IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CITY OF MIAMI, A FLORIDA MUNICIPAL CORPORATION, *Plaintiff-Appellant*, v. BANK OF AMERICA CORPORATION; BANK OF AMERICA, N.A.; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS; COUNTRYWIDE BANK, FSB, *Defendants-Appellees.*	14-14543
CITY OF MIAMI, A FLORIDA MUNICIPAL CORPORATION, *Plaintiff-Appellant*, v. WELLS FARGO & CO., WELLS FARGO BANK, N.A., *Defendants-Appellees.*	14-14544

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, AARP, AARP FOUNDATION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL FAIR HOUSING ALLIANCE, INC. AND EIGHT LOCAL FAIR HOUSING CENTERS LOCATED WITHIN THE ELEVENTH CIRCUIT, AND THE POVERTY & RACE RESEARCH ACTION COUNCIL FOR LEAVE TO FILE A BRIEF AMICI CURIAE

MOTION FOR LEAVE TO FILE AMICI BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a) and Eleventh Circuit Rule 29(a), Amici The American Civil Liberties Union Foundation, The American Civil Liberties Union Foundation of Florida, AARP, AARP Foundation, Lawyers' Committee for Civil Rights Under Law, NAACP Legal Defense & Educational Fund, Inc., National Fair Housing Alliance, Inc. and Eight Local Fair Housing Centers Located within the Eleventh Circuit, and Poverty & Race Research Action Council move the Court for leave to file the attached Brief Amici Curiae in support of Plaintiff-Appellant's Brief. The proposed brief is attached to this Motion. In support of this Motion, Amici state as follows:

1. **The American Civil Liberties Union** ("ACLU") is a nationwide, non-profit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. **The American Civil Liberties Union of Florida** is one of its statewide affiliates. Since its founding in 1920, the ACLU has engaged in a nationwide program of litigation and advocacy on behalf of people who have been historically denied their constitutional and civil rights in housing and other areas.

2. **AARP** is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia,

Puerto Rico, and the U.S. Virgin Islands, AARP works to strengthen communities and advocate for what matters most to families with a focus on health security, financial stability and personal fulfillment. **AARP Foundation** works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness. Among other things, AARP and AARP Foundation advocate for the elimination of discrimination in housing and for the availability of affordable, accessible, and appropriate housing through the vigorous enforcement of fair housing laws. For example, AARP Foundation attorneys litigate on behalf of plaintiffs to challenge practices that violate the Fair Housing Act, 42 U.S.C. § 3601 *et seq*., *see, e.g*., *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, 134 S. Ct. 636 (2013).

3. **The Lawyers' Committee for Civil Rights Under Law** ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American Bar, at the request of President John F. Kennedy, to help defend the civil rights of racial minorities and the poor. For over fifty years, the Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination. The Lawyers' Committee and its affiliates have litigated numerous claims under the Fair Housing Act. They have

seen firsthand how cases brought pursuant to the Fair Housing Act are essential to meeting the Act's central goal of integrating American communities.

4. **The NAACP Legal Defense and Educational Fund, Inc.** ("LDF") is a non-profit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has challenged public and private policies and practices that deny African Americans housing opportunities and isolate African-American communities. *See, e.g.*, *McGhee v. Sipes*, 334 U.S. 1 (1948) (companion case to *Shelley v. Kraemer*, 334 U.S. 1 (1948)); *Cent. Ala. Fair Hous. Ctr. v. Lowder Realty Co.*, 236 F.3d 629 (11th Cir. 2000) (racial steering); *Comer v. Cisneros*, 37 F.3d 775 (2d Cir. 1994) (racial discrimination in public housing and assistance programs); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (redlining in homeowners insurance business); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (exclusionary zoning); *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006) (federal government's obligation to affirmatively further fair housing); Consent Decree, *Byrd v. First Real Estate Corp. of Ala.*, No. 95-CV-3087 (N.D. Ala. May 14, 1989) (racial steering); *Price v. Gadsen Corp.*, No. 93-CV-1784 (N.D. Ala. filed Aug. 30, 1993) (unfair lending practices); *Brown v. Artery Org., Inc.*, 654 F. Supp. 1106 (D.D.C. 1987) (redevelopment plans that unfairly eliminate affordable housing); *see also*

