id.* at 243-45 (Scalia, J.). In fact, the only reason Justice Scalia did not join Part III of Justice Stevens's opinion was his belief that, though that part was reasoned correctly, the Court should simply rest its decision on deference to the EEOC under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). *See id.* at 243 (Scalia, J.).

The Supreme Court's reliance on the ADEA's purpose is particularly notable because it clearly reveals the fallacy of Wells Fargo's central thesis – that *City of Jackson* signals the Court's rejection of its own reliance in *Griggs* on Title VII's purpose as support for that statute's application to disparate impact claims. To the contrary, the purpose of the ADEA was of central importance even to the Justices who disagreed with applying the ADEA to disparate impact, Justices O'Connor, Kennedy, and Thomas:

> In other words, the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, and it therefore should not control our decision here. Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent.

Id. at 262 (O'Connor, J.) (citation omitted). Justice Stevens's opinion likewise placed great emphasis on Congressional purpose by discussing at length the purpose of the ADEA as revealed by its legislative history. *See id.* at 232-33, 235 n.5. He also made clear that *Griggs* is supported by *both* the purpose and text of Title VII, and that Supreme Court precedent discussing the text complements, without replacing, the emphasis on purpose in *Griggs*. *See id.* at 235.

The factors considered in *City of Jackson* to determine whether the ADEA permits disparate impact causes of action were, therefore, much broader than Defendants acknowledge. In addition to the

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("disparate impact liability under the ADEA cannot be justified, and is not necessary, as a means of redressing the cumulative results of past discrimination").

statute's text, they include its legislative history and purpose, the text of related statutory provisions, the type of discrimination at issue (*e.g.*, race, age), and the administrative construction of the statute.[18] These factors are also the foundation for prior Supreme Court cases considering the question pursuant to other civil rights statutes. *See Chisom v. Roemer*, 501 U.S. 380, 383, 393 (1991) (examining Voting Rights Act's broad preamble and legislative purpose); *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985) (examining Rehabilitation Act's legislative history and purpose, agency interpretation, and consensus among appellate courts); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 386-391 (1982) (examining 42 U.S.C. § 1981's legislative history and purpose); *Griggs*, 401 U.S. at 429-30 (examining Title VII's purpose). They are, of course, familiar tools in the exercise of statutory construction generally. Defendants' insistence that nothing matters but a narrow search for particular words, on the other hand, is demonstrably inadequate.

C. Each Factor That the Supreme Court Has Consistently Relied On In Considering Disparate Impact Claims – Legislative History and Purpose, Subsequent Congressional Action, Statutory Text, and Administrative Construction – Demonstrates That the Circuit Courts Have Properly Concluded That Disparate Impact Claims May Be Brought Under the FHA

The factors relied on by the Supreme Court, including most recently in *City of Jackson*, are the same factors upon which the Fourth Circuit and ten other Circuit Courts have relied in finding a disparate impact cause of action under the FHA. The consistent use of these factors by the Supreme Court to determine the availability of a disparate impact claim confirms that the Circuit Courts have properly analyzed this question under the FHA. As shown in this section, an analysis of each factor

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[18] Justice O'Connor (joined by Justices Kennedy and Thomas) added in *City of Jackson* that "we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims" if "*Griggs* had been decided *before* the ADEA was enacted." 544 U.S. at 259 (emphasis in original). Before the FHA was amended in 1988, as explained below, eight federal appellate courts had held that the FHA applies to disparate impact claims. Because the amendments maintained the operative language of 42 U.S.C. §§ 3604 and 3605 and even extended it to handicap and familial status, Justice O'Connor's analysis supports crediting Congress with the intention that the consistent judicial construction of the Act would continue to govern. *See* section III.C.2, *infra*.

leads to the same conclusion – that Baltimore may bring a disparate impact claim under the FHA.

1. The Legislative History of the Fair Housing Act Demonstrates That Disparate Impact Claims Are Cognizable

Congress adopted the Fair Housing Act in the wake of the highly publicized report by the National Advisory Commission on Civil Disorders, which warned that the "Nation is moving toward two societies, one black, one white – separate and unequal." *See Report of the Nat'l Advisory Comm'n on Civil Disorders* 1, 13 (1968). Proponents of the FHA emphasized that the facially neutral practices of private and public actors were a principal cause of residential segregation, which the Act aimed to eliminate.[19] One of the Act's leading supporters, Senator Brooke, noted that African Americans could not move to better neighborhoods because they were "surrounded by a pattern of discrimination based on individual prejudice, often *institutionalized* by business and industry, and Government *practices*." 114 Cong. Rec. 2526 (1968) (emphases added). Senator Mondale, the Act's principal sponsor, explained that after the Supreme Court prohibited explicitly racial zoning laws in 1917, "[l]ocal ordinances *with the same effect*, although operating more deviously in an attempt to avoid the Court's prohibition, were still being enacted." *Id.* at 2669 (emphasis added).

Proponents of the FHA plainly intended to eliminate these causes of residential segregation. Senator Mondale stated that it "seems only fair, and is constitutional, that Congress should now pass a fair housing act to undo *the effects*" of past discriminatory governmental actions. *Id.* (emphasis added). Because Congress was undoubtedly empowered to proscribe intentional governmental discrimination, Senator Mondale would have had no reason to comment on the Act's constitutionality unless it aimed at the discriminatory effects of facially neutral laws and practices. While this statement focused on public

[19] Marking the fortieth anniversary of the Fair Housing Act, the House of Representatives recently confirmed that the Act aimed "to advance equal opportunity in housing and achieve racial integration . . . ." H.R. Res. 1095, 110th Cong. (2008) (enacted), *available at* 154 Cong. Rec. H2280-01, 2008 WL 1733432 (Apr. 15, 2008).

actors, there is no indication in the Act's text or history that Congress intended to treat facially neutral private and public acts differently. *See Nat'l Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 59 n.7 (D.D.C. 2002) ("*Prudential*").

