A FLOOD—NOT A RIPPLE—OF HARM: PROXIMATE CAUSE UNDER THE FAIR HOUSING ACT

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Over the past decade, several city governments across the country have filed suits against banks pursuant to the Fair Housing Act seeking redress for municipal damages caused by the banks' discriminatory lending practices. Following the ruling in Bank of America Corp. v. City of Miami*, lower courts are now confronting the question of where to "draw the line" of proximate causation under the Fair Housing Act, and specifically whether the harms experienced by cities as a result of banks' discriminatory lending meet the requirements of proximate causation. In suggesting a direction for lower courts, the Court in* City of Miami *alluded to several cases arising under statutes with common law foundations in which proximate cause analysis was limited to the "first step." In doing so, the Court noted that a Fair Housing Act violation may cause "ripples of harm" to flow through society, thus pointing to a need for some point to limit liability. This Article traces the origins of the "first step" test—along with the carefully-chosen "ripples of harm" metaphor—back to the Clayton and Sherman Acts and their regulation of specific economic harms. The Article suggests that importing proximate cause standards developed for the initially contractual harms arising in the antitrust context into the very different tortious harms arising in the fair housing context is unwise and unworkable. It offers an alternative proximate cause standard for the Fair Housing Act—a "scope of liability" standard—drawn from the Third Restatement of Torts, which we examine in light of the Fair Housing Act's legislative history and the empirical reality of the*

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effects of the discriminatory lending at issue in the case. The harm caused by banks' discriminatory lending practices can be better analogized to water accumulating into a flood than water dispersing through a ripple, and the correct proximate cause standard under the Fair Housing Act allows cities to recover for this harm.

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INTRODUCTION

Ten years after the beginning of the foreclosure crisis, cities across the country are still reeling from its consequences. In many neighborhoods, mortgage foreclosures were followed by property abandonment and accompanied by increased crime rates, diminished property values, and increased demands on basic city services, such as

code enforcement, sanitation, policing, and firefighting.[1] For years, some cities severely affected by foreclosures have tried to hold lenders accountable for what those cities see as lenders' share of the responsibility for these municipal challenges.[2]

Crises of concentrated foreclosures in predominantly Black and Latino neighborhoods were triggered, these cities argue, by the discriminatory lending practices of banks. In particular, these cities allege that mortgage originators targeted Black and Latino homebuyers and neighborhoods with predatory loans in a process of reverse-redlining, in which the objective is not to deny credit on the basis of race but to target loans with more costly and less favorable terms to non-white borrowers relative to those loans offered to similarly situated white borrowers.[3] Many cities have turned to the Fair Housing Act as a

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1 *See* discussion *infra* Part III.

2 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017); City of Cleveland v. Ameriquest Mortg. Sec., Inc., 615 F.3d 496, 506 (6th Cir. 2010); City of Miami Gardens v. Wells Fargo & Co., No. 328 F. Supp. 3d 1369, 1381–82 (S.D. Fla. 2018); City of Oakland v. Wells Fargo Bank, N.A., No. 15-CV-04321-EMC, 2018 WL 3008538, at *15 (N.D. Cal. June 15, 2018); City of Philadelphia v. Wells Fargo & Co., No. CV 17-2203, 2018 WL 424451, at *7 (E.D. Pa. Jan. 16, 2018); Cobb Cty. v. Bank of Am. Corp., No. 1:15-CV-04081-LMM, 2016 WL 9047108, at *2 (N.D. Ga. July 19, 2016); City of Los Angeles v. Wells Fargo & Co., No. 2:13-CV-09007-ODW(RZX), 2015 WL 4398858, at *13 (C.D. Cal. July 17, 2015), *aff'd*, 691 F. App'x 453 (9th Cir. 2017); City of Los Angeles v. Bank of Am. Corp., No. CV 13-9046 PA, 2015 WL 4880511, at *4 (C.D. Cal. May 11, 2015), *aff'd*, 691 F. App'x 464 (9th Cir. 2017); Cty. of Cook v. HSBC N. Am. Holdings Inc., 136 F. Supp. 3d 952, 965 (N.D. Ill. 2015); Cty. of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909, 919 (N.D. Ill. 2015); Cty. of Cook v. Bank of Am. Corp., 181 F. Supp. 3d 513, 518 (N.D. Ill. 2015); City of Los Angeles v. Citigroup Inc., 24 F. Supp. 3d 940, 951 (C.D. Cal. 2014); City of Los Angeles v. JPMorgan Chase & Co., No. 2:14-CV-04168-ODW, 2014 WL 6453808, at *4 (C.D. Cal. Nov. 14, 2014); DeKalb Cty. v. HSBC N. Am. Holdings, Inc., No. 12-CV-03640-SCJ, 2013 WL 7874104, at *16 (N.D. Ga. Sept. 25, 2013); City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756, at *14 (W.D. Tenn. May 4, 2011); Mayor of Baltimore v. Wells Fargo Bank, N.A., No. CIV. JFM-08-62, 2011 WL 1557759, at *6 (D. Md. Apr. 22, 2011); City of Birmingham v. Citigroup Inc., No. CV-09-BE-467-S, 2009 WL 8652915, at *4–5 (N.D. Ala. Aug. 19, 2009).

3 *See, e.g.*, Saint-Jean v. Emigrant Mortg. Co., 337 F. Supp. 3d. 186 (E.D.N.Y. 2018) (jury verdict in favor of plaintiffs alleging banks' practice of specifically marketing unfavorable home equity loans to African Americans and Latinos violated the Fair Housing Act); Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7 (D.D.C. 2000) (recognizing reverse redlining as the practice of extending credit on unfair terms to communities that had previously been redlined, and finding that these predatory loan practices can make housing unavailable and thus constitute a violation of the Fair Housing Act); Matthews v. New Century Mortg. Corp., 185 F. Supp. 2d 874 (S.D. Ohio 2002) (finding that defendants' targeting of elderly, unmarried women homeowners for high-cost home equity loans constituted reverse redlining and was cognizable as violations of the Fair Housing Act and the Equal Credit Opportunity Act); Barkley v.

means of recovering for the broader municipal harms they see as caused by these banks' discriminatory lending practices. Cities seeking to recover for these municipal harms have had mixed results.[4] In light of the Supreme Court's recent decision in *Bank of America Corp. v. City of Miami*, whether these cities will be able to recover now depends on an unresolved issue: the interpretation and application of proximate causation requirements under the Fair Housing Act.

In 2010, Florida led the nation in foreclosures, with over 500,000 of the 2.9 million foreclosures nationwide.[5] Shortly thereafter, Miami suffered from the highest foreclosure rate in the country.[6] In 2013, Miami brought suit against Bank of America, Wells Fargo, and Citigroup pursuant to the Fair Housing Act, alleging that these banks had engaged in unlawful lending practices that caused harm to the city in the form of decreased tax revenues, increased spending on public safety and services, and increased spatial segregation of city residents. The cause of these harms, the City of Miami alleged, was the banks' practice of reverse-redlining.[7] A map of foreclosures in Miami at that

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Olympia Mortg. Co., No. 04-CV-875, 2010 WL 3709278 (E.D.N.Y. Sept. 13, 2010), *aff'd*, 557 F. App'x 22 (2d Cir. 2014) (denying defendants' motion for summary judgment on reverse redlining and other claims and describing reverse redlining as a situation in which a lender unlawfully discriminates by extending credit to a neighborhood or class of people on terms less favorable than would been extended to those outside of the class); *see also* Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164 (2009); Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361, 361–93 (2009); Justin P. Steil, *Innovative Responses to Foreclosures: Paths to Neighborhood Stability and Housing Opportunity*, 1 COLUM. J. RACE & L. 63, 78-80 (2011).

4 *Compare City of Miami Gardens*, 328 F. Supp. 3d at 1384 (finding that plaintiff's expert report had failed to establish discrimination in violation of the Fair Housing Act and granting defendant's motion for summary judgment), *with City of Philadelphia*, 2018 WL 424451, at *7 (finding that plaintiff had adequately pled causation and denying defendant's motion to dismiss).

5 *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, REALTYTRAC (Jan. 12, 2011), https://www.realtytrac.com/news/record-2-9-million-u-s-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december [https://perma.cc/XC24-VQKZ].

6 *1.4 Million U.S. Properties with Foreclosure Filings in 2013 Down 26 Percent to Lowest Annual Total Since 2007*, REALTYTRAC (Jan. 13, 2014), https://www.realtytrac.com/news/1-4-million-u-s-properties-with-foreclosure-filings-in-2013-down-26-percent-to-lowest-annual-total-since-2007 [https://perma.cc/T9JG-Z2RZ].

7 Brief of Respondent City of Miami at 11–12, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (No. 15-1111), 2016 WL 5800272.

time shows that foreclosures were unevenly distributed and particularly concentrated in Miami's neighborhoods with predominantly non-white residents.[8] Miami argued that this distribution of foreclosures was caused in part by the banks' practice of steering non-white borrowers into loans with higher interest rates, fees, penalties, and other unfavorable loan terms when compared to similarly situated white borrowers.[9]

The district court ruled that the injuries for which the City sought to recover did not fall within the "zone of interests" that the Fair Housing Act was intended to protect, and that the City did not sufficiently allege the causal connection between its injuries and the banks' discriminatory conduct.[10] The Eleventh Circuit reversed, holding that the City was an "aggrieved person" under the Fair Housing Act in keeping with the Supreme Court's precedent of extending standing under the Fair Housing Act to the limit of Article III of the Constitution, and that the City demonstrated a close enough connection between the banks' lending violations and the City's injuries to satisfy the requirement of proximate cause.[11] The Eleventh Circuit opinion held that the appropriate standard of proximate cause under the Fair Housing Act was a standard of foreseeability, and that the harms suffered by the City were indeed foreseeable consequences of the banks' practices.[12] The banks appealed, presenting the questions of whether the City of Miami's claims were within the Fair Housing Act's zone of interests and whether its pleadings satisfied the requirements of proximate cause.

In a 5-3 opinion, the Supreme Court affirmed the Eleventh Circuit's decision regarding standing pursuant to the Fair Housing Act's zone of interests but remanded with regard to proximate cause, finding that the Eleventh Circuit erred in relying on a proximate cause standard

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8 *Id.* at app. 33a.

9 *Id.* at 5–7.

10 *See* City of Miami v. Bank of Am. Corp., No. 13-24506-CIV, 2014 WL 3362348, *5 (S.D. Fla. July 9, 2014).

11 City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1289 (11th Cir. 2015), *vacated and remanded sub nom.*, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017); City of Miami v. Wells Fargo & Co., 801 F.3d 1258, 1268 (11th Cir. 2015), *vacated and remanded sub nom.*, *Bank of Am. Corp.*, 137 S. Ct. 1296; City of Miami v. Citigroup Inc., 801 F.3d 1268, 1278 (11th Cir. 2015).

12 *Bank of Am. Corp.*, 800 F.3d at 1282 ("We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability.").

of foreseeability.[13] Although the Court clarified who can sue under the Fair Housing Act pursuant to the zone of interests test, it left for a later day elucidation of how to determine what claims can be brought under the Fair Housing Act. Writing for the majority, Justice Breyer suggested that a plaintiff under the Fair Housing Act must establish "some direct relation" between the defendant's violation and the plaintiff's injury.[14] The Court declined to articulate a specific test for proximate cause under the Fair Housing Act, but suggested that the "general tendency" under statutes with "common-law foundations" was not to "go beyond the first step."[15] The Eleventh Circuit and lower courts adjudicating analogous municipal lawsuits now face the task of delineating the boundaries of proximate cause under the Fair Housing Act.