LDF et al., *The Future of Fair Housing: Report on the National Commission of Fair Housing and Equal Opportunity* (Dec. 2008). LDF has also long played an instrumental role in advancing the doctrine of disparate impact discrimination. *See, e.g.*, *Lewis v. City of Chicago*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

5. **The National Fair Housing Alliance, Inc.** ("NFHA") is a non-profit corporation that represents approximately 75 private, non-profit fair housing organizations throughout the country. Through education, outreach, policy initiatives, community development programs, advocacy, and enforcement, NFHA promotes equal housing, lending, and insurance opportunities. Relying on the Fair Housing Act, NFHA and its members undertake important enforcement initiatives across the country and in cities, including the City of Miami, and states across the country.

6. Eight Local Fair Housing Centers Located within the Eleventh Circuit join NFHA as Amici. **The Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of the Greater Palm Beaches, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc.**, and **Savannah-Chatham County Fair Housing Council, Inc**. are non-profit, public interest fair housing agencies operating in the States of Florida,

Alabama, or Georgia. Each works to eliminate housing discrimination and to ensure equal housing opportunities for all people within their communities through leadership, education and advocacy, public policy initiatives, and enforcement. They accept complaints alleging housing discrimination, investigate housing-related industries for compliance with fair housing laws, and participate in federal and state court litigation brought under those laws.

7. **The Poverty & Race Research Action Council** ("PRRAC") is a civil rights policy organization based in Washington, D.C., committed to bringing the insights of social science research to the fields of civil rights and poverty law. PRRAC's housing work focuses on the government's role in creating and perpetuating patterns of racial and economic segregation, the long term consequences of segregation for low-income families of color in the areas of health, education, employment, and economic mobility, and the government policies that are necessary to remedy these disparities.

8. Proposed Amici are committed to zealously enforcing the Fair Housing Act of 1968 ("FHA"), Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601–3631). Since the enactment of the FHA in 1968, this nation has made substantial progress toward eliminating racial segregation and discrimination in public and private housing. Yet, in many housing markets across our nation, the vestiges of de jure residential segregation persist. Moreover, the foreclosure crisis

revealed a new set of discriminatory policies and practices that deny housing opportunities on the basis of race and other protected characteristics. An unduly restrictive interpretation of proximate cause in the FHA context could significantly limit the strength of the FHA as a tool for combatting these policies and practices as well as other continuing forms of housing discrimination.

9. Leave to file a brief as amici curiae should be granted when "the amici have stated an 'interest in the case,' and it appears that their brief is 'relevant' and 'desirable,'" such as when "it alerts the merits panel to possible implications of the appeal." *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (quoting Fed. R. App. P. 29(a)(3)); *see also id.* at 132 ("The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.").

10. Proposed Amici submit that their experience combating discriminatory barriers to equal housing opportunity and their longstanding support for robust enforcement of the FHA provide a perspective that may benefit the Court and warrants their participation as amici. Notably, many proposed Amici submitted amici briefs to the Supreme Court when it addressed this matter, and some Amici also submitted an amici brief when this matter was previously before this Court.

11. Attorneys for the Plaintiffs have consented to the filing of this amici brief.

12. Attorneys for the Plaintiffs and for proposed Amici sought the consent of the Defendant-Appellees. Both Defendant-Appellees agreed to consent to the filing of this brief, but only on the condition that Amici file it by April 30, 2018, the day the parties' briefs were due. *See* Order, February 28, 2018. Defendant-Appellees stated that because the Court had set a simultaneous briefing schedule for the parties, it would not be fair to provide amici with the opportunity to respond to the parties' briefs.

13. Pursuant to Federal Rule of Appellate Procedure 29(a)(6) and Eleventh Circuit Rule 29(a)(6), amicus curiae briefs are due "no later than 7 days after the principal brief of the party being supported is filed." This Court's February 28, 2018 Order directed "the parties" to file briefs "simultaneously," but it did not contain any language addressing the timing of amicus filings. As a result, the Rules governing the timing for filing an amicus brief control.

14. Moreover, the attached brief does not respond directly to arguments in the parties' briefs, but rather provides insight into the broad statutory context of this Court's decision. As a result, it is not "responsive briefing" prohibited by the Court's February 28, 2018 Order.