The Act's legislative history also demonstrates that Congress was aware of the difficulty of proving discriminatory intent and, because of that difficulty, allowed other forms of proof. Senator Baker introduced an amendment that would have exempted from liability any homeowner who engaged a real estate agent "without indicating any preference, limitation or discrimination based on race . . . ., or an intention to make any such preference, limitation or discrimination." 114 Cong. Rec. at 5214. That is, it would have made those homeowners liable only if they intentionally discriminated. A number of the bill's supporters objected that the amendment would undermine Congress's purpose by making proof of discrimination difficult in all but the most blatant cases. Senator Dominick argued that the amendment would "increase[] the opportunity for discrimination," *id.* at 5220, and Senator Percy stated that the amendment "would require proof that the single homeowner had specified racial preference. I maintain that proof would be impossible to produce." *Id.* at 5216; *see also id.* at 5218, 5220-21 (remarks of Senators Mondale and Hart regarding the difficulty of proving discriminatory intent). Because of these concerns, the Baker amendment was defeated. *See id.* at 5221-22.

In short, the FHA's sponsors clearly recognized that residential segregation stemmed in part from ostensibly neutral private and public practices and they sought to undo the effects of those practices. Together with the widespread recognition that evidence of overt discrimination would often be difficult to uncover, this confirms that Congress intended to provide a disparate impact cause of action under the FHA. The contrary conclusion would effectively condemn Congress as having adopted a measure manifestly incapable of achieving its intended aims.

2. Congress Endorsed the Application of the Act to Disparate Impact Claims In the Fair Housing Amendments Act of 1988

When it passed the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) ("FHAA"), Congress used the same language the FHA already applied to race, color, religion, sex, and national origin to add new prohibitions against discrimination because of familial status or handicap. *See id.* § 6(a), (b). *Compare* 42 U.S.C. § 3604(a), (b) *with id.* § 3604(f)(1), (2). Prior to the FHAA, all eight of the Circuit Courts to address the issue had concluded that the FHA includes a disparate impact cause of action. It is presumed that Congress "adopt[s prior judicial] interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (citations omitted). This presumption is especially strong here because the legislative history of the FHAA shows that Congress agreed with the Circuit Courts.

Congress's actual knowledge of the Circuit Courts' decisions is evident from the House Report on the FHAA and Senate hearings. The House Report explicitly cited the Fourth Circuit's decision in *Turtle Creek* and a Ninth Circuit decision: "[b]ecause minority households tend to be larger and exclusion of children often has a racially discriminatory *effect*, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under title VIII." H.R. Rep. No. 100-711, at 21 (1988) (emphasis added). The Report also discusses the Second Circuit's *Huntington* decision permitting disparate impact claims. *See id.* at 90; *see also Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 100th Cong. 529-557 (1987) (testimony and statement of Robert Schwemm) (discussing "strong consensus" in Circuit Courts).

Congressional approval of these decisions is demonstrated by the House's rejection of an amendment mandating that "a zoning decision is not a violation of the Fair Housing Act unless the

decision was made with the *intent* to discriminate on the basis of race or other prohibited criteria under the Act." H.R. Rep. No. 100-711, at 89 (emphasis added). The explicit purpose of the amendment was to eliminate the disparate impact standard approved by the Fourth Circuit and other courts in favor of an intent requirement. *See id.* 89-93. The House Judiciary Committee rejected it. *See id.* at 89.

The House likewise made clear that it intended disparate impact analysis to apply to the new protected class of handicap:

> The Committee understands that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. *Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination.* A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying "No Handicapped People Allowed."

Id. at 25 (1988) (emphasis added). By using the FHA's original language to accomplish its goal of reaching acts with a disparate impact based on handicap, the Committee demonstrated its agreement with the Circuit Courts' holdings that the original language reaches disparate impact.

In addition, the day after the FHAA was signed into law, its principal sponsor, Senator Kennedy, made clear that "Congress accepted th[e] consistent judicial interpretation" "of the [] Federal courts of appeals" that the FHA "prohibit[s] acts that have discriminatory effects, and that there is no need to prove discriminatory intent." 134 Cong. Rec. 23711-12 (1988).

3. The Text of the Fair Housing Act Compels the Conclusion That Disparate Impact Claims Are Cognizable

Baltimore brings this action under four FHA provisions, 42 U.S.C. §§ 3604(a), (b), (c) and 3605.[20] As an initial matter, it is important to note that the text of these provisions does not explicitly

[20] Defendants cite the text of § 3605 but not § 3604, *see* Defs.' Br. at 26, even though they also address the FHA broadly, *see id.* at 23, 29. Baltimore addresses the language of both sections, and demonstrates that each supports a disparate impact cause of action.

state that disparate impact claims are or are not cognizable. Any suggestion by Defendants that the plain language of the statute, viewed in isolation, definitively answers the question under consideration is therefore mistaken. However, the text of each may properly be interpreted as permitting disparate impact causes of action. Another provision, § 3601, mandates that this is therefore the only permissible interpretation because it is the broader one. There are key textual differences between these FHA provisions and the ADEA provisions considered in *City of Jackson*. Defendants ignore these differences, but they demonstrate that *City of Jackson*'s understanding of the ADEA's text is consistent with holding Wells Fargo liable under the FHA based on the disparate impact of its policies.

Under 42 U.S.C. § 3604, it is unlawful:

> (a) 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.
>
> (b) To discriminate 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.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

Under 42 U.S.C. § 3605:

> It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.

The "any person," "because of," and "based on" constructions fit with a disparate impact claim because they do not focus on a particular individual.

The Supreme Court explained in *City of Jackson* that an explicit focus on a particular individual

is the reason why one part of the ADEA, 29 U.S.C. § 623(a)(1), is inconsistent with disparate impact liability. *See* 544 U.S. at 236 n.6. Contrary to Wells Fargo's claim that the language of the FHA "mirrors" the language of that part of the ADEA, Defs.' Br. at 25, it does not. The key words in the ADEA emphasized by the *City of Jackson* Court – "*any individual*" and "because of *such individual's*" – are not found in the FHA. 544 U.S. at 236 n.6 (emphases in original). The FHA uses "any person" instead of the ADEA's "any individual," and defines "person" to include, *inter alia*, "one or more individuals." 42 U.S.C. § 3602(d). Similarly, the FHA has no parallel to the ADEA's "such individual's" phrase. The FHA's use of the plural makes it more akin to the section of the ADEA that *City of Jackson* found does allow disparate impact claims, 29 U.S.C. § 623(a)(2), because that section of the ADEA uses the plural term "employees."