This Article presents a way forward by setting out a definition of proximate cause under the Fair Housing Act after *City of Miami*. Part I introduces the problem of statutory proximate cause in general and notes the specific challenges of defining proximate cause under the Fair Housing Act. This Part then traces the lineage of the first step standard, alluded to by the *City of Miami* Court, back to its origins in antitrust law. It recovers the original justification for cutting off liability at the first step in early antitrust jurisprudence and examines later-developed justifications, most notably from the law and economics tradition. This Part then discusses the difficulties that arise in trying to import the antitrust proximate cause standard into the Fair Housing Act in particular. Part II examines the legislative history and policy goals of the Fair Housing Act. It then draws on the Restatement of Torts to articulate a scope of liability standard and examine its compatibility with the Fair Housing Act. Part III applies this standard to the chain of events known to have resulted from reverse-redlining and engages with the sizable social science literature on the consequences of discriminatory lending and foreclosure.

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13 *Bank of Am. Corp.*, 137 S. Ct. at 1301.

14 *Id.* at 1306.

15 *Id.* at 1299.

I. PROXIMATE CAUSE UNDER RICO IS NOT THE SAME AS PROXIMATE CAUSE UNDER THE FAIR HOUSING ACT

A. *"A Welter of Confusion"*

The concept of causation has long been philosophically puzzling.[16] The legal definition of proximate cause may be even more challenging. According to the leading treatise on the subject, "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion."[17] Leading formulations of proximate cause under common law principles include the "one of the risks" test, the "foreseeability" test, and the "substantial factor" test.[18] Courts have long recognized that the immediate cause of a harm and the creation of a condition upon which that cause operated are functionally the same because the law's interest in deterring the conduct is no different.[19] If a defendant pours gasoline around a home, he may be culpable even though he does not directly spark the flame that ignites the gasoline.[20] Yet the exact boundary of responsibility remains murky, and the Supreme Court has noted "the lack of consensus on any one definition of 'proximate cause.'"[21] Collectively, the leading proximate cause tests amount not to a single, consistent doctrine but to a grab bag of different tools for drawing the line between the proximate and the distant in causality.

The lack of a consistent definition stems from the fact that, unlike "factual" or "but-for" causation, the doctrine of proximate causation is not actually about causation, if causation is understood to mean the pathway of cause-and-effect as it takes place in the real world. Instead,

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16 *See, e.g.*, DAVID HUME, A TREATISE OF HUMAN NATURE pt. 3 (T.H. Green & T.H. Grose eds., Longmans, Green & Co. 1874) (1739) (asking from where our impressions of causation are derived).

17 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984).

18 *See, e.g.*, Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 85–87 (2012). Allen notes other "magic words" used to describe proximate cause tests, including "superseding cause," "superseding event," "direct cause," and "causal nexus," among several others. *Id.* at 102 n.147

19 *See* KEETON ET AL, *supra* note 17, § 42, at 277.

20 *Id.*

21 CSX Transp., Inc. v. McBride, 564 U.S. 685, 701 (2011) (citations omitted).

proximate causation concerns the appropriate scope of a defendant's legal responsibility—that is, it is one of "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[22] Because the consequences of an actor's conduct can "go forward to eternity" and its origins "back to the dawn of human events,"[23] any proximate cause test expresses some principles about where the line of legal responsibility should be drawn.[24] These principles necessarily reflect considerations imported from conceptual areas beyond causation itself, such as public policy considerations.[25] It is no wonder, then, that proximate cause is a notoriously obscure area of torts. Although proximate cause may appear to be rooted in an intuitive mode of analysis, when put into practice it is often less than stable.[26]

For example, in perhaps the most famous proximate cause case in American history, *Palsgraf v. Long Island Railroad Co.*, Judges Cardozo and Andrews offered two competing views of proximate cause in the context of a negligence claim. For Cardozo, proximate cause could be dealt with as an issue of *foreseeability*.[27] It was not enough for a defendant's negligence to foreseeably result in some kind of injury to some kind of plaintiff; the particular group of harmed individuals and the particular type of injury must also have been foreseeable.[28] In *Palsgraf*, Cardozo found that the railroad employee's negligent act of pushing a fireworks-carrying passenger into the train could have violated the duty of care the railroad owed to some plaintiffs by foreseeably leading to some kinds of injuries, but not to the injury sustained by Mrs. Palsgraf when, distant from the incident, she was

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22 Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992).

23 KEETON ET AL, *supra* note 17, § 41, at 264.

24 *See also* Sandra F. Sperino, *Statutory Proximate Cause*, 88 NOTRE DAME L. REV. 1199, 1204 (2013).

25 *CSX Transp.*, 564 U.S. at 692–93 (2011) ("What we . . . mean by the word 'proximate' . . . is simply this: '[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.'" (quoting Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 103 (1928) (Andrews, J., dissenting)) (alterations and omissions in original).

26 Leon Green offered a classic characterization of proximate cause as doing the "work of Aladdin's lamp." *See* Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471–72 (1950) ("No other formula . . . so nearly does the work of Aladdin's lamp.") As noted in Sperino, *supra* note 24.

27 *Palsgraf*, 162 N.E. 99, 99–101 (1928) (majority opinion).

28 *Id.*

struck by a scale toppled either by the fireworks' explosion or the panic of others on the platform.[29] For Cardozo and the New York Court of Appeals, this type of injury to this type of plaintiff was not a foreseeable result of the defendant's negligence.

Judge Andrews, in contrast, suggested in dissent that foreseeability was only one factor to take into account, and that a more fundamental consideration was policy: "What we do mean by 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[30] For Judge Andrews, an abstract notion of foreseeability was not an appropriate reason to bar recovery for Mrs. Palsgraf, though other reasons such as judicial economy and public policy factors might have been.[31]

These two perspectives remain in tension today. Some approaches to proximate cause, such as Judge Cardozo's in *Palsgraf*, emphasize the actual sequence of events and assess them against abstract concepts such as foreseeability and substantiality. Others, such as Judge Andrews's, concede that the answers to proximate cause questions cannot be found in the actual sequence of events and in abstractions; instead, they place a greater focus on considerations external to the chain of causation, primarily considerations of policy.

Confusion over the bounds of causation becomes even thornier when courts read proximate cause standards into statutes. The typical case involves a statute that introduces a new harm sounding in tort, but that does not have a close parallel in a common law tort. Without clearly expressed proximate cause standards written into the statute, judges must develop proximate cause standards to limit liability in ways that do not frustrate the statutory purpose.[32] Because defining proximate cause often requires the exercise of policy judgment about where liability should end, its definition depends on the underlying claim in which it is embedded. In crafting statute-specific proximate cause standards, judges run the risk of narrowing the scope of liability under a given statute further than legislators may have intended.[33] Indeed, reliance on

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29 *Id.*

30 *Id.* at 103 (Andrews, J., dissenting).

31 *Id.*

32 *See generally* Sperino, *supra* note 24.

33 *Id.*

inappropriate proximate cause standards has contributed to a steady narrowing of the original scope of many statutes, especially in the civil rights context, raising separation of powers concerns.[34]

In light of *City of Miami*, lower courts are now confronted with where to "draw the line" of proximate causation under the Fair Housing Act, and their decisions will have major consequences for the future of antidiscrimination remedies and civil rights in the context of housing. The *City of Miami* Court declined to delineate the "precise boundaries" of proximate cause under the Fair Housing Act, and emphasized that the definition should depend on the "nature of the statutory cause of action" and the statute's policy goals.[35] The Court noted that proximate cause rests upon "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."[36] The Court further observed that proximate cause requires "an assessment 'of what is administratively possible and convenient,'" implicating practical questions of proof and the calculation of damages.[37]

B. *Statutory Proximate Cause Under RICO: The "First Step"*

Though it did not issue a ruling on proximate cause, the *City of Miami* Court suggested that the standard must encompass more than just foreseeability. The Court cited three cases—*Holmes v. Securities Investor Protection Corp.*,[38] *Anza v. Ideal Steel Supply Corp.*,[39] and *Hemi Group, LLC v. City of New York*,[40]—in emphasizing the principle of "directness" over "foreseeability." The Court offered this line of cases as illustrative of a "general tendency" "not to go beyond the first step" in dealing with statutes with common law foundations.[41]

Holmes, *Anza*, and *Hemi* all arise under the same statute—The Racketeer Influenced and Corrupt Organizations Act (RICO).[42] In

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34 *Id.*

35 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305–06 (2017) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (2014)).

36 *Id.*

37 *Id.* at 1306 (citing Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 268 (1992)).

38 503 U.S. 258 (1992).

39 547 U.S. 451 (2006).

40 559 U.S. 1 (2010).

41 *City of Miami*, 137 S. Ct. at 1305–06.

42 Pub. L. No. 91-452, 84 Stat. 922 (1970).

Holmes, upon which the later *Anza* and *Hemi* rely, the Court determined the scope of proximate cause under RICO by importing the "first step" proximate cause standard used under the Sherman Antitrust Act[43] and Clayton Antitrust Act,[44] the two foundational antitrust statutes.[45] The case involved a stock-manipulation scheme, run by petitioner Robert Holmes, which prevented two stock broker-dealers from meeting the obligations owed to their customers, thus forcing the respondent Securities Investor Protection Corporation (SIPC) to step in and reimburse those customers.[46] SIPC brought a civil action against Holmes under RICO, which the Court dismissed on the ground that Holmes's violation could not be said to have proximately caused the harm suffered by SIPC.[47] In doing so, the Court had to settle on a standard for proximate cause under the RICO statute.

Writing for the majority, Justice Souter concluded that the proximate cause standard under RICO reflected an earlier standard developed in the context of the antitrust laws.[48] Two considerations were key in Souter's determination. First, when Congress enacted the RICO statute, it indicated an intent to base the RICO standard on that of the Clayton Act, and the *Holmes* Court noted a number of cases in which it had been assumed that Congress was aware of the Clayton Act's standards and later jurisprudence.[49] Second, policy considerations under RICO parallel policy considerations in the context of the Clayton Act and antitrust enforcement.[50]

Justice Souter emphasized three of these policy considerations. First, he noted the difficulty in parsing the damages flowing from the RICO violation from those caused by independent factors.[51] A RICO

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43 15 U.S.C. §§ 1–7 (2018).

44 15 U.S.C. §§ 12–27 (2018).

45 Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 271–72 (1992) (quoting S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)).

46 *Id.* at 261–63.

47 *Id.*

48 *Id.* at 267–69.

49 *Id.* at 268 ("We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4.").

50 *Id.* at 272–74.

51 *Id.* at 269 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the [RICO] violation, as distinct from other, independent, factors.").

violation can have wide-ranging effects on a number of economic actors remote from the defendant's action with multiple chances for other economic causes to impact these distant plaintiffs.[52] Second, Justice Souter noted the concern over allowing "multiple recoveries" by indirectly affected plaintiffs.[53] This concern is heightened for treble-damages statutes like RICO, in which multiple recoveries could become more punitive than necessary to deter future violations and achieve justice for the plaintiffs.[54] Third, Justice Souter referenced the expectation that directly injured victims can be counted on to bring their claims and force the violating party to account for the full amount of the harm caused.[55] If the goal is to achieve a deterrence effect by forcing defendants to pay for the entire amount of money damages inflicted on plaintiffs, then there is no need to extend liability further beyond those directly affected. In addition to the legislative history indicating an intent to import principles from the antitrust laws, Justice Souter suggested that these proximate cause considerations under RICO closely parallel proximate cause considerations under the Clayton and Sherman Acts, as we discuss below.[56]

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[52] *Id.* at 272–273 ("[T]he district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.").

[53] *Id.* at 269 (allowing recovery by indirectly injured plaintiffs "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries").

[54]

> Assuming that an appropriate assessment of factual causation could be made out, the district court would then have to find some way to apportion the possible respective recoveries by the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages. Finally, the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication.

Id. at 273

[55] *Id.* ("[D]irectly injured victims can generally be counted on to vindicate the law . . . .").

[56] Sperino disagrees, considering the importation of the antitrust standard into RICO as "derivative reasoning." Sperino, *supra* note 24, at 1225.