For these reasons, Amici respectfully request that the Court grant this

Motion for Leave to File a Brief Amici Curiae and accept the attached brief for filing.

Respectfully submitted,

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Dated: May 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I filed the foregoing document entitled **Motion of The American Civil Liberties Union Foundation, The American Civil Liberties Union Foundation of Florida, AARP, AARP Foundation, Lawyers' Committee For Civil Rights Under Law, NAACP Legal Defense & Educational Fund, Inc., National Fair Housing Alliance, Inc. and Eight Local Fair Housing Centers Located Within The Eleventh Circuit, and The Poverty & Race Research Action Council For Leave To File A Brief Amici Curiae** via the Court's CM/ECF system, which shall send notice to all counsel of record for the parties.

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Plaintiff-Appellant,

v.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, N.A.; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS; COUNTRYWIDE BANK, FSB,
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Defendants-Appellees.

On Remand from the Supreme Court of the United States

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, AARP, AARP FOUNDATION, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL FAIR HOUSING ALLIANCE, INC. AND EIGHT LOCAL FAIR HOUSING CENTERS LOCATED WITHIN THE ELEVENTH CIRCUIT, AND THE POVERTY & RACE RESEARCH ACTION COUNCIL AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 - 26.1-3, amici curiae make the following disclosures:

In addition to those identified in Plaintiff-Appellant's Brief pursuant to Eleventh Circuit Rule 26.1-1 – 26.1-3, amici curiae disclose the following trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations as having an interest in the outcome of this case:

1. AARP, Amicus Curiae
2. AARP Foundation, Amicus Curiae
3. Abudu, Nancy, Attorney for Amici Curiae
4. The American Civil Liberties Union Foundation, Amicus Curiae
5. The American Civil Liberties Union Foundation Of Florida, Amicus Curiae
6. Goodman, Rachel E., Attorney for Amici Curiae
7. Greenbaum, Jon, Attorney for Amici Curiae
8. Lawyers' Committee for Civil Rights Under Law, Amicus Curiae
9. Lapidus, Lenora M., Attorney for Amici Curiae
10. NAACP Legal Defense & Educational Fund, Inc., Amicus Curiae
11. Park, Sandra S., Attorney for Amici Curiae
12. Parker, Dennis, Attorney for Amici Curiae

13. The Poverty & Race Research Action Council, Amicus Curiae
14. Quereshi, Ajmel, Attorney for Amici Curiae
15. Rich, Joe, Attorney for Amici Curiae

AARP, AARP Foundation, The American Civil Liberties Union Foundation, The American Civil Liberties Union Foundation Of Florida, Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of the Greater Palm Beaches, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Housing Opportunities Project for Excellence, Inc., Lawyers' Committee for Civil Rights Under Law, Metro Fair Housing Services, Inc., NAACP Legal Defense & Educational Fund, Inc., National Fair Housing Alliance, Inc., The Poverty & Race Research Action Council, and Savannah-Chatham County Fair Housing Council, Inc. are each non-profit corporations that have no parent corporations, and no publicly held corporation owns 10 percent or more of their respective stock.

Pursuant to Fed. R. App. P. 29(c)(5), amici curiae states that no party's counsel authored the brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person

other than amici curiae, their members, or their counsel contributed money to fund the preparation or submission of this brief.

Dated: May 4, 2018

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INTERESTS OF AMICI CURIAE

Amici are The American Civil Liberties Union Foundation, The American Civil Liberties Union Foundation of Florida, AARP, AARP Foundation, Lawyers' Committee For Civil Rights Under Law, NAACP Legal Defense & Educational Fund, Inc., National Fair Housing Alliance, Inc. and Eight Local Fair Housing Centers Located within the Eleventh Circuit[1], and The Poverty & Race Research Action Council. Each is a non-profit organization that has long sought to eliminate the vestiges of our nation's history of housing segregation and promote equal housing opportunity for all. More detailed statements of interest are contained in the accompanying motion seeking the Court's leave to file this amici brief.