The FHA thus reflects a general concern with all people, not just a particular individual. Accordingly, even if the language of sections 3604 and 3605 does not unambiguously allow disparate impact claims, that interpretation is at least a reasonable one. *See, e.g.*, *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977) ("*Arlington Heights II*") (explaining the "broad" and "narrow" views of the Act); *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49 (1st Cir. 2000). Section 3601 mandates that, between two reasonable interpretations of the FHA, the one which provides a broader application of the Act to more activities is correct. 42 U.S.C. § 3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."). Wells Fargo ignores section 3601, which has no parallel in the ADEA.[21] The interpretive rule reflected in section 3601 is precisely why the Supreme Court has held that prudential requirements for standing do not apply under the FHA. *See, e.g.*, *Havens*, 455 U.S. at 372. Here, section 3601 requires

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[21] *Compare* 42 U.S.C. § 3601 *with* 29 U.S.C. § 621(b) (ADEA statement of purpose).

the Act's application to disparate impact claims because this construction is permitted by sections 3604 and 3605 and, in light of the Supreme Court's unanimous approval of disparate impact claims under Title VII more than thirty-five years ago in *Griggs*, is plainly constitutional.

4. Administrative Implementation of the Fair Housing Act Supports a Disparate Impact Standard

The various agencies charged with implementing and administering the FHA have embraced the use of disparate impact analysis. Most significantly, the Secretary of HUD, who has "[t]he authority and responsibility for administering th[e] Act," 42 U.S.C. § 3608(a), has endorsed disparate impact. *See HUD v. Mountain Side Mobile Estates*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,053, 1993 WL 307069, at *5 (HUD Sec'y 1993). Even if the statute itself did not resolve the issue of whether disparate impact is a valid basis of liability, the Secretary's administrative construction adopted through adjudication is entitled to the highest degree of *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 230-31 & n.12 (2001).[22] HUD has also asserted in litigation that the FHA permits a disparate impact cause of action. *See Pfaff v. HUD*, 88 F.3d 739, 745 (9th Cir. 1996) (describing HUD's position); *Mountain Side*, 56 F.3d at 1250 (same). This expression of HUD's position is also entitled to great deference. *See City of Jackson*, 544 U.S. at 244-45 (Scalia, J., concurring).

In addition, HUD's Assistant Secretary for Fair Housing and Equal Opportunity has told Congress that "[t]he standards to determine discrimination [in home insurance under the FHA] – as in all other covered areas – will be based on the principles of overt discrimination, disparate treatment, and disparate impact." *See Homeowners Ins. Discrimination: Hearing Before the Sen. Comm. on Banking, Housing, & Urban Affairs*, 103d Cong. 52 (1994) (statement of Roberta Achtenberg). Similarly, HUD's

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[22] This conclusion is not altered by the Tenth Circuit's reversal of this decision on other grounds in *Mountain Side*. In fact, the Tenth Circuit expressly endorsed the Secretary's view that the FHA includes a disparate impact cause of action. *Mountain Side Mobile Estates P'ship v. Sec'y of HUD*, 56 F.3d 1243, 1250-51 (10th Cir. 1995) ("*Mountain Side*").

FHA enforcement handbook endorses disparate impact theory.[23] Thus, even if *Chevron* deference did not apply to the Secretary's interpretation, HUD's view of the FHA reflected in these pronouncements is firmly rooted in the statutory framework and entitled to *Skidmore* deference, *i.e.*, deference based on HUD's "specialized experience" and "the value of uniformity." *See Mead*, 533 U.S. at 234-35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139, 140 (1944)) (internal quotation marks omitted).

Other agencies have also interpreted the FHA to permit a disparate impact cause of action. As part of its enforcement responsibilities under the Act, *see, e.g.*, 42 U.S.C. §§ 3610(g)(2)(C), 3614, the Department of Justice ("DOJ") has successfully urged the courts to adopt an impact standard. It has done so both on behalf of HUD in 1995 and 1996, *see Mountain Side* and *Pfaff*, and on behalf of the United States in 1974, *see United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974). In 1994, HUD, DOJ, the Federal Reserve Board, and seven other federal agencies that regulate financial institutions adopted a joint "Policy Statement on Discrimination in Lending" recognizing that proof of disparate impact is sufficient to establish a violation of the FHA. *See* 59 Fed. Reg. 18266, 18269-70 (Apr. 15, 1994).[24] Although these other agencies lack the interstitial lawmaking power delegated to the Secretary of HUD, their views are also entitled to *Skidmore* deference, and confirm the propriety of the Secretary's determination that a disparate impact cause of action is actionable under the FHA.

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[23] *See* HUD, No. 8024.01, *Title VIII Complaint Intake, Investigation & Conciliation Handbook*, 2-27 (REV-2 2005) (available at http://www.hudclips.org/sub_nonhud/cgi/selecthbk.cgi (select "search" and 8024.01)) ("a respondent may be held liable for violating the Fair Housing Act even if his action against the complainant was not even partly motivated by illegal considerations"); *id.* at 2-28 ("even in cases where there is absolutely no evidence of discriminatory intent, a discriminatory impact claim may result in a finding of liability").

[24] Wells Fargo's citation to a 1988 brief plainly fails to accurately reflect the position of the Department of Justice since, at the least, 1994. *See* Defs.' Br. at 29 & n.9.

5. Relying On These Factors, the Fourth Circuit and the Ten Other Circuits to Address the Issue Have Held That the Fair Housing Act Allows Disparate Impact Claims

The Fourth Circuit has repeatedly held that the FHA provides for a disparate impact cause of action. *See Edwards*, 885 F. 2d at 1223 ("A facially neutral housing-related policy may . . . violate Title VIII if it has a disproportionate adverse impact on minorities."); *Turtle Creek Assocs.*, 736 F.2d at 986 (FHA violation may be found where practice "is shown to have a disproportionate adverse impact on minorities"); *Town of Clarkton*, 682 F.2d at 1065 (agreeing with Third, Seventh, and Eighth Circuits that "[p]roof of a discriminatory effect is . . . sufficient to prove a violation of" the FHA). The other ten United States Circuit Courts of Appeals to address the issue agree unanimously. *See, e.g.*, *Langlois*, 207 F.3d at 49 (1st Cir.); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934-35 (2d Cir.) ("*Huntington*"), *aff'd per curiam*, 488 U.S. 15 (1988); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977); *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); *Arlington Heights II*, 558 F.2d at 1288-90 (7th Cir.); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974); *Pfaff*, 88 F.3d at 745-46 (9th Cir.); *Mountain Side*, 56 F.3d at 1250-52 (10th Cir.); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1543 (11th Cir. 1994).[25] The Court would now have to usurp the prerogative of the Fourth Circuit and reject every one of these other precedents to rule in Defendants' favor.