C. *Statutory Proximate Cause in the Antitrust Context: "Ripples of Harm"*

In addition to pointing to the RICO cases, the *City of Miami* Court made an implicit reference to the antitrust standard when it cautioned that a Fair Housing Act violation may cause "'ripples of harm to flow' far beyond the defendant's misconduct."[57] This analogy again relies on a proximate cause standard from the antitrust context in which this phrase first entered the proximate cause lexicon.[58] The "ripple," however, is a precise analogy used to describe the specific type of harm that antitrust violations cause, and it illustrates why the antitrust standard is not appropriate under the Fair Housing Act.[59]

Consider a monopolist who, in violation of an antitrust law, sells to a set of direct buyers at an unlawfully high price. In order to avoid potential losses, those direct buyers then sell to indirect buyers at a price that reflects their higher input costs—a phenomenon known as "passing on."[60] The nature of the harm in the context of an antitrust violation is therefore just like a "ripple," emanating outward through a series of actors and leaving only the final buyers to bear the injury.[61] The harm begins with a single violation and spreads throughout the economy, but does so in a way that erases itself at each step along the commercial chain as the overcharge is passed on to the next buyer and the previous buyer is made whole.

It is a long-established principle of antitrust jurisprudence that only *direct buyers*—the "first step" along the consumer chain—may recover from the monopolist.[62] Although buyers further out along the chain do suffer an injury in the form of inflated prices, courts have

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57 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017).

58 The "ripples of harm" metaphor was first mentioned in *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476–77 (1982), in reference to a Brennan dissent from *Illinois Brick Co. v. Illinois*, in which Brennan pointed to a long line of cases defending the first step standard. 431 U.S. 720, 759–60 (1977) (Brennan, J., dissenting).

59 *McCready*, 457 U.S. at 476–77 (1982) ("An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy"); *Ill. Brick*, 431 U.S. at 736–38 (majority opinion) (discussing how an overcharge in a price-fixing case is distributed between the overcharged party and its customers).

60 RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 316–17 (Little, Brown & Co., 4th ed. 1992).

61 *See id.*

62 *See, e.g.*, *Ill. Brick Co.*, 431 U.S. at 745.

decided that the monopolist's liability does not extend to those distant buyers. There are two standard justifications for cutting off proximate causation at the first step: an argument from the law and economics movement, articulated by Richard Posner and others, and an older line of jurisprudential reasoning associated with Justice Holmes.[63]

1. The "First Step" and Law and Economics

The law and economics argument acknowledges two often-competing goals of private antitrust enforcement: compensating harmed purchasers and deterring future violations.[64] The law and economics approach prioritizes deterrence over compensation in the antitrust context. Richard Posner has summarized this position succinctly:

> It makes sense to permit the [direct buyers] to sue the monopolist for the entire monopoly overcharge, even though they will in all likelihood have passed on the bulk of the overcharge to the [indirect buyers] who in turn will have passed it on to the consumers . . . .[T]he [direct buyers] may yield . . . windfall gains, yet the most important thing from an economic standpoint—deterring monopoly—will have been accomplished more effectively than if such suits are barred.[65]

Posner has argued that, even if compensation for the end-consumer were the chief goal of antitrust policy, limiting recovery to direct buyers would still be preferable.[66] If direct buyers know that they alone can recover, direct buyers competing with one another should temporarily assume the costs of the price hike without passing it on to the next actor in the chain, since they can expect to recover from the monopolist afterward.[67] Further, not only is the harm also passed on along the chain, but the quantum of harm becomes smaller at each outward step, assuming there are many more indirect buyers than direct

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63 *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 605 (1979); POSNER, *supra* note 60, at 316–17; S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533–34 (1918).

64 Landes & Posner, *supra* note 63.

65 POSNER, *supra* note 60, at 317.

66 Landes & Posner, *supra* note 63, at 605.

67 *Id.* at 605–06.

buyers. Similar to a class action, the many indirect buyers lack a strong incentive to bring claims on their own, since their individual recoveries would be small.[68] Finally, allowing every indirect buyer to recover would raise issues of judicial economy, since the splintered harm resulting from an antitrust violation could result in a massive number of small claims.[69]

The Supreme Court considered these issues in detail in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* and *Illinois Brick v. Illinois*. The Court held in *Hanover Shoe* that direct purchasers who had already "passed on" the harm caused by a price hike could still recover from the monopolist.[70] In that case, the antitrust violator sought to raise the passing on issue defensively in order to stop the direct purchaser from bringing suit.[71] The "first step" rule in the context of antitrust became settled law when the Supreme Court subsequently decided *Illinois Brick*. The Court in *Illinois Brick* dealt with a suit brought by an indirect purchaser—one that had borne the higher cost passed on by a direct purchaser.[72] The Court in *Illinois Brick* barred indirect purchaser suits, effectively limiting recovery to the "first step," for two reasons. First, allowing recovery by subsequent purchasers would lead to "a serious risk of multiple liability for defendants."[73] Opening the door to "duplicative recoveries" in an antitrust context, where treble damages are available, would be too punitive a measure and would go beyond the antitrust statutes' aim of deterrence.[74] Second, the Court reasoned that even if indirect purchasers were allowed to bring suit, the "costs to the judicial system" of calculating the exact amount of economic harm suffered by each indirect purchaser would be too great.[75] These were, of course, some of the same concerns later voiced by the *Holmes* Court in

68 *Id.* at 612–13.

69 *Id.* at 612–25.

70 *See generally* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 488 & n.6 (1968) ("The Court of Appeals, like the District Court, rejected this assertion of the so-called 'passing-on' defense, and we affirm that judgment."), *aff'g* 185 F. Supp. 826, 829 (M.D. Pa. 1960).

71 *Hanover Shoe*, 185 F. Supp. at 829–30.

72 Ill. Brick Co. v. Illinois, 431 U.S. 720, 726–27 (1977).

73 *Id.* at 729.

74 *Id.* at 731 (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)).

75 *Id.* at 732.

restricting recovery under RICO to the first step. For the *Illinois Brick* Court, these calculations were simply "insurmountable."[76]

The holding in *Illinois Brick* prohibiting recovery by subsequent purchasers is consistent with the justification advanced by Richard Posner and others, since this line of thinking supposes that direct purchasers will take into account the fact that actors further along the chain cannot recover, and therefore not pass on the price hike but instead wait to recover from the original seller. This rationale rests on two fundamental assumptions: first, that direct purchasers are aware of price hikes when they occur; and second, that direct purchasers are aware that their own customers cannot recover for them. The logic also seems to assume that not all direct purchasers in a given competitive market are equally affected by the price hike; if they were all equally affected, there would be less of an incentive for direct purchasers to temporarily shoulder the costs of the price hike themselves.

These assumptions have been questioned by critics of *Illinois Brick*.[77] Some critics have called for a "return" to a "functionalist" approach to antitrust law that allows for recovery beyond the first step in many circumstances. For instance, Barak Richman and Christopher Murray argue that this alternative approach would place greater emphasis on the need to compensate victims, which the early legislative history of the Clayton and Sherman Acts suggests was one of the motivating forces in the movement that gave rise to the statutes.[78] Allowing indirect purchasers to recover may also better fit the realities of contemporary commercial relationships, in which the linear, seller-direct purchaser-consumer chain is increasingly rare.[79] Finally, the assumption that direct purchasers should rationally assume the cost of price hikes without passing it on has been challenged empirically: in many well-known antitrust cases, direct purchasers have passed the cost on along the chain.[80] The law and economics approach to the first step rule is, therefore, arguably on somewhat shaky ground.

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76 *Id.* at 725 n.3.

77 *See generally* Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69 (2007).

78 *Id.*

79 *Id.* at 91–92.

80 *See, e.g.*, Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003) (reviewing RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001)).

2. The "First Step" and Privity

The law and economics argument builds on and lends support to the original line of judicial reasoning on indirect recovery dating back to Justice Holmes's 1918 opinion in *Southern Pacific Co. v Darnell-Taenzer Lumber Co.*[81] It was in this case that the Court first articulated the "first step" standard:

> The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss.[82]

The reasoning behind the Court's limitation to the first step in this case is crucial. Although Justice Holmes mentions a general tendency with regard to damages not to go beyond the first step, he emphasizes that the central question ultimately is whether the plaintiff has suffered a loss. Justice Holmes goes on to clarify that indirect buyers lack the ability to recover not because of their causal distance from the source of the price hike, but from their lack of *commercial privity* with that source: "The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum."[83]

Justice Holmes's emphasis is not on the number of links in the causal chain, but on the *nature* of the links and, in particular, the nature of the links between the monopolist and the direct buyer. In basing his reasoning on privity, Holmes pointed to a series of state and lower court cases, including a 1908 case from the Vermont Supreme Court, *State v. Central Vermont Railroad Co.*[84] In *Central Vermont Railway*, another case of railroad price fixing in which direct purchasers passed on the

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81 S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533–34 (1918).

82 *Id.*

83 *Id.* at 534.

84 71 A. 193 (Vt. 1908).

harm, the Vermont Court reasoned that the lack of commercial privity between the railroad company and the end-user meant that the direct purchaser could be said to be the cause of the end-user's injury, not the railroad itself:

> It can hardly be denied that a provision for the recovery of an overpayment points to the parties in whose dealings the overpayment was made, and to the payor therein as the party aggrieved. The loss of the plaintiff flows directly from the action of its vendor, and only indirectly from the defendant's overcharge. It may be substantially injured, but it cannot be brought within the remedy without holding that the right to sue follows the transfer of the property wherever it may be sold with the freight charges transformed into purchase price.[85]

This tracing of the origins of the "first step" rule suggests that it was, in fact, built on common law commercial privity. Again, the focus here is on the nature of the relationships between the plaintiff and the defendant, and not on the number of links in the commercial chain between the two.

The origins of this antitrust standard for proximate cause are actually somewhat distinct from later-developed concerns over judicial economy and deterrence. A version of "first step" based on privity and not the number of causal events removes several of the common concerns involved in proximate cause analysis. For example, concerns about intervening cause come into play when the focus of proximate cause analysis is on the number of links in the chain; it would not, however, be much of a factor if the focus is on privity. Importantly, this conception of a "first step" rule is conceptually different from the rule that has been imported into statutes in recent years, which tends to emphasize the number of causal links and not their qualitative nature.[86]

One of the primary reasons for the focus on privity is the fact that the harm affecting direct purchasers is fundamentally the exact same harm as that affecting indirect purchasers. For example, antitrust violator A may charge direct purchaser B $40.00 for 10 widgets, instead

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85 *Id.* at 193–94.

86 *See, e.g.*, Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9–10 (2010) (recounting the number of links in the causal chain that led to the City's injury and finding that the City's theory of causation "requires [the Court] to move well beyond the first step").

of the $30.00 it would have charged without resort to unfair methods of competition or an unlawful conspiracy to restrain trade. Buyer B then resells widgets to indirect buyer C for $4.25 instead of the $3.50 for which it previously sold them, and then indirect buyer C resells to consumer D for $4.50 instead of the previous $4.00. If each widget is sold individually to direct purchasers and then resold just twice, there will be 20 additional purchasers claiming an additional $12.50 in damages, even though the direct purchaser and indirect buyer both passed those damages along and were not, in reality, harmed. Even though the amount of the initial overcharge is just $10, antitrust violator A could face claims for $22.50. The defendant is now effectively facing more than double the original damages and 21 different claimants for the same initial $10 harm.

Taken together, both the economic policy justification articulated by Posner and the original judicial reasoning from Justice Holmes behind the first step rule are suited not only to the antitrust context but also to circumstances that commonly arise under the RICO statute. Consider, for example, an extortion racket run by an organized crime syndicate that forces a supplier of goods to pay the syndicate in order to be left alone. The supplier can, of course, assume the costs of the extortion racket without affecting its downstream supply chain. A more likely response would be to raise its prices for its customers, who then have to pay more for the goods than they normally would. This is the exact logic of an antitrust "ripple," caused by a mob instead of a monopolist, and the harm will proceed along the commercial chain in the same way, erasing itself at each step.