INTRODUCTION

In *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), the Supreme Court affirmed this Court's holding that the City's interests fell within the zone of interests protected under the Fair Housing Act and that the City therefore had standing, but found this Court had erred in holding that foreseeability alone is sufficient to establish proximate cause under the Fair Housing Act ("FHA"). The Court declined to define "the precise boundaries of proximate cause under the

[1] Namely, The Center for Fair Housing, Inc., Central Alabama Fair Housing Center, Inc., Fair Housing Center of the Greater Palm Beaches, Inc., Fair Housing Center of Northern Alabama, Fair Housing Continuum, Inc., Housing Opportunities Project for Excellence, Inc., Metro Fair Housing Services, Inc., and Savannah-Chatham County Fair Housing Council, Inc.

FHA" and remanded the case to permit lower courts to define "the contours" of that analysis. *Id.* at 1306. This issue is of great importance to amici, which support vigorous enforcement of the FHA. Amici submit this brief concerning "the meaning of direct, proximate causation" under the FHA, Order, Feb. 28, 2018, and in support of the City of Miami.

SUMMARY OF ARGUMENT

The nature of a statutory cause of action dictates the definition of proximate cause. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). The Supreme Court's decision here suggested that plaintiffs must allege some combination of foreseeability and directness to establish proximate cause under the FHA. 137 S. Ct. at 1299. Identifying the precise contours of proximate cause under the FHA requires careful consideration of the background and purpose of the FHA and the "nature of the [FHA] statutory cause of action." *Id.* at 1306 (citation omitted). A definition of directness under the FHA must be grounded in the Act's legislative history which makes clear that the direct effects of housing discrimination extend beyond the immediate victims of a discriminatory act. Case law discussing proximate cause in other statutory contexts is therefore of limited utility.

ARGUMENT

I. THE FAIR HOUSING ACT'S BROAD REMEDIAL GOALS DEFINE THE SCOPE OF THE PROPER PROXIMATE CAUSE ANALYSIS.

A. The proximate cause doctrine is driven by policy concerns and thus proximate cause turns on the purpose of the statute in question.

Proximate cause is not actually about causation. "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.'" *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (first alteration in original) (citation omitted). Proximate cause is one of "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). It thus concerns the appropriate scope of a defendant's legal responsibility and as such, its application inherently turns on policy considerations. *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 179 (2d Cir. 1999) (Calabresi, J., concurring) ("The requirement of proximate causation is one of policy."). Because the consequences of an actor's conduct can "go forward to eternity" and "go back to the dawn of human events," *Holmes*, 503 U.S. at 266 n.10 (citation omitted), proximate cause expresses a normative preference about where the line should be drawn. *See* Sandra F. Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. 1199, 1204 (2013).

The Supreme Court has repeatedly held that the proper proximate cause standard depends upon the policy goals of the underlying statute. *See, e.g.*, *Lexmark*, 134 S. Ct. at 1390. For example, in *CSX Transportation*, the Supreme Court found that the Federal Employers' Liability Act ("FELA") did not incorporate common-law standards of proximate cause because Congress had explicitly detailed the extent of liability under the statute. 564 U.S. at 688, 703. In so holding, the Court was "informed by the statutory history" of FELA, including its goal of addressing the "exceptionally hazardous" risks associated with the railroad business at the time the statute was enacted. *Id.* at 691, 695. Given the expansive remedial purpose of the statute, along with the statute's broad language regarding causation, the Court found that Congress did not intend to limit liability through the use of common-law concepts of directness and foreseeability. *Id.* at 692, 696; *see also* Sperino, *supra* at 1210 (noting courts applying proximate cause to a statute must respect the appropriate balance between the judicial and legislative branches before "creating law").

While the Supreme Court held in this matter that proximate cause under the FHA would entail some notion of both foreseeability and directness, it recognized that these concepts are highly dependent upon the specific character of the statute. *See* 137 S. Ct. at 1305 ("Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a

sufficiently close connection to the conduct the statute prohibits[.]" (citing *Lexmark*, 134 S. Ct. at 1390)).

B. The appropriate proximate cause analysis here must recognize that Congress envisioned broad enforcement of the FHA.

In considering the proper proximate cause analysis here, then, this Court must focus on Congress's statements about enforcement of the FHA.

Events leading up to the passage of the FHA