The Circuit Courts' grounds for finding the FHA applicable to disparate impact claims are broad and mirror those relied on in *City of Jackson*. Their decisions reflect and often rely on the Supreme Court's instruction that the Act must be given a "generous construction" in light of its "broad and

[25] The D.C. Circuit recently "assume[d] without deciding that [plaintiffs] may bring a disparate impact claim under the FHA." *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673, 679 (D.C. Cir. 2006). The court recognized that the First through Eleventh Circuits have "held that the FHA . . . prohibits not only intentional housing discrimination, but also housing actions having a disparate impact." *Id.* (citation omitted). The United States District Court for the District of Columbia recognizes a district impact claim under the FHA. *See Prudential*, 208 F. Supp. 2d at 58-60.

inclusive" "language." *Trafficante*, 409 U.S. at 209, 212; *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995); *see also Havens*, 455 U.S. at 380 (rejecting an interpretation that would "undermine[] the broad remedial intent of Congress embodied in the Act"). These requirements would be contradicted by failing to permit disparate impact claims under the FHA. *See, e.g.*, *Huntington*, 844 F.2d at 935 (relying in part on *Trafficante* in holding disparate impact actionable); *Arlington Heights II*, 558 F.2d at 1289-90 (same).

The Circuit Courts also emphasize that the legislative history, as discussed above, demonstrates that recognizing disparate impact claims advances Congress's purpose. The Second Circuit explained that Congress's rejection of the Baker amendment "underscore[s] congressional willingness to broaden Title VIII to encompass segregation resulting from the application of facially neutral rules, even in the absence of discriminatory intent." *Huntington*, 844 F.2d at 934-35. The Third Circuit agreed. *See Rizzo*, 564 F.2d at 147. Citing leading proponents Senators Mondale and Brooke, the Third Circuit also emphasized that "several Congressmen spoke of the importance of [the FHA] in eliminating the adverse discriminatory effects of past and present prejudice in housing." *Id.* at 147 & n.30. These analyses parallel the Supreme Court's analysis of the FHA in *Gladstone*, which showed by example that the Act's legislative history is important to its construction. *See* 441 U.S. at 105 (support from Act's legislative history is "substantial"). In considering remedies under the FHA, the Fourth Circuit likewise quoted Senator Mondale's statement that the Act aims to replace "the ghettos by truly integrated and balanced living patterns." *Town of Clarkton*, 682 F.2d at 1068 (citations, ellipsis omitted).

The Circuit Courts have also looked to Title VII jurisprudence because, as the Fourth Circuit put it, "the anti-discrimination objectives of [the FHA] are parallel to the goals of Title VII . . . ." *Town of Clarkton*, 682 F.2d at 1065; *see also Turtle Creek Assocs.*, 736 F.2d at 987 (objectives of Title VII and

Title VIII" are "parallel") (citations omitted); *Huntington*, 844 F.2d at 935. This plainly is correct. "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees," *Griggs*, 401 U.S. at 429-30, and the FHA's objective was just as far-reaching: "Congress was aware that the measure would have a very broad reach, and indeed the legislation was seen as an attempt to alter the whole character of the housing market." *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (*en banc*) (Wilkey, McGowan, & Leventhal, JJ., concurring). In light of the statutes' close relationship, the Supreme Court has looked to its interpretation of Title VII to give meaning to provisions of the FHA. For example, in *Trafficante*, the Court interpreted the phrase "person aggrieved" in the FHA by citing a case that construed a similar phrase in Title VII. 409 U.S. at 208-09; *cf. General Bldg.*, 458 U.S. at 389-90 (14th Amendment's discriminatory purpose standard controls claims under the 1866 Civil Rights Act because the laws are "legislative cousins" and it would be "incongruous to construe" them in a "markedly different" manner). Following the Supreme Court's example, many courts have relied in part on the availability of a disparate impact claim under Title VII and *Griggs* in holding that one is also permitted under the FHA. *See, e.g.*, *Town of Clarkton*, 682 F.2d at 1065; *Huntington*, 844 F.2d at 934-36; *Rizzo*, 564 F.2d at 146; *Mountain Side*, 56 F.3d at 1250-51 & n.7.

Setting their holdings on still another foundation, the Circuit Courts have also found that the FHA reaches disparate impact claims because of the difficulty of proving intent in many cases, and the invidiousness of the effects of many practices even where that proof cannot be made. This was precisely the rationale offered by the Act's supporters in opposition to the Baker amendment – requiring proof of intent would eviscerate the Act. The Seventh Circuit explained:

> Conduct that has the necessary and foreseeable consequence of perpetuating segregation can be as deleterious as purposefully discriminatory conduct in frustrating the national commitment "to replace the ghettos by 'truly integrated and balanced living patterns.'" Moreover, a requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy.

Arlington Heights II, 558 F.2d at 1289-90 (quoting *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (Sen. Mondale))). The Second Circuit similarly explained that "clever men may easily conceal their motivations," and that "[o]ften, [facially neutral] rules bear no relation to discrimination upon passage, but develop into powerful discriminatory mechanisms when applied." *Huntington*, 844 F.2d at 935; *see also id.* at 934 ("an intent requirement would strip the statute of all impact on de facto segregation"); *City of Black Jack*, 508 F.2d at 1185.