A similar parallel can be found in *Holmes*, the case in which the Court first imported antitrust causation into RICO. The harm caused by the initial offender was in effect "passed on" from the broker-dealers to the SIPC, since the broker-dealers could rely on the SIPC to cover their obligations to their customers. This is another "ripple" in the RICO context: a financial crime is committed and directly harms a number of parties—the equivalent of the "direct purchaser" in antitrust—who may often be able to pass along that harm in the form of financial risk to insurers or other commercial entities, who may themselves be protected by secondary insurance coverage. Taking into account the concerns noted by Justice Souter in *Holmes*, it makes little sense to allow entities distant from the initial harm, such as secondary insurers, to recover for the harm caused by RICO defendants like the one from *Holmes*.

D. *Proximate Cause Under Civil Rights Statutes: Not a Ripple But a Flood*

The harms that civil rights statutes are designed to prevent, however, are very different from the harm resulting from an antitrust violation. Civil rights violations often take the form of a series of wrongs committed against individuals that, individually or in combination, also create a different type of shared harm at a greater scale. For example, racial discrimination in housing harms individual non-white home-seekers who are unable to access housing in a particular location. That discrimination also harms the other residents of the neighborhood in which it takes place because those residents are subjected to continued segregation as well. Unlike antitrust violations, a civil rights violation is not "passed on" and erased at each step; rather, it is spread through a series of affected parties in the causal chain without erasing itself along the way. And, rather than splintering into successively smaller quanta of harm along the chain as in the antitrust context, civil rights violations often cumulate into a different harm that does its damage at a greater scale.[87]

The likelihood that immediate targets of civil rights violations will bring suit is also different than the likelihood that commercially sophisticated direct purchasers engaged in repeated contractual relationships with antitrust violators and with consumers will bring suit. Unlike in the antitrust context, where the initial direct purchasers are more likely to be aware of the harm and are better situated to remedy it than the multitude of later consumers, in the fair housing context the initial victims, such as home-seekers or borrowers, may be less aware of the harm and less able to remedy it than entities such as a housing counseling organization or a municipal economic development office. These are entities that can identify a pattern of discrimination invisible to any individual victim and that also suffer a distinct, additional harm in the diversion of their resources and the frustration of their missions.

If we were to rely on the original justification for the first step rule—based on commercial privity and not on later-developed policy

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87 *Cf.* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2515 (2015) (noting that "[d]e jure residential segregation by race was declared unconstitutional almost a century ago, but its vestiges remain today, intertwined with the country's economic and social life") (internal citation omitted).

grounds—the application of the rule to the civil rights context would be equally unworkable. Privity is a legal concept rooted in contract and property relations of a contractual nature.[88] The early reliance on privity as a justification for the first step rule envisioned commercial relationships between individual economic agents. Civil rights harms, however, are generally closer to tort than contract claims: they deal with broadly conceived duties between individuals and how those duties translate into specific modes of conduct, instead of contractually specified economic relations.[89] In many circumstances, civil rights violations are committed without any direct contractual relationship between the violator and the victim. Indeed, it is often the refusal on the part of the violator to establish a contractual relationship with the victim that constitutes the violation, as in the case of redlining.[90]

Civil rights harms, in short, are not "ripples." Victims of civil rights harms are not able to pass on to others the harm that they suffered. The harms do not diminish along the causal chain and, collectively, individual harms often combine into a new type of harm at a greater scale that is exactly what the original civil rights statutes were motivated to remedy, such as the continuing reality that as a nation we live in largely separate and unequal neighborhoods by race, a residential pattern that can be traced in part to historic and contemporary discriminatory actions.[91] A more apt metaphor for this type of harm is a "flood": individual quanta of harm—the rain droplets—sometimes build up until a new type of harm emerges that can wreak havoc on a much more significant scale. Fair Housing Act violations of the sort that gave rise to *City of Miami* are an excellent example of "floods of harm":

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88 *See Privity*, BLACK'S LAW DICTIONARY, (2d ed. 1910) ("The term 'privity' means mutual or successive relationship to the same rights of property. The executor is in privity with the testator, the heir with the ancestor, the assignee with the assignor, the donee with the donor, and the lessee with the lessor. . . . Privity of *contract* is that connection or relationship which exists between two or more contracting parties.") (emphasis added) (internal citations omitted).

89 On the relationship between common law tort and civil rights law for discrimination, see Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2116 (2007)

90 *See, e.g.*, Cartwright v. Am. Sav. & Loan Ass'n, 880 F.2d 912, 913 n.1 (7th Cir. 1989).

91 As the Court noted in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, discrimination a century ago still has effects today and Congress enacted the Fair Housing Act to address the continuing denial of housing opportunities on the basis of protected characteristics. 135 S. Ct. 2507, 2515–16 (2015).

violations committed against individual homebuyers combined in a manner that result in substantial, distinct harm done to the City.[92]

II. PROXIMATE CAUSE UNDER THE FAIR HOUSING ACT

The Supreme Court has consistently held that the definition of proximate cause is statute-specific and that courts addressing proximate cause in the context of a statutory tort must directly address the legislative purpose of that statute.[93] As the Court has stated, the analysis of proximate cause "is controlled by the nature of the statutory cause of action."[94] The fundamental question "is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.[95]

The inadequacy of the antitrust standard of proximate cause as applied to the context of civil rights statutes—and to the Fair Housing Act in particular—points to the need to clarify a proximate cause definition for the Fair Housing Act and other civil rights statutes that preserves their integrity and achieves their purpose. The appropriate direction for courts, in light of *City of Miami*, is to craft a workable definition of proximate cause for the Fair Housing Act, drawing from the Act's text, legislative history, logical structure, and policy goals.

The Court recently undertook this kind of analysis in the context of the Federal Employers' Liability Act (FELA).[96] In *CSX Transportation,*

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92 The Court has consistently recognized that violations of the Fair Housing Act can cumulate to affect others in addition to the immediate individuals targeted by the violation. For instance, in *Trafficante v. Metropolitan Life Insurance Co.*, the Court identified the alleged injury to existing tenants that arose from the exclusion of non-white potential tenants from the apartment complex. 409 U.S. 205, 209–10 (1972). Not only were individual housing applicants denied housing opportunities, existing tenants were denied the "important benefits from interracial associations." *Id.* at 210. In *Gladstone Realtors v. Village of Bellwood*, the Court noted that the realtors' racial steering at issue in the case "effectively manipulates the housing market," and that this is a cognizable injury against not only those home-seekers who might be denied housing as a result of steering but also a cognizable injury against the Village: "If, as alleged, petitioners' sales practices actually have begun to rob Bellwood of its racial balance and stability, the village has standing to challenge the legality of that conduct." 441 U.S. 91, 109, 111 (1979).

93 *See, e.g.*, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017); Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014); CSX Transp., Inc. v. McBride, 564 U.S. 685, 695 (2011).

94 *City of Miami*, 137 S. Ct. at 1305.

95 *Lexmark Int'l*, 572 U.S. at 133.

96 45 U.S.C. §§ 51–60 (2018).

Inc. v. McBride, the plaintiff locomotive engineer filed suit under FELA for debilitating injuries sustained while switching railroad cars.[97] FELA holds railroads liable for employees' injuries "resulting in whole or in part from [carrier] negligence" and McBride alleged that CSX had required him to use another company that provided unsafe switching equipment and had failed to train him to operate it correctly.[98] CSX sought a jury instruction requiring McBride to show that CSX's negligence "was a proximate cause of the injury" and defining proximate cause as "any cause, which, in natural or probable sequence, produced the injury complained of."[99] The district court rejected CSX's proposed jury instruction and instructed the jury instead that defendant "'caused or contributed to' [McBride's] injury if Defendant's negligence played a part—no matter how small—in bringing about the injury."[100] The Supreme Court noted that liability under FELA is limited in two key respects: "Railroads are liable only to their employees, and only for injuries sustained in the course of employment."[101] Aside from those limitations, the statute makes railroad companies liable for injury or death "resulting in whole or in part from the [railroad's] negligence."[102] The remedial goals of Congress in enacting the statute, the Court held, mean that courts should apply "a relaxed standard of causation" in comparison to common law proximate cause standards.[103] In so holding, the Court was "informed by the statutory history" of FELA, including its objective of addressing the "exceptionally hazardous" risks associated with the railroad business at the time the statute was enacted.[104] Given the expansive remedial purpose of the statute, along with the statute's broad language on causation, the Court found that Congress did not intend to limit liability through the use of common law concepts of directness and foreseeability.[105] To undertake a similar

97 *CSX Transp.*, 564 U.S. at 689.

98 45 U.S.C. § 51; 564 U.S. at 689.

99 *CSX Transp.*, 564 U.S. at 689.

100 *Id.* at 690.

101 *Id.* at 691.

102 45 U.S.C. § 51 (2018).

103 564 U.S. at 692.

104 *Id.* at 695.

105 *Id.* at 696; *see also* Sperino, *supra* note 24, at 1210 (noting courts applying proximate cause to a statute must respect the appropriate balance between the judicial and legislative branches).

analysis of proximate cause under the Fair Housing Act, we begin with the Act's history.

A. *The History and Intent of the Fair Housing Act*

The standard for proximate cause under the Clayton, Sherman, and RICO Acts is a poor fit for proximate cause under the Fair Housing Act because the qualitative nature of the harms they are meant to address are fundamentally different. The analysis of an appropriate standard must begin by returning to the original purpose of the Fair Housing Act and the circumstances in which Congress enacted it to determine whether the particular harms alleged are within the statute's scope.

Congress passed the Fair Housing Act "to provide, within constitutional limitations, for fair housing throughout the United States."[106] Given the ambitious goals of the Fair Housing Act, the Supreme Court has instructed courts to give the "broad and inclusive" language of the Act a "generous construction" to effectuate its remedial purpose.[107]

Throughout the 1960s, cities across the United States were convulsed by protests against discriminatory housing policies and urban inequality. During the summer of 1967, more than 150 uprisings erupted in cities across the country. In response, President Johnson convened the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission, after its Chair, Otto Kerner, the Governor of Illinois.[108] The Kerner Commission's report, released in February of 1968, described the nation as "moving toward two societies, one Black, one white—separate and unequal."[109] The report determined that housing discrimination, residential segregation, and economic inequality were causing increasing societal division, and

106 42 U.S.C. § 3601 (2018).

107 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209, 212 (1972).

108 Establishing a National Advisory Commission on Civil Disorders, Exec. Order No. 11365, 32 Fed. Reg. 11,111 (Aug. 1, 1967).

109 NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968).

recommended that Congress "enact a comprehensive and enforceable open housing law."[110]

On April 4, 1968, Martin Luther King, Jr. was assassinated, and the threat of widespread civil unrest loomed in cities throughout the nation. One week later, Congress passed the Fair Housing Act, setting out a sweeping goal of providing for fair housing throughout the nation, and creating a broad definition of standing and causation in order to advance that goal. Senator Jacob Javits, speaking in support of the Act, warned that "the crisis of the cities . . . is equal to the crisis which we face in Vietnam."[111] Senator Walter Mondale, the primary drafter of the Fair Housing Act, cautioned that "our failure to abolish the ghetto will reinforce the growing alienation of white and Black America. It will ensure two separate Americas constantly at war with one another."[112] This crisis motivated Congress to pass an ambitious bill, one with "teeth and meaning," as Senator Mondale described it, to address the conditions that fostered civil unrest.[113] The Court has recently noted that the continuing consequences of housing discrimination "remain today, intertwined with the country's economic and social life."[114]

The legislative record makes clear that Congress had a broad understanding of the harms caused by housing discrimination. Congress focused on discrimination in the marketing, sale, rental, and financing of housing as a central factor in the creation of these two separate and unequal Americas, aware that the victims of that discrimination were not limited to those who were its direct targets.[115]

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110 *Id.* at 13.

111 114 CONG. REC. 2703 (1968).

112 *Id.* at 2274.

113 *Id.* at 2275.

114 Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2515 (2015).

115 Congress found that people of color not only had difficulty finding available housing outside of the inner cities, they also encountered discrimination in their attempts to secure financing to buy a home. In debate over the Fair Housing Act, Senator Edward W. Brooke quoted a 1961 U.S. Commission on Civil Rights report that "found evidence of racially discriminatory practices by mortgage lending institutions throughout the country." 114 CONG. REC. 2526 (1968). The report described discrimination in the mortgage industry, both banks' refusal to grant mortgages to minorities seeking to buy homes in certain neighborhoods and also banks' inclusion of unfavorable terms in mortgages that were offered to minorities. *See* U.S. COMM'N ON CIVIL RIGHTS, HOUSING: A REPORT OF THE COMMISSION (1961). Congress understood that discrimination in lending led directly to segregated housing patterns and limitations in opportunity for people of color.

Discriminatory housing practices hurt not only individuals who were denied access to housing, but also "the whole community."[116] Senator Mondale emphasized that citywide problems are "directly traceable to the existing patterns of racially segregated housing."[117] The scope of the remedy Congress created in the Fair Housing Act matched the scale of the problem. The Fair Housing Act aimed to replace segregated ghettos with "truly integrated neighborhoods."[118] As the Supreme Court recognized in 1972, in its first Fair Housing Act decision, this neighborhood focus reflected Congress's understanding that "those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered."[119]

Congress intended the Fair Housing Act to address exactly the types of systemic, higher-scale harms alleged in *City of Miami*. The Kerner Commission drew attention to the financial plight of Detroit as one of the causes of unrest: "Because of its financial straits, the city was unable to produce on promises to correct such conditions as poor garbage collection and bad street lighting."[120] The sponsors of the Fair Housing Act pointed out that cities were overburdened and underfinanced specifically as a result of discrimination in housing. For instance, Senator Mondale stated that the Fair Housing Act was necessary to address the "[d]eclining tax base, poor sanitation, loss of jobs, inadequate education opportunity, and urban squalor" that central cities faced.[121]

Congress repeatedly framed the Fair Housing Act as legislation intended to address the intertwined challenges that discrimination in housing had entrenched in segregated metropolitan areas. Senator Edward Brooke emphasized that the "tax base on which adequate public services, and especially adequate public education, subsists has fled the city," and noted that the objective of the Fair Housing Act "must [be to] move toward [the] goal" of recreating "adequate services in the central city" by rooting out systemic discrimination.[122] The drafters of the Fair Housing Act recognized that housing discrimination perpetuates racial

116 114 CONG. REC. 2706 (1968).

117 *Id.* at 2276.

118 *Id.* at 3422.

119 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972).

120 *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 109, at 51.

121 114 CONG. REC. 2274 (1968).

122 *Id.* at 2280.

segregation and that racial segregation leads to substantial economic disparities between neighborhoods that continue to the present. Senator Philip Hart read into the record a letter from President Johnson stating that "[m]inorities have been artificially compressed into ghettoes where . . . city administrations are burdened with rising social costs and falling tax revenues."[123] The President's letter urged Congress to act: "Fair housing practices . . . are essential if we are to relieve the crisis in our cities."[124] In short, the President and Congress recognized and sought to address the direct relationship between discrimination in lending, metropolitan segregation, declining central city revenues, and increasing central city costs.

Against this background, Congress defined an "aggrieved person" under the Act broadly, as any party "who claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur."[125] Over the years, the Supreme Court has consistently interpreted that phrase broadly and has recognized that when Congress amended the Fair Housing Act in 1988, "it retained without significant change the definition of 'person aggrieved' that [the] Court had broadly construed."[126] As in *CSX Transportation*,[127] the language in the Fair Housing Act conveys a broad conception of causation in order to ensure the fulfillment of a broad remedial purpose.

Congress similarly used carefully chosen language to specify causes of action under the statute. Section 804(a) of the Fair Housing Act makes it unlawful:

> 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.[128]

Section 804(b) provides that:

> It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate

123 *Id.* at 3358.

124 *Id.*

125 42 U.S.C. § 3602(i) (2018) (definitions).

126 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1303–04 (2017) (citing Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2519 (2015)).

127 CSX Transp., Inc. v. McBride, 564 U.S. 685, 691 (2011).

128 42 U.S.C. § 3604(a).

> 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.[129]

The Supreme Court has recognized that the phrase "otherwise make unavailable" "refers to the consequences of an action rather than the actor's intent," and found that this "results-oriented language" creates liability for discrimination on the basis of policies with a disparate impact where there is a less discriminatory alternative.[130] Indeed, the Court found that this broad language encompassing disparate impact liability is consistent with the Fair Housing Act's intent "to eradicate discriminatory practices within a sector of our Nation's economy."[131]

Indeed, an expansive view of causation and of those directly harmed by housing discrimination has been central to the Fair Housing Act and to the Supreme Court's holdings concerning standing under the Act. In *Trafficante v. Metropolitan Life Insurance Co.*,[132] the Supreme Court confirmed that the Fair Housing Act protects both those who are the immediate victims of discrimination as well as those who suffer as a result of the continuing effects of that discrimination. In *Trafficante*, two tenants, one white and one Black, alleged that their landlord had discriminated against non-white tenants. Neither of the plaintiffs were the direct targets of that discrimination, but they alleged that, as a result of the discrimination, they lost the social benefits of living in an integrated community; missed business and professional advantages which would have accrued if they lived with members of minority groups; and suffered economic damage in their social, business, and professional activities.[133] The Court explicitly recognized that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices," and that the only way to "give vitality" to the Fair Housing Act is through the generous construction intended by Congress of the statute's standing and causation requirements.[134]

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129 *Id.* § 3605(a).

130 *Tex. Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. at 2518.

131 *Id.* at 2521; *see also* H.R. REP. NO. 100-711, at 15 (1988) (explaining the Fair Housing Act "provides a clear national policy against discrimination in housing").

132 409 U.S. 205, 208 (1972).

133 *Id.*

134 *Id.* at 368.

Expanding upon *Trafficante*, the Supreme Court in *Gladstone Realtors v. Village of Bellwood* explicitly recognized that the Fair Housing Act addressed the impact of housing discrimination on municipalities.[135] The municipality in that case, the Village of Bellwood, alleged that discriminatory racial steering of individual home-seekers by local realtors caused harms to the municipality by perpetuating segregation and reducing the value of local homes. The Court recognized that these discriminatory practices contributed to neighborhood change and segregation and that "[t]he adverse consequences attendant upon a changing neighborhood can be profound," including a reduction in the number of buyers and a reduction in the price of homes.[136] According to the Court, these two effects of discrimination "directly injure [the] municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."[137]

In *Havens Realty Corp. v. Coleman*, the Court considered whether fair housing testers had standing to bring claims based on the neighborhood level harms that discriminatory racial steering by realtors caused. Racial steering, the testers alleged, perpetuated segregation and denied them "the social and professional benefits of living in an integrated society."[138] The Court noted that "[t]his concept of 'neighborhood' standing differs from that of 'tester' standing in that the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff."[139] The Court concluded that this distinction "is, however, of little significance" in the context of the Fair Housing Act, and that this type of injury was among the harms the statute was enacted to prevent.[140] Again, the Court consistently recognized that the Fair Housing Act intended to remedy shared harms experienced by immediate neighbors, by neighborhood residents more broadly, and by municipalities overall as a result of discriminatory practices targeted against individual home-seekers.

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135 441 U.S. 91, 111 (1979),

136 *Id.* at 110.

137 *Id.* at 110–11.

138 Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 (1982)

139 *Id.* at 375.

140 *Id.* at 376.

B. *The Scope of Liability Under the Fair Housing Act*

The breadth of the Fair Housing Act's scope and vision is made plain in its text, its legislative history, and in the Supreme Court's repeated interpretations of the statute, and requires a proximate cause analysis that recognizes the close relationship between housing discrimination and measurable harms that identifiable acts of discrimination cause to the nation's cities and communities. The Court in *City of Miami* held that "foreseeability alone does not ensure the close connection that proximate cause requires."[141] As we have demonstrated above, a strict "first step" standard is also inappropriate.[142] We argue instead that the appropriate standard is the scope of liability standard or scope of the risk test that is well-established in the common law of torts and that has already been recognized by the Supreme Court in the context of other statutory claims.[143] Under the scope of liability standard, the central question in assessing proximate cause is whether the harm for which damages are sought was a result of one of the risks that made the defendant's conduct a violation of the statute. This scope of the liability test closely parallels the instruction in *City of Miami* that the fundamental question in determining proximate cause is "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."[144]

As we have discussed, in the context of the antitrust laws, the original concept at the root of the first step standard was commercial privity.[145] Policy-oriented justifications—for example, the law and economics argument advanced by Richard Posner—were later developed to reinforce that original justification.[146] In the context of the Fair Housing Act and civil rights law in general, the types of harms are

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141 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017).

142 *See* discussion *supra* Section I.B.

143 *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010) (describing the scope of liability standard); ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963) (setting out a scope of the risk test); LEON GREEN, RATIONALE OF PROXIMATE CAUSE 39–42 (1927) (describing the importance of taking into account the scope of a defendant's risk when assessing liability); *see also* Paroline v. United States, 572 U.S. 434, 445 (2014) (analyzing proximate cause through the scope of the defendant's risk).

144 *City of Miami*, 137 S. Ct. at 1305.

145 *See* discussion of the Posner justification, *supra* Section I.C.

146 *Id.*

fundamentally different than in the antitrust or RICO contexts, for at least three reasons. First, although in the antitrust and RICO context there are concerns about preventing duplicative recoveries for the same harm that is erased when passed on to others, harms in the fair housing context are neither remedied nor diminished by being passed on. Indeed, the concern in the fair housing context is that the full harm will rarely actually be vindicated, both because all of the directly targeted victims are unlikely to know of the discrimination, and because there are distinct, additional harms to others, such as plaintiffs like those in *City of Miami*. Second, in the antitrust or RICO context, the first set of victims "can generally be counted on to vindicate the law"[147] because their damages are larger than any subsequent victims, they have long-term interests in remedying any antitrust violation, and they are more likely than subsequent purchasers to recognize the change in price and the possibility that it was caused by an antitrust violation. In the fair housing context, however, individuals who have been directly discriminated against cannot be counted on to vindicate their rights in the same way because: (1) any one individual's damages may be minimal; (2) home-seekers turned away may decide it is not worth the effort to vindicate a right to live among those who seek to exclude them; and, most fundamentally, (3) they may not know that they were victims of discrimination.[148] Third, while it can be difficult to parse the damages

147 Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 269 (1992).

148 For instance, it is very difficult for individual mortgage borrowers to find out that they were part of a pattern or practice of being charged more for loans on the basis of their race compared to other similarly situated borrowers. The Department of Housing and Urban Development sponsored two studies, in 2002 and 2006, to examine the extent to which the public is aware of fair housing laws and believe they have ever experienced unfair treatment in a housing transaction. Martin D. Abravanel & Mary K. Cunningham, URBAN INST., HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS (2002), https://www.huduser.gov/portal/Publications/pdf/hmwk.pdf [https://perma.cc/PJ29-7KV3]; MARTIN D. ABRAVANEL, URBAN INST., DO WE KNOW MORE NOW? TRENDS IN PUBLIC KNOWLEDGE, SUPPORT AND USE OF FAIR HOUSING LAW (2006), http://www.huduser.org/Publications/pdf/FairHousingSurveyReport.pdf [https://perma.cc/2U88-AKPN]. Most prospective renters or homebuyers who are denied housing or are offered unequal terms never know either the reason behind the denial or that someone else was offered the same house on more favorable terms. Victims of discrimination often do not know fair housing laws, do not know they have been discriminated against, or both. The current structure of fair housing enforcement, however, places the burden on victims to identify when they have encountered discrimination. *See* Michael H. Schill, *Implementing the Federal Fair Housing Act: The Adjudication of Complaints*, *in* FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS 143, 151 (John

flowing from an antitrust or RICO violation from those caused by independent factors, tracing the effects of a discriminatory action with relative precision is feasible in the fair housing context. What is needed instead of importing the antitrust standard for the Fair Housing Act, therefore, is a core concept equivalent to first-step privity that takes into account the types of social relationships governed by the Fair Housing Act and how the Act conceptualizes the causal pathways operating in these relationships.