Finally, the nation's courts have of course also relied on the text of the FHA to support their conclusion that the Act permits disparate impact claims. Notably, courts emphasize two different components of the Act. First is the Act's own statement of its exceptional breadth: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601. *See Huntington*, 844 F.2d at 928, 934 (relying in part on § 3601 in holding disparate impact actionable); *Arlington Heights II*, 558 F.2d at 1289-90 (same); *City of Black Jack*, 508 F.2d at 1184 (same); *see also Town of Clarkton*, 682 F.2d at 1068 (relying on § 3601 to reject defendant's leading objection to broad scope of trial court's remedial order). Second, courts have considered the language of 42 U.S.C. § 3604, which enumerates some of the particular practices prohibited by the Act. They have found that this language is ambiguous as to whether it reaches disparate impact claims because, as the Seventh Circuit put it, it is subject to both a "narrow view" and a "broad view." *Arlington Heights II*, 558 F.2d at 1288; *see also, e.g.*, *Langlois*, 207 F.3d at 49 (text "*could* be thought to refer simply to intentional discrimination") (emphasis added). In light of the many

factors that courts have found to favor allowing disparate treatment claims under the FHA, they have adopted the broad view. *See, e.g.*, *Arlington Heights II*, 558 F.2d at 1289 ("we decline to take a narrow view of the phrase 'because of race'").

In sum, the First through the Eleventh Circuits, including the Fourth, are in unanimous agreement that the FHA permits disparate impact claims. These courts' analyses, grounded on Supreme Court rules of FHA construction, legislative history, purpose, analogy to Title VII, issues of proof, and the Act's text, are multifaceted, consistent, and in accordance with *City of Jackson*'s analysis of the parallel question under the ADEA. The precedents across the nation are overwhelming.

D. Post-*City of Jackson* Cases Continue to Hold That Disparate Impact Claims Are Cognizable Under the Fair Housing Act

Given the broad foundation of the Circuit Courts' holdings that the FHA allows disparate impact claims and Defendants' inaccurate representation of *City of Jackson*, it is not surprising that the same argument Defendants make here has been rejected repeatedly by other courts. Lenders in at least four cases have asked courts to overturn precedent and hold that, because of *City of Jackson*, disparate impact claims are no longer cognizable under the Fair Housing Act. Each court has explicitly rejected that proposition. *See Ramirez v. GreenPoint Mortgage Funding, Inc.*, No. C08-0369, 2008 WL 2051018, at *3-4 (N.D. Cal. May 13, 2008); *Zamudio v. HSBC N. Am. Holdings Inc.*, No. 07-C-4315, 2008 WL 517138, at *2 (N.D. Ill. Feb. 20, 2008); *Garcia v. Country Wide Fin. Corp.*, No. 07-1161-VAP, slip op. at 7-11 (C.D. Cal. Jan. 17, 2008) (*see* App. Cases Not Generally Reported); *Beaulialice v. Fed. Home Loan Mortgage Corp.*, No. 8:04-CV-2316-T-24-EAJ, 2007 WL 744646, at *4 (M.D. Fla. Mar. 6, 2007).

In addition, after *City of Jackson*, at least six federal appellate opinions have held yet again, though without citing *City of Jackson*, that the FHA permits disparate impact claims. *See Cox v. City of Dallas*, 430 F.3d 734, 746 (5th Cir. 2005); *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729,

740-41 (8th Cir. 2005); *Darst-Webbe Tenant Ass'n v. St. Louis Hous. Auth.*, 417 F.3d 898, 902 (8th Cir. 2005); *Affordable Hous. Dev. Corp. v. City of Fresno*, 433 F.3d 1182, 1194 (9th Cir. 2006); *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229 (10th Cir. 2007); *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1286 (11th Cir. 2006). These opinions implicitly reject Defendants' notion that decades of consistent decisions from eleven Circuits were rejected *sub silentio* in *City of Jackson.* To the contrary, these recent decisions reaffirm what is essentially, and with good reason, settled law.

IV. BALTIMORE PROPERLY STATES A DISPARATE IMPACT CLAIM UNDER THE FAIR HOUSING ACT

Baltimore properly states a claim that Wells Fargo's predatory practices, even if not motivated by race, have a disparate impact on African Americans. Wells Fargo's assertion that the complaint does not state a claim because it does not adequately allege (1) a disparate impact or (2) a causal connection between the challenged practices and a disparate impact, *see* Defs.' Br. at 30-40, fails for several reasons. First, Defendants rely on a heightened standard of review that is not appropriate at the pleading stage. Second, they misconstrue the nature of a disparate impact claim. Third, they ignore the allegations of the complaint in favor of their own, often contrary assertions of fact. Finally, they repeat the same flawed causation assertions they make with respect to Article III standing.

A. Baltimore Properly Alleges a Disparate Impact On African Americans

1. Defendants Seek to Invoke a Heightened Standard of Review That Is Only Appropriate For Post-Discovery Motions

In asserting that Baltimore does not adequately allege the existence of a disparate impact on African Americans, Wells Fargo fails to recognize the very limited standard of review applicable here. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Supreme Court rejected the proposition that a heightened pleading requirement applies to discrimination claims. Specifically, it held that a

discrimination complaint does not need to contain "specific facts establishing a prima facie case of discrimination," but instead need only provide "fair notice of the basis for [the plaintiff's] claims" consistent with Fed. R. Civ. P. 8(a)(2). *Id.* at 508, 514. The Court held that discovery and summary judgment, not a heightened pleading standard, serve to define and narrow the issues. *See id.* at 512. *Twombly* reaffirmed *Swierkiewicz* in the course of holding that the basis for the claim set forth in the complaint must be plausible. *See* 127 S. Ct. at 1973-74.

Defendants would nonetheless have the Court hold Baltimore's complaint to a standard of review that is appropriate only for post-discovery motions. Indeed, their brief reads more like an attack on an expert report than a motion to dismiss. That attack is undermined not only by *Swierkiewicz* and *Twombly*, but also by the very authorities on which Wells Fargo relies. Tellingly, of the fourteen discrimination cases Wells Fargo cites in this portion of its brief, *see* Defs.' Br. at 30-37, only two address Rule 12(b)(6) motions.[26] One of those two considered a practice that, as alleged, affected whites and non-whites in exactly the same way. *See Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1223-24 (4th Cir. 1989).[27] That case is inapposite because Baltimore alleges that Wells Fargo's predatory lending practices do, in fact, impact African Americans more severely than similarly situated

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[26] Seven are post-trial decisions and five are summary judgment decisions, all relying on standards of review appropriate to those stages of a case. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (post-trial), *superseded by statute*, Civil Rights Act of 1991, § 105, 105 Stat. 1074-75; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (same); *Walther v. Lone Star Gas Co.*, 977 F.2d 161 (5th Cir. 1992) (same); *EEOC v. Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978) (same); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475 (9th Cir. 1983) (same); *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia*, 444 F.3d 673 (D.C. Cir. 2006) (same); *Donnelly v. Rhode Island Bd. of Governors for Higher Education*, 929 F. Supp. 583 (D.R.I. 1996) (same), *aff'd* 110 F.3d 2 (1st Cir. 1997); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (summary judgment); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) (same); *Paige v. California*, 291 F.3d 1141 (9th Cir. 2002) (same); *Johnson v. County of Nassau*, 480 F. Supp. 2d 581 (E.D.N.Y. 2007) (same); *Hargraves v. Capital City Mortgage Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000) (same). Moreover, two (*Walther* and *Johnson*) concern intentional discrimination, not disparate impact. Defendants also cite *Twombly*, an antitrust case.