The Fair Housing Act recognizes direct connections between violations perpetrated at the individual level and harm to other identifiable individuals, organizations, or collectivities at larger scales. For instance, as discussed above in *Trafficante*, the Court recognized that the denial of housing to individual home-seekers on the basis of race could injure other individuals who were tenants of the building and who were denied the benefits of interracial association. The harm for which damages were sought by these tenants, the denial of the benefits of interracial association, is closely connected to the conduct the Fair Housing Act prohibits that was at issue in the case, actions that make housing unavailable on the basis of race. In *Village of Bellwood*, the Court recognized that the steering of individual home-seekers on the basis of race could injure the Village as a whole by perpetuating segregation and reducing the Village's tax base. Here, again, the harms for which damages were sought by the Village of Bellwood, the perpetuation of segregation and the consequences of that segregation for the Village's tax base and ability to provide services to its residents,

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Goering ed., 2007) (arguing that placing the burden of discrimination on the victim creates perverse incentives because "the more sophisticated the violator is, the less likely it is that the victim will successfully identify him or her"). The two studies confirmed that some groups perceive less discrimination than that documented by national paired-testing studies. *See* ABRAVENEL, *supra*, at 33–35 (finding that only 6% of Latinos reported perceiving discrimination based on their race or ethnicity, 4% of households with children reported perceiving discrimination based on family status, and less than 1% of persons in households with a disabled individual reported perceiving discrimination based on disability, even though paired testing and other studies indicate discrimination against these groups is significantly more common than their perception suggests). Further, between one-fifth and one-half of the public is not aware of one or more of the discriminatory acts that fair housing laws prohibit. *Id.* at 8–19. Even among those who believed that they were discriminated against, four of every five took no action in response. *Id.* at 36 (finding that those who were better informed about fair housing laws were more than twice as likely to take action in response to discrimination than those who were less well-informed, but that even among the well-informed, three out of four people still took no action in response to discrimination).

are closely connected to the statute's prohibition on making housing unavailable on the basis of race. In *Havens Realty*, the Court recognized the direct connection between discriminatory racial steering of individual home-seekers and the cognizable harms to other neighborhood residents who, as a result, were denied the benefits of living in an integrated neighborhood. Again, the harms for which the fair housing testers sought damages, the denial of the benefits of living in an integrated neighborhood, were closely connected to the prohibited conduct of falsely representing because of the applicant's race that a dwelling is not available.

Where a harm is done to an individual on the basis of some protected characteristic, such as race or sex, a harm may also be inflicted upon others who are measurably affected. Discriminatory practices reinforce and exacerbate durable, socially constructed categories of inequality such as race or sex.[149] The Fair Housing Act is premised on a causal logic reflective of the deep connections between the individual-level and collective harms that the statute was designed to address simultaneously. If a violation directed at a specific individual has a direct, measurable connection with statutorily cognizable harms to other identifiable individuals or entities, and these harms are closely connected to the prohibited conduct, then this connection cannot be severed by a narrow conception of proximate cause if the structure and purpose of the Fair Housing Act is to be kept intact. The scope of liability standard carefully applied to the Fair Housing Act allows for an appropriate limitation of liability while preserving the statute's purpose.

The Third Restatement of Torts generally avoids the terms "proximate cause" or "legal cause," referring instead to questions regarding (1) whether an action is a factual cause of the harm, and (2) the scope of liability in tort.[150]

The test for a factual cause is commonly referred to as the "but for" standard: "an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred."[151] Frequently there is more

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149 *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157–159 (1976).

150 RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM ch. 6, Special Note on Proximate Causation (AM. LAW INST. 2010).

151 *Id.* § 26 cmt. b.

than one cause of any given harm, however, and the "[t]he existence of other causes of the harm does not affect whether [the] specified tortious conduct was a necessary condition for the harm to occur."[152] If one identifies each of the necessary conditions for the plaintiff's harm, it may be that, absent any one of those conditions, the harm would not have taken place. Nevertheless, "so long as the harm would not have occurred absent the tortious conduct, the tortious conduct is a factual cause."[153]

The appropriate test in the Third Restatement of Torts for what has been called proximate causation is a test of the scope of liability. For a harm to fall within the scope of a defendant's liability, "the harm that occurred must be one that results from the hazards that made the defendant's conduct tortious in the first place."[154] This definition of the scope of liability builds on Robert Keeton's *Legal Cause in the Law of Torts* and Leon Green's *Rationale of Proximate Cause*.[155] The limitation on liability that this test imposes avoids what could be unjustified or unending liability by confining the liability's scope to the reasons for holding the actor liable in the first place—that is for their negligence, or in this case, statutory violation.[156] The rule requires consideration of "(a) the risks that made the actor's conduct tortious, and (b) whether the harm for which recovery is sought was a result of any of those risks."[157] If a defendant moves to dismiss a complaint on the basis of proximate cause or scope of liability, therefore, a court must consider "all of the range of harms risked by the defendant's conduct that the jury could find as the basis for determining that conduct tortious," and then assess whether the harm alleged by the plaintiff falls within that range.[158] This test is more stringent than the commonly used foreseeability test, as many harms could be foreseeable yet fall outside the range of harms

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152 *Id.* at cmt. c.

153 *Id.*

154 *Id.* § 29 cmt. b. The Third Restatement goes on to note that "[m]ultiple factual causes always exist" and that an "actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause." *Id.*

155 *See* KEETON, *supra* note 143, at 9–10; GREEN, *supra* note 143, at 39–42.

156 RESTATEMENT (THIRD) OF TORTS: PHYSICAL. & EMOTIONAL HARM § 29(d) (AM. LAW INST. 2010).

157 *Id.*

158 *Id.*

against which a common law duty or a given statute is intended to protect.[159]

For example, the Third Restatement presents the following illustration:

> Richard, a hunter, finishes his day in the field and stops at a friend's house while walking home. His friend's nine-year-old daughter, Kim, greets Richard, who hands his loaded shotgun to her as he enters the house. Kim drops the shotgun, which lands on her toe, breaking it. Although Richard is negligent for giving Kim his shotgun, the risk that makes Richard negligent is that Kim might shoot someone with the gun, not that she would drop it and hurt herself (the gun was neither especially heavy nor unwieldy). Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm.[160]

Although Richard's action is undoubtedly a factual cause of Kim's broken toe and her broken toe is also a foreseeable consequence of Richard's action, her injury is not within the scope of Richard's liability in common law tort for handing her a loaded shotgun, which would extend only to the consequences of the gun's accidental discharge. The plaintiff's claim here passes the foreseeability test, but it fails the scope of liability test.

The scope of liability analysis is particularly well-suited to a statutory tort claim. The "judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing,"[161] and instead is limited to those harms that have "a sufficiently close connection to the conduct the statute prohibits."[162] In order to prevail, a plaintiff must demonstrate that the harm was, in fact, a realization of some risk that falls within the duty that the statute imposes on the defendant.[163] Indeed, the Supreme Court has noted elsewhere that proximate cause is often analyzed in terms of the "scope of the risk" or

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159 *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1254 (2009).

160 RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 29 (AM. LAW INST. 2010)

161 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983).

162 Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014).

163 Zipursky, *supra* note 159, at 1271.

liability created by the statutorily proscribed conduct.[164] The scope of the liability test for proximate cause then serves to limit liability where the causal link between the conduct at issue and the harm is so tenuous or distant "that what is claimed to be consequence is only fortuity."[165]

An example of this distinction in the context of the Fair Housing Act can be drawn from Bank of America's briefs to the Court in *City of Miami*. Bank of America asserted that allowing the City of Miami to recover damages would undermine any meaningful limit on liability and allow claims by utility companies that served foreclosed homes for their lost revenues from the decline in power or water usage and claims by local businesses that served the customers who previously resided in those homes for lost business revenues as a result of their decline in revenues.[166] An analysis of the scope of liability distinguishes such claims from those brought by the City of Miami. Given the long history of redlining and reverse-redlining in the United States and the historical effect of these practices on residential segregation by race,[167] common sense would tell us that lending practices that discriminate on the basis of race run the risk of perpetuating segregation and, in so doing, exacerbating the municipal disparities the Fair Housing Act was enacted in part to address. As the discussion above of the Fair Housing Act's text and history demonstrates, the Fair Housing Act's prohibition on discriminatory housing practices was intended in part to prevent "further deterioration" of "municipal tax bases" and the race-based disparities in municipalities' ability to provide basic services that was caused by discriminatory housing practices and racial residential segregation.[168] The statute was not, however, directed at remedying the effects of segregation on private business owners' profits, whether utility companies or dry-cleaners or anyone else. The municipal harms identified by the City of Miami are closely connected to the conduct

164 Paroline v. United States, 572 U.S. 434, 445 (2014)

165 Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 838 (1996)

166 Reply Brief for Petitioners at 21–22, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (No. 15-1111), 2016 WL 6406400.

167 *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); THE DREAM REVISITED: CONTEMPORARY DEBATES ABOUT HOUSING, SEGREGATION, AND OPPORTUNITY 133–98 (Ingrid Gould Ellen & Justin Peter Steil eds., 2019).

168 *See* NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, *supra* note 109, at 19; 114 CONG. REC. 2993 (1968).

prohibited by the Fair Housing Act, while the lost profits of private businesses are not.

The Court in *City of Miami* draws on *Lexmark International, Inc. v. Static Control Components, Inc.* to suggest, consistent with the scope of liability analysis, that the necessary calculus for proximate cause is essentially "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits" or is instead too remote from the risks the statute protects against.[169] In *Lexmark*, the Court considered a case arising under the Lanham Act prohibiting trademark infringement, false advertising, and unfair competition.[170] Lexmark manufactured laser printers and toner cartridges, and used shrink-wrap licensing on its toner cartridge and a microchip in the toner that would disable an empty cartridge in order to force users to return the cartridge to Lexmark to buy new toner.[171] Static Control Components did not manufacture toner cartridges but created a microchip that enabled other remanufacturers to refurbish and resell used cartridges originally made by Lexmark.[172] Lexmark sued Static Control Components alleging violations of the Copyright Act of 1976 and the Digital Millennium Copyright Act; Static Control Components counterclaimed, alleging violations of the Lanham Act's prohibition on false advertising.[173] As in *City of Miami*, the Court in *Lexmark* considered two basic questions: first, whether Static Control Components' claims fell within the zone of interests of the Lanham Act; and second, whether Lexmark's actions proximately caused Static Control Components' injuries.

First, addressing the zone of interests question, the Court asked whether a plaintiff "comes within the class of plaintiffs whom Congress authorized to sue" under the statute—a question of standing.[174] Second,

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169 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017) (citing Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014)). Other prior cases in which the Court had previously considered the dimensions of statutory proximate cause include *CSX Transportation* and *Holmes*, discussed above, as well as *Staub v. Proctor Hospital*, 562 U.S. 411, 419–20 (2011); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342–46 (2005); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703–04 (2004); *Department of Transportation v. Public Citizen*, 541 U.S. 752, 754 (2004); and *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535–36 (1983).

170 *Lexmark Int'l*, 572 U.S. at 122.

171 *Id.* at 121.

172 *Id.*

173 *Id.* at 122.