[27] The alleged practice was issuing permits allowing substandard housing to be used for migrant farmworkers. *See id.* at 1217. The court explained that whites and non-whites living in the housing would be affected to exactly the same degree, and so any statistical disparity was due to the overall makeup of the migrant farmworker population, not the challenged practice. *See id.* at 1223-24. This kind of "[e]qual adverse impact on white and non-white" cannot state a disparate impact claim. *Id.* at 1224.

whites. *See, e.g.*, Compl. ¶¶ 35-40. Defendants' other Rule 12(b)(6) case applied the Second Circuit's heightened pleading standard that the Supreme Court specifically rejected a year later in *Swierkiewicz. See Collette v. St. Luke's Roosevelt Hospital*, 132 F. Supp. 2d 256, 276-78 (S.D.N.Y. 2001) (dismissing for failing to allege prima facie elements). Accordingly, Wells Fargo's overarching assertion that the complaint lacks the "specificity" to state a disparate impact claim, based on summary judgment and post-trial cases, reflects the wrong standard of review. Defs.' Br. at 30; *see id.* at 31 ("complaint fails to specifically allege a disparate impact as to a particular protected class"); *see id.* at 32 (relying on two post-trial cases in asserting that Baltimore's statistical allegations are not "adequate").

The proper inquiry is instead whether the complaint gives Wells Fargo fair notice of the nature of a plausible disparate impact claim. *See, e.g.*, *Swierkiewicz*, 534 U.S. at 514. The complaint does so, in abundance, by enumerating particular lending practices and alleging that these practices have a disproportionately negative impact and are responsible for the disproportionately high rate of foreclosure on African Americans and residents of African-American communities (who are, by the nature of that identification, mostly African American). *See, e.g.* Compl. ¶¶ 26, 36-60. The complaint alleges, for example, that 8.2% of Wells Fargo's loans in neighborhoods that are 60% or more African-American result in foreclosure, but that the same is true for only 2.1% of its loans in neighborhoods that are 60% or more white. *See id.* ¶ 39; *see also id.* at 36-38 (discussing statistics that further demonstrate the concentration of Wells Fargo foreclosures in African-American neighborhoods since at least 2000). In 2005 and 2006, two-thirds of Defendants' foreclosures were in neighborhoods that are 60% or more African-American, but only 15.6% were in neighborhoods that are less than 20% African-American. *See id.* ¶¶ 3, 37. Wells Fargo increases the interest rate on loans that are less than $75,000, which are nearly twice as likely to be in African-American than in white neighborhoods, while decreasing the rate

for loans above $150,000, which are nearly six times as likely to be in white neighborhoods. *See id.* ¶¶ 50-52. In 2006, Wells Fargo made high-cost loans to 65% of its African-American mortgage customers in Baltimore, but to only 15% of its white customers. *See id.* ¶ 47.

Through discovery, Baltimore might obtain additional statistical proof in support of its disparate impact claim and might choose to present that evidence at trial, but at the pleading stage it does not have to allege the existence of every fact that it might ultimately present to a jury. Certainly, Baltimore does not have to allege the content of any expert statistical analysis of information that, in large part, has yet to be obtained through discovery.[28] Wells Fargo's contrary suggestion is groundless.

2. <u>Wells Fargo Misconstrues What It Means to Show a Disparate Impact</u>

Defendants also attack the adequacy of the complaint's statistical allegations demonstrating a disparate impact on the ground that the complaint compares the impact of Wells Fargo's practices on foreclosure rates in neighborhoods that are, respectively, at least 80% African-American and no more than 20% African-American. *See* Defs.' Br. at 33-34. Defendants claim that statistics are invalid unless they account for every white and African-American resident of Baltimore and do so individually, not based on neighborhood.[29] *See id.* Defendants' argument fails for two reasons.

First, to prevail on a disparate impact claim, a plaintiff need not show that all members or only members of the protected class are harmed by the challenged practice. *See, e.g.*, *Turtle Creek Assocs.*, 736 F.2d at 988 (prima facie case established where 74.9% of minority population was affected, but only

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[28] For example, at this stage, Baltimore cannot even identify all of the loans in Baltimore that have been foreclosed on that were originated by Defendants because foreclosure records do not always indicate the original lender. *See* Compl. ¶ 38.

[29] In a motion to dismiss in another case, Wells Fargo's attorneys, Mr. Sandler and Mr. Klubes, made the same argument about statistics "fail[ing] to adequately represent the entire population." Decl., Ex. 5 at 20-22 (Mot. to Dismiss, *Nat'l Fair Housing Alliance, Inc. v. Prudential Ins. Co. of Am.*, No. 1:01-cv-02199 (D.D.C. Dec. 20, 2001)). The argument was rejected. *See Prudential*, 208 F. Supp. 2d at 60-61 ("plaintiffs have alleged more than adequate facts to support their disparate impact claim") (citing *Town of Huntington*).

26.4% of white population); *Town of Clarkton*, 682 F.2d at 1064-65 (decision which "fell 2.5 times more harshly on black population than on the white [population]" left "no doubt" of adverse impact); *Huntington*, 844 F.2d at 938 (zoning decision that affected 28% of area's minorities but only 11% of whites "created a strong prima facie showing of discriminatory effect"); *Keith v. Volpe*, 858 F.2d 467, 484 (9th Cir. 1988) (racially discriminatory effect established where defendant's action "had twice the adverse impact on minorities as it had on whites"). Unfair practices principally affecting neighborhoods that are mostly African-American therefore demonstrate a sufficient disparity to state a disparate impact claim. *See, e.g.*, *Hargraves*, 140 F. Supp. 2d at 21. The complaint amply alleges such disparities. *See* Compl. ¶¶ 36-40, 64-65. *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), which Defendants chiefly rely on here, is inapposite because the plaintiff (on summary judgment) offered no evidence whatsoever that the challenged policy had a negative impact on anyone, much less evidence of a disparate impact. *See id.* at 191.

Second, Defendants again ignore the complaint's actual allegations. The complaint alleges disparate foreclosure rates on Wells Fargo mortgages in majority African-American neighborhoods compared to all other neighborhoods (not just 80% versus 20%). *See* Compl. ¶ 38, 64. It also alleges disparate foreclosure rates in neighborhoods that are 60% African-American as compared to those that are 60% white. *See id.* ¶¶ 37, 39-40. Far from alleging only a "potential" disparate impact, as Defendants assert, the City alleges an actual disparate impact regardless of how one looks at the data.

3. Defendants Repeatedly Ignore and Contest the Allegations of the Complaint, Which They May Not Do Under Rule 12(b)(6)

Wells Fargo also errs by ignoring and contesting the factual allegations of the complaint that demonstrate a disparate impact. *See* Defs.' Br. at 32-36, 38. Defendants' own assertions of "fact," however, have no place in a Rule 12(b)(6) motion.

Defendants' unwillingness to accept the allegations of the complaint, as it must on a motion to dismiss, manifests in several ways. First, Defendants imply that factors like credit scores explain away every statistical disparity identified in the complaint. *See id.* at 34 (listing credit scores, debt-to-income ratios, and loan-to-value ratios); *id.* at 35 (claiming that pricing is "merely the by-product of . . . an individualized and automated risk-assessment of race-neutral criteria") (emphasis omitted).[30] Three pages later, Defendants dispense with any vestige of subtlety, asserting "the simple truth that the Defendants made their loan pricing decisions based on credit risk and that similarly-situated borrowers with the same credit risk received the same rates." *Id.* at 38. There is no basis for this "simple truth," the testing of which will undoubtedly be a central focus of discovery. To the contrary, the complaint alleges that: Wells Fargo's illegal "targeted activities fully explain[] the disparate rates of foreclosure, *see* Compl. ¶ 45; Wells Fargo "ignores [traditional underwriting] criteria," *id.* ¶¶ 26(d), 45; after controlling for relevant variables, Wells Fargo charges African Americans more than similarly situated whites, *see id.* ¶¶ 53-54; and that borrowers in African-American neighborhoods typically receive loans with higher interest rates and, on adjustable rate loans, higher interest rate caps, *see id.* ¶¶ 50-52, 58-60. Wells Fargo exacerbates its error by rebuking Baltimore for not analyzing the credit scores and general creditworthiness of Wells Fargo's borrowers before filing, even though such information is in Defendants' exclusive control. *See* Defs.' Br. at 34, 37. Discovery, not Defendants' bald assertions, will yield the truth about the role of credit scores in Wells Fargo's approach to underwriting in Baltimore. At that time, Baltimore will have access to Wells Fargo's loan files and the ability to test Wells Fargo's assertions about the relative creditworthiness of its borrowers.

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[30] Wells Fargo's assertion that Baltimore "concedes" that Wells Fargo's underwriting is based on an "individualized and automated risk-assessment of race-neutral criteria" is preposterous. *See* Defs.' Br. at 35. Paragraph 43 of the complaint explains that this is what "responsible" lenders do, but then immediately alleges that Wells Fargo "is not following fair or responsible underwriting practices with respect to African-American customers." Compl. ¶¶ 43-44.

Second, Defendants assert (in the guise of calling Baltimore's allegations "implausible") that they properly underwrite "2/28" and "3/27" adjustable rate loans to African Americans and exercise no discretion in setting interest rate caps on such loans, and that their disparate pricing of loans to similarly situated African-American and white borrowers in Philadelphia is not indicative of their practices in Baltimore. *See* Defs.' Br. at 35-36. As with Defendants' purportedly race-neutral reliance on proper credit factors, these assertions contradict the allegations of the complaint and are wholly unsupported.[31] *See, e.g.*, Compl. ¶¶ 53-60. Baltimore is entitled to a full and fair opportunity during discovery to challenge these defenses.

In effect, Defendants would have the Court view every statistic in the complaint in the light most favorable to them instead of to Baltimore and reject the City's statistics if there might be a nondiscriminatory explanation. That does not even remotely resemble the proper standard of review. *See, e.g.*, *Schweikert v. Bank of America, N.A.*, 521 F.3d 285, 2008 WL 853005, at *2 (4th Cir. 2008). The statistics need only make a plausible showing that Wells Fargo's practices have a racially discriminatory impact and need not constitute sufficient proof of that impact to prevail at trial. Wells Fargo may later, with evidence, challenge and offer its own interpretation of the data set forth in the complaint, but it is not entitled to a presumption that it will succeed.

B. Baltimore Properly Alleges That the Disparate Impact Is Caused By Wells Fargo's Predatory Practices

Defendants also recast their assertions about traceability as a failure adequately to allege a causal connection between Wells Fargo's predatory practices and the disparate foreclosures rates. *See* Defs.' Br. at 37-40. Defendants rely on the same arguments, *e.g.*, about tax lien sales and property tax rates,

[31] Relatedly, Wells Fargo appears to assert here that "information and belief" pleading did not survive, or was at least seriously hobbled, by *Twombly*. *See* Defs. Br. at 36. *Twombly* stands for nothing of the sort, however, and Wells Fargo cites no authority in support. *See Follman v. Hospitality Plus of Carpentersville, Inc.*, 532 F. Supp. 2d 960, 963 n.1 (N.D. Ill. 2007) (rejecting parallel argument).

which fail for the same reasons.[32] As set forth above, the complaint plausibly alleges that Wells Fargo targets African Americans and residents of Baltimore's African-American neighborhoods for predatory practices, and that this is directly responsible for disproportionately high foreclosure rates on Wells Fargo loans among African Americans and in African-American communities. *See* sections II.A, II.B.1, *supra*. This more than satisfies the *Twombly* standard of review.