174 *Id.* at 137.

finding that Static Control Components fell within the statute's zone of interests, the Court then considered the causation question, asking whether the plaintiff's injuries were proximately caused by Lexmark's misrepresentations asserting that Static Control's business was illegal. The Court noted that "the causal chain linking Static Control's injuries to consumer confusion is not direct, but includes the intervening link of injury to the remanufacturers."[175] The Court nevertheless held that Static Control met the requirements of proximate cause, because even as an "indirect victim," its harms were "surely attributable to Lexmark" and fall within types of harms the Lanham Act is intended to prevent.[176] The Court differentiated Static Control, as a competitor and an indirect victim, from other potential indirect victims alleging harms that do not fall within the Lanham Act's prohibition on unfair competition: "while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's 'inability to meet [its] financial obligations.'"[177]

The scope of liability standard is well-suited to the broad structure and goals of the Fair Housing Act, and it incorporates basic principles of proximate causation from the common law. But perhaps more importantly, it is a workable standard as applied to the process of harm set in motion by Fair Housing Act violations as they play out empirically. The text of the Fair Housing Act and the Supreme Court's interpretation of that text demonstrates that the economic harms of reduced tax revenues and increased expenditures, and non-economic harms of increased residential segregation by race, that the City of Miami alleges fall within the types of harms the Fair Housing Act was meant to prevent. Part III examines the well-established social science research that has helped illuminate the direct connection between the discriminatory practices by the defendants in *City of Miami* and the harms that the City experienced. It suggests that the harms alleged by the City of Miami are neither remote from the harms intended to be prevented by the Fair Housing Act nor from the discriminatory conduct by the banks that the Act proscribes.

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175 *Id.* at 139.

176 *Id.*

177 *Id.* at 134 (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006)).

III. THE APPLICATION OF A SCOPE OF LIABILITY STANDARD

To examine how this scope of liability standard might work in practice, we apply it to the facts alleged in the *City of Miami* complaint. In its pleadings, the City alleged that the defendants' "injurious conduct"—the practice of targeting African American and Latino mortgage borrowers for loan products with higher interest rates, more fees, and worse terms relative to similarly situated white peers—led to concentrated foreclosures in Black and Latino neighborhoods and that these foreclosures fueled further segregation in those communities. The City alleges that, as a result of the defendants' discriminatory practices, it suffered both economic and non-economic injuries.[178] The discriminatory loans harmed the city economically by: (1) reducing property tax revenues from the homes subject to discriminatory loans on which the bank subsequently foreclosed; and (2) increasing the provision of costly municipal services for those same homes that entered foreclosure as a result of the discriminatory loans. The discriminatory loans also harmed the city by frustrating the City of Miami's efforts to advance racial integration.[179]

With regard to the practical questions of proof implicated by the Court's reference to "what is administratively possible and convenient" in assessing proximate cause, evidence is available to the City that would allow it to prove both the banks' alleged Fair Housing Act violations and the specific, limited injuries these violations directly caused to the City of Miami.[180] What precisely are the discriminatory practices alleged and to what extent do these discriminatory practices directly harm the City of Miami itself?

A. *The Discriminatory Practices*

Comparisons of the defendant banks' treatment of white and non-white borrowers and the resulting loan terms, burdens, and risks can establish the discriminatory conduct that the City of Miami alleged.

178 Brief of Respondent City of Miami at 34–44, Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017) (No. 15-1111), 2016 WL 5800272.

179 *Id.* at 6.

180 Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017).

Multiple studies document the practice of creating compensation structures and incentives for brokers and loan officers to charge borrowers of color higher rates and impose riskier but more profitable terms than those for which the non-white mortgage applicants qualified.[181] This compensation policy relying on pricing discretion systematically disfavors Black and Latino borrowers, who have long been denied credit in the past and who continue to live in neighborhoods less likely to be served by mainstream banks.[182] Research has identified disparities in the amount of compensation earned by mortgage originators and disparities in costs charged to borrowers based on the race and ethnicity of the borrowers.[183] Through these practices, banks, loan officers, and brokers profit when borrowers pay inflated rates, but borrowers suffer from significantly higher payment burdens over the life of the loans that lead to increased defaults and foreclosures.[184]

Indeed, rigorous quantitative studies have found that African American and Latino borrowers over the past decade were charged higher rates and fees and given riskier loan terms than similarly situated white borrowers.[185] Even after controlling for credit scores, loan to value

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181 *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011); DANIEL IMMERGLUCK, FORECLOSED: HIGH-RISK LENDING, DEREGULATION, AND THE UNDERMINING OF AMERICA'S MORTGAGE MARKET (2009); *see also* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259–70 (2002). *See generally* Justin P. Steil, Len Albright, Jacob S. Rugh & Douglas S. Massey, *The Social Structure of Mortgage Discrimination*, 33 HOUSING STUD. 759 (2017).

182 Alan M. White, *Subprime Mortgage and Discriminatory Lending: Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing*, 60 S.C. L. REV. 677, 690–91 (2009); *see also* Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUSING POL'Y DEBATE 328 (2013); STEPHEN L. ROSS & JOHN YINGER, THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT (2002).

183 Howell E. Jackson & Laurie Burlingame, *Kickbacks or Compensation: The Case of Yield Spread Premiums*, 12 STAN. J.L. BUS. & FIN. 289, 346, 350 (2007); SUSAN E. WOODWARD, A STUDY OF CLOSING COSTS FOR FHA MORTGAGES 45–48 (Urban Inst. May 2008), http://www.thecyberhood.net/documents/projects/woodward08.pdf [https://perma.cc/FH32-QADD].

184 IMMERGLUCK, *supra* note 181, at 141–43.

185 *See, e.g.*, Consent Order, United States v. Countrywide Fin. Corp., No. 11-CV-10540 (PSG) (C.D. Cal. Dec. 28, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf [https://perma.cc/DTE8-RE2C] (detailing the determinations by examiners at the Federal Reserve and the Office of Thrift Supervision that Countrywide Bank was engaging in a pattern or practice of discrimination based on race and ethnicity, charging

ratios, the existence of subordinate liens, and housing and debt expenses relative to individual income, a study of lending between 2004 and 2007 in seven metropolitan areas, including Miami, found that Black and Latino borrowers in each metropolitan area were significantly more likely to receive a high-cost loan than similarly situated white borrowers.[186] The increased incidence of high cost mortgages was attributable to both the steering of minorities to specialized high-cost lenders and to the differential treatment of equally qualified borrowers by lenders.[187]

Previous studies of defendant Wells Fargo's loans found that, after controlling for credit scores, income, occupancy status, loan-to-value ratios, and other background characteristics, Black borrowers in Black neighborhoods were charged significantly higher rates and received less favorable loan terms than similarly situated white borrowers in white neighborhoods.[188] Together, these higher cost loans with less favorable terms created a significantly higher likelihood of foreclosure among Black and Latino borrowers who received unfavorable terms than among white borrowers who were not subject to these higher costs and riskier provisions.[189] The collective effect of this discrimination was the stripping of millions of dollars of equity from non-white neighborhoods by Wells Fargo and the investors who purchased these securitized loans.

Black and Latino borrowers higher interest rates, fees, and costs, and placing them into subprime loans more often than similarly situated white borrowers); Faber, *supra* note 182, at 328; DEBBIE GRUENSTEIN BOCIAN, WEI LI, CAROLINA REID & ROBERTO G. QUERCIA, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES (Ctr. for Responsible Lending 2011), https://communitycapital.unc.edu/files/2011/11/Lost-Ground-2011.pdf [https://perma.cc/J7X7-JHV5]; Vicki Been, Ingrid Ellen & Josiah Madar, *The High Cost of Segregation: Exploring Racial Disparities in High-Cost Lending*, 36 FORDHAM URB. L.J. 361 (2009).

186 Patrick Bayer, Fernando Ferreira & Stephen L. Ross, *What Drives Racial and Ethnic Differences in High-Cost Mortgages? The Role of High-Risk Lenders*, 31 REV. FIN. STUD. 175, 189–190 (2018); *see also* Patrick Bayer, Fernando Ferreira & Stephen L. Ross, *The Vulnerability of Minority Homeowners in the Housing Boom and Bust*, 8 AM. ECON. J.: ECON. POL'Y 1, 23–26 (2016).

187 *See* sources cited *supra* note 186.

188 Jacob S. Rugh, Len Albright & Douglas S. Massey, *Race, Space, and Cumulative Disadvantage: A Case Study of the Subprime Lending Collapse*, 62 SOC. PROBS. 186 (2015); Jacob S. Rugh, *Double Jeopardy: Why Latinos Were Hit Hardest by the US Foreclosure Crisis*, 93 SOC. FORCES 1139 (2015).

189 *See* sources cited *supra* note 188.

B. *Non-Economic Harms*

Empirical research has shown that the foreclosure crisis significantly increased both Black-white and Latino-white levels of residential segregation. One study compiled data on nearly all foreclosures in the country between 2005 and 2009, and compared the patterns of racial segregation after the foreclosure crisis with projections of segregation patterns based on pre-crisis trends.[190] The data shows that a one percentage point increase in the number of foreclosed homes in a given community reduced the percentage of white residents by half a percentage point, and increased the Black and Latino population shares by 0.2 and 0.3 percentage points, respectively.[191] Discriminatory lending contributed to concentrations of foreclosures in predominantly African American and Latino neighborhoods as well as racially integrated ones, and these foreclosures reduced the proportion of whites in these neighborhoods, in part because whites had greater resources to leave neighborhoods experiencing housing distress.[192]

Increased residential segregation by race and ethnicity frustrated the City of Miami's attempt to combat segregation and contributed further to the recognized harms of segregation.[193]

C. *Reductions in the Tax Base*

Existing empirical studies suggest that the discriminatory loans made by the defendant banks directly caused reductions in the values of the properties securing those loans, and therefore diminished the City of Miami's tax base and revenues.

As previously discussed, the discriminatory practices alleged by the City of Miami resulted in the concentration of expensive mortgage loans

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190 Matthew Hall, Kyle Crowder & Amy Spring, *Neighborhood Foreclosures, Racial/Ethnic Transitions, and Residential Segregation*, 80 AM. SOC. REV. 526 (2015).

191 *Id.* at 543.

192 *Id.*

193 *See, e.g.*, THE DREAM REVISITED, *supra* note 167, at 133–98; SEGREGATION: THE RISING COSTS FOR AMERICA 81–260 (James H. Carr & Nandinee K. Kutty eds., 2008); *see also* Jorge De la Roca, Ingrid Gould Ellen & Justin Steil, *Does Segregation Matter for Latinos?*, 40 J. HOUS. ECON. 129, 135 (2018); Ingrid Gould Ellen, Justin P. Steil & Jorge De la Roca, *The Significance of Segregation in the 21st Century*, 15 CITY & COMMUNITY 8, 10–11 (2016).

with onerous terms in non-white communities that had previously been denied credit and, thus, increased rates of foreclosure among Black and Latino borrowers.[194] Research suggests that "blacks and Latinos remained trapped during the housing boom by the 'new inequality' of subprime lending—a dual mortgage market in terms of price, risk, and the denial of credit based on race and neighborhood racial composition."[195] Concentrated foreclosures caused by discriminatory lending therefore have two sets of victims: the homeowners who lose their homes and the communities that are left with devalued and abandoned houses.

Research also shows that foreclosures reduce the value of the foreclosed homes and of nearby homes, by increasing the neighborhood vacancy rate, through direct physical effects on neighborhoods of poor property maintenance, through weak property appraisals based on comparable sales prices, and through the creation of an imbalance of demand and supply in an illiquid neighborhood housing market.[196] In some neighborhoods, these spillover effects on the prices of homes near foreclosures pushed down home values so far that millions of borrowers' home values were now worth less than the remaining balance on their mortgages. In this situation, homeowners having trouble making their payments could not sell their homes for enough to retire their mortgages and thus were at increased danger of foreclosure.[197]

As early as 2006, research found that foreclosures reduced the value of nearby homes.[198] Recent research uses hedonic regression to analyze data from over one million housing transactions to identify the costs of forced sales as a result of foreclosures compared with other types of forced sales (e.g., death of the owner or bankruptcy), confirming that

194 *See, e.g.*, IMMERGLUCK, *supra* note 181, at 78–84, 101–10; Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 644 (2010); Jackelyn Hwang, Michael Hankinson & Kreg Steven Brown, *Racial and Spatial Targeting: Segregation and Subprime Lending Within and Across Metropolitan Areas*, 93 SOC. FORCES 1081 (2015).