Defendants, with little elucidation, cite nine additional cases here, but none remotely suggests a different result than with respect to standing and traceability. Of the five that address discrimination claims, two applied the standard of review rejected in *Swierkiewicz* and simply are not good law. *See Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712-13 (2d Cir. 1998); *Trezza v. Hartford, Inc.*, No. 98-civ.-2205 (MBM), 1998 WL 912101 (S.D.N.Y. Dec. 30, 1998). One applied a summary judgment standard to a Rule 12(b)(6) motion and therefore should not be followed. *See Syverson v. IBM Corp.*, No. C-03-04529-RMW, 2007 WL 2904252, at *6 (N.D. Cal. Oct. 3, 2007) (taking standard of review from *City of Jackson*, a summary judgment case). The plaintiffs in another failed to identify any practice they were challenging or any disproportionate impact on anyone; they merely complained that a lender was "aggressively pursing foreclosure." *Burrell v. State Farm Fire & Cas. Co.*, No. 00-civ.-5733 (JGK), 2001 WL 797461, at *10 (S.D.N.Y. July 12, 2001). The fifth case addressed a class certification motion after discovery, which the court explained presented a greater challenge than establishing a prima facie discrimination case (which, as *Swierkiewicz* holds, presents a greater challenge than stating a claim). *See Garcia v. Johanns*, 444 F.3d 625, 630, 633-636 (D.C. Cir. 2006). Defendants appear to have cited

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[32] Defendants' reliance on the same arguments demonstrates that, to the extent their standing challenge is read as a factual attack instead of a facial one, the standing challenge is "intertwined with the facts central to the merits of the dispute" and may not be considered under Rule 12. *Adams*, 697 F.2d at 1219; *see* note 2, *supra* at 7.

cases based on outcome, not analytical relevance.[33]

V. BALTIMORE PROPERLY STATES AN INTENTIONAL DISCRIMINATION CLAIM UNDER THE FAIR HOUSING ACT

Solely in a footnote, Defendants assert that Baltimore does not allege intentional discrimination and that, even if it did, it has not stated a claim for intentional discrimination. *See* Defs.' Br. at 31 n.11. Both assertions are specious.

Baltimore plainly alleges that Wells Fargo is liable for intentional discrimination by alleging that Wells Fargo engages in "reverse redlining." Compl. ¶¶ 4-5, 46, 64, 66. Baltimore alleges that Wells Fargo's acts are "intentional and willful," *id.* ¶ 74, and that it engages in predatory practices with the "effect and purpose" of taking advantage of inexperienced and underserved borrowers, *id.* ¶¶ 4, 46 (emphasis added). The complaint further states: "As used by Congress and the courts, the term 'reverse redlining' refers to the practice of targeting residents in certain geographic areas for credit on unfair terms due to the racial or ethnic composition of the area." *Id.* ¶ 28 (emphasis added). Targeting an area for harmful practices based on the African-American population of that area is inherently deliberate, intentional discrimination. The complaint likewise alleges that Wells Fargo's "targeted" practices are responsible for Wells Fargo's disproportionately high rate of foreclosure in the City's African-American neighborhoods, *id.* ¶¶ 5, 46, and that it targets African-American neighborhoods because of their

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[33] None of Defendants' remaining four cases involve discrimination claims of any sort, and none offer any principles that support Defendants' motion. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (investor alleging securities fraud must "provide a defendant with some indication of the [economic] loss and the causal connection that the plaintiff has in mind"); *Teachers' Retirement Sys. v. Hunter*, 477 F.3d 162, 186-88 (4th Cir. 2007) (securities fraud complaint alleged publicity surrounding a lawsuit was responsible for economic loss, but the lawsuit did not reveal the allegations that purportedly caused share price to decline; causal connection was inherently illogical); *Allegheny General Hospital v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000) (hospitals lacked standing to sue tobacco companies under antitrust and RICO laws to recover costs of providing health care to nonpaying patients; even though "[t]here is a causal connection," factors such as "smokers' independent (i.e., separate from the fraud and conspiracy) decisions to smoke" defeated standing); *City of Philadelphia v. Beretta USA, Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (state tort law did not support claims against gun manufactures to recover costs of harm from gun violence; among other reasons, Pennsylvania courts take "a restrictive approach to imposing liability upon defendants who are absent at the time of the actual injury where other adults are present who could have acted responsibly to prevent the harm").

vulnerability to these practices due to the historic denial of credit to minorities, *see id.* ¶¶ 29-30, 64. As with so much of its motion, Defendants simply disregard these allegations.

The notion that the complaint does not state a claim for intentional discrimination is equally unfounded. Defendants' first basis for this charge is that the complaint does not allege that "a single loan officer marked up an interest rate or made additional charges as a result of racial animus." Defs. Br. at 31 n.11. There is no requirement that the complaint identify a particular loan officer who is personally responsible for a discriminatory loan, however. In any event, Baltimore alleges that the Defendant companies are responsible for discriminatory practices and loans, from which it may plainly be inferred that the companies did so through the acts of their employees and agents. Moreover, because intentional discrimination may be proved by circumstantial evidence alone, *see, e.g.*, *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 714 n.3 (1983), Baltimore need not identify direct evidence or a "smoking gun" to prevail, let alone allege such in the complaint. To imply, as Wells Fargo does, that an intentional discrimination complaint must identify a smoking gun to survive a motion to dismiss is simply wrong.

Defendants' second basis is that the complaint does not allege that Wells Fargo "consciously or deliberately decided to discriminate against African-Americans in Baltimore City." This ignores the allegations, noted above, that Wells Fargo deliberately and purposefully targets African Americans in Baltimore for reverse redlining. In addition, the statistical disparities are so large here that, even standing alone, they support an inference of discriminatory intent. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977).

Furthermore, Defendants vastly overstate the pleading requirements for a claim of intentional discrimination. As explained above, the complaint need not even set forth the *prima facie* elements of the claim; it need only provide "fair notice of the basis for [the plaintiff's] claims." *Swierkiewicz.*, 534

U.S. at 514. There is no doubt that the complaint provides sufficient detail so that Wells Fargo is aware of what this case is about. Even if it did not, Baltimore would be entitled to the opportunity to provide greater specificity through amendment. *See, e.g.*, *Ostrzenski*, 177 F.3d at 252-53.

CONCLUSION

For all of the reasons stated above, Baltimore respectfully submits that Defendants' motion to dismiss should be denied in its entirety.

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Respectfully submitted,

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