195 Rugh, *Double Jeopardy*, *supra* note 188, at 1140.

196 John P. Harding, Eric Rosenblatt & Vincent W. Yao, *The Contagion Effect of Foreclosed Properties*, 66 J. URB. ECON. 164 (2009).

197 Ben Bernanke & Mark Gertler, *Agency Costs, Net Worth, and Business Fluctuations*, 79 AM. ECON. REV. 14, 28 (1989).

198 Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL'Y DEBATE 57 (2006).

foreclosures have significant causal effects on a home's value, as well as on the surrounding property values.[199] This research estimates that each foreclosure that takes place lowers the price of a home within five-hundredths of a mile by one percent.[200] The negative effect diminishes rapidly as the distance from the foreclosure increases, reinforcing the significance of bank actions that concentrate foreclosures in communities of color.[201] Multiple other studies have confirmed the negative relationship between sales prices of neighboring properties and foreclosures while controlling for property and neighborhood characteristics.[202] Research has further shown that the independent causal effects of foreclosures on property values, above and beyond general housing market fluctuations, directly reduce municipal revenues.[203]

D. *Increases in Municipal Expenditures*

Research also demonstrates that cities are forced to increase spending on municipal services as foreclosure rates increase. As early as 2005, scholars estimated the direct increased costs to cities for each foreclosed, abandoned property, including expenditures that cities are forced to make for increased police and fire services, building inspections, sanitation activities, and demolition contracts.[204] Increased foreclosures cause increased complaints about property maintenance, vandalism, and crime. For example, a study of property complaints in the city of Boston from 2008 to 2012 found that the typical single-family

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199 John Y. Campbell, Stefano Giglio & Parag Pathak, *Forced Sales and House Prices*, 101 AM. ECON. REV. 2108 (2011).

200 *Id.* at 2130.

201 *Id.* at 2129.

202 *See* W. Scott Frame, *Estimating the Effect of Mortgage Foreclosures on Nearby Property Values: A Critical Review of the Literature*, 95 FED. RES. BANK ALA. ECON. REV. 1 (2010).

203 James Alm, Robert D. Buschman & David L. Sjoquist, *Foreclosures and Local Government Revenues from the Property Tax: The Case of Georgia School Districts*, 46 REGIONAL SCI. & URB. ECON. 1, 8–10 (2014); Raymond H. Brescia, *On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 21 (2011).

204 WILLIAM C. APGAR, MARK DUDA & ROCHELLE NAWROCKI GOREY, THE MUNICIPAL COST OF FORECLOSURES: A CHICAGO CASE STUDY (Homeownership Preservation Found., 2005); *see also* DAN IMMERGLUCK, PREVENTING THE NEXT MORTGAGE CRISIS: THE MELTDOWN, THE FEDERAL RESPONSE, AND THE FUTURE OF HOUSING IN AMERICA (2015).

property was over nine times as likely to receive a complaint when owned by banks following foreclosure compared to when its previous owner was current on his or her mortgage.[205] A study of Florida counties, including Miami-Dade County, found that between 1997 and 2011 an increase in real estate owned properties led to an increase in municipal expenditures, including capital, economic environment, physical environment, transportation, and civil court expenditures.[206]

E. *Applying the Scope of Liability Standard*

Lower courts have wrestled with the issue of proximate cause under the Fair Housing Act for roughly a decade. Two early cases were *Mayor of Baltimore v. Wells Fargo Bank, N.A.*[207] and *City of Memphis v. Wells Fargo Bank, N.A.*[208] Both cases alleged that Wells Fargo intentionally targeted minority communities and used discriminatory and deceptive methods to steer minority customers into high-cost loans, resulting in extraordinarily high rates of foreclosure that caused local governments to lose property tax revenue and spend additional resources to maintain vacant homes. The Federal District Court granted Wells Fargo's motions to dismiss Baltimore's complaint twice because, in the court's view, the city had not sufficiently established a "causal connection between the widespread damages it sought and Wells Fargo's lending practices."[209]

Baltimore then focused its claims on instances in which "Wells Fargo . . . steered African-American borrowers who qualified for prime loans into more onerous subprime loans," and on instances in which Wells Fargo targeted borrowers who already owned their homes and who had either paid off their mortgages or had affordable mortgages already but steered these homeowners into high-cost refinance or home equity loans.[210] With these allegations focused on foreclosures directly

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205 LAUREN LAMBIE-HANSON, WHEN DOES DELINQUENCY RESULT IN NEGLECT? MORTGAGE DISTRESS AND PROPERTY MAINTENANCE (Fed. Reserve Bank of Boston Public Policy Discussion Papers, 2013).

206 Keith Ihlandfeldt & Tom Mayock, *Foreclosures and Local Government Budgets*, 53 REGIONAL SCI. & URB. ECON. 135, 142 (2015).

207 No. CIV. JFM-08-62, 2011 WL 1557759, at *6 (D. Md. Apr. 22, 2011).

208 No. 09-2857-STA, 2011 WL 1706756, at *15 (W.D. Tenn. May 4, 2011).

209 *Mayor of Baltimore*, 2011 WL 1557759, at *1.

210 *Id.* at *3.

caused by the discriminatory lending, the Federal District Court denied Wells Fargo's motions to dismiss; Wells Fargo ultimately chose to settle both cases, agreeing to pay millions of dollars to borrowers who were overcharged, as well as to the municipalities that brought suit.

The evidence presented in *City of Miami* establishes that the bank's discriminatory lending, prohibited by the Fair Housing Act was a "but for" cause of both the economic and non-economic harms the City of Miami experienced, harms that fall within the scope of liability under the Fair Housing Act. Although there may have been multiple additional causes of the City's harm, such as trespassers setting fire to foreclosed and abandoned properties, the discriminatory loan remains a "but for" cause of the foreclosure, abandonment, and subsequent municipal costs and lost revenue. The harms experienced by the City of Miami also fall within the scope of the liability for discriminatory lending under the Fair Housing Act. Congress enacted the Fair Housing Act to "provide, within constitutional limitations, for fair housing throughout the United States."[211] By prohibiting discrimination in home financing, the statute encompasses not just liability for the economic harms of those borrowers who pay inflated rates and fees, but also for the economic harms experienced by the negatively affected municipalities and the non-economic harms to those municipalities and organizations that are frustrated in their efforts to advance fair housing.[212] As the Court stated in *Gladstone*, discrimination against individual home-seekers also "directly injures . . . [the] municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services."[213] These economic and non-economic harms fall within the scope of the Fair Housing Act's liability for discriminatory lending practices and represent fundamentally distinct harms from those economic harms experienced by individual borrowers. Applying the established scope of liability test to proximate causation clarifies that the harms the City of Miami alleges are neither remote from the statute's scope nor from the defendants' conduct.

Two subsequent cases similar to *City of Miami* reveal the continuing confusion regarding proximate cause. In *City of Philadelphia v. Wells Fargo & Co.*, the district court, considering the bank's motion to

211 42 U.S.C. § 3601 (2018).

212 Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208 (1972).

213 Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 110 11 (1979).

dismiss, concluded that the City of Philadelphia had plausibly plead proximate cause for the alleged non-economic injuries.[214] The court noted that the higher-cost loans Wells Fargo made to non-white as compared to white borrowers directly affected their ability to purchase homes, harming the City of Philadelphia's efforts to promote fair housing and integrated communities.[215] Philadelphia's data analysis indicated that Wells Fargo's high-cost loans to Black and Latino borrowers were four and three times, respectively, more likely to result in foreclosure than the standard loans made to white borrowers.[216] These higher foreclosure rates for non-white borrowers harmed the City of Philadelphia's interests by reducing diversity in homeownership and impeding efforts to create stable, integrated communities. The court thus concluded that the City sufficiently alleged its non-economic injuries. However, it declined to address the question of proximate cause for Philadelphia's economic injuries, expressing only "serious concerns about the viability of the economic injury aspect of the City's claim with regard to proximate cause" and relying in part on the Supreme Court's citation to the proximate cause standard articulated in *Holmes*.[217]

In another recent post-*City of Miami* case, however, the City of Oakland brought a lawsuit similar to the claims in *City of Miami*, alleging that Wells Fargo had engaged in systematic discriminatory lending practices resulting in higher rates of concentrated foreclosures, which decreased tax revenues and increased municipal expenditures. The District Court in *City of Oakland v. Wells Fargo Bank, N.A.* denied Wells Fargo's motion to dismiss based on proximate cause, and focused largely on the distinction between the nature of the harm in antitrust and RICO cases and the nature of the harm in Oakland's case.[218] The court found that the concerns voiced by the Supreme Court in *Holmes*

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214 City of Philadelphia v. Wells Fargo & Co., No. CV 17-2203, 2018 WL 424451 (E.D. Pa. Jan. 16, 2018).

215 *Id.* at *5.

216 *Id.* at *4.

217 *Id.* at *6.

218 The district court did, however, dismiss without prejudice the claim for damages based on increased municipal expenditures, claiming that the City of Oakland had put forward no statistical evidence for increased expenditures, as it had done for decreased tax revenues. City of Oakland v. Wells Fargo Bank, N.A., No. 15-CV-04321-EMC, 2018 WL 3008538, at *5–6 (N.D. Cal. June 15, 2018).

generally do not apply to harm done to cities by Fair Housing Act violations. While *Holmes* was concerned with the difficulty in dealing with widespread individualized damages, the *Oakland* court correctly noted that the Fair Housing Act-related harm is *aggregative*, leaving open the possibility that Oakland could credibly approximate the economic cost of the harm.[219] Concerns regarding the administrative feasibility of calculating damages noted in *Holmes*, and reiterated by the Supreme Court, were inapplicable, since the aggregative harm to the municipality could be calculated from analysis of existing city data. Further, the court found that the concern in *Holmes* over duplicative injury is also inapplicable, since Oakland's injuries are "distinct and different" from the harm caused to individual borrowers.[220]

The district court noted that the only *Holmes* factor that worked against Oakland was the third, which emphasizes the first-step victims' ability to vindicate their own claims and thus deter future violations. However, if the injury suffered by the City is distinct from the injury suffered by borrowers, then it would follow logically that if only the borrowers are able to recover, this is *not* an adequate level of deterrence by way of recovery. On balance, however, the district court found that Oakland's claims should not be analyzed under the RICO-based *Holmes* test. The court correctly identified a different pattern of harm arising as a result of the banks' Fair Housing Act violations, which we characterize above as a "flood." The district court in *Oakland*, like the court in *Philadelphia*, did not, however, articulate an alternative test for proximate cause. The scope of liability test presents the sensible alternative, supported by the common law, the Restatement, and other Supreme Court conceptualizations of proximate cause.

CONCLUSION

The harms alleged by the City of Miami and other municipalities across the country represent real shared injuries that municipalities and their residents experienced as a direct consequence of racially discriminatory lending practices that were disturbingly widespread in the 1990s and 2000s. Discriminatory lending practices were to blame for

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219 *Id.* at *8.

220 *Id.*

only a small portion of lost municipal revenues, increased municipal service costs, and growth in residential segregation. But, as the review of the Fair Housing Act's history above demonstrates, these are harms that the statute was intended to address and that are distinct from any recovery that individual borrowers may have been able to obtain. To realize the goal of fair housing throughout the United States, those entities that discriminate in the provision of home financing must be held responsible for the significant shared harms they inflicted, as well as the individual ones. The scope of liability standard is the appropriate test to evaluate proximate cause under the Fair Housing Act and will enable courts to simultaneously limit liability and fulfill the mandate of this crucial civil rights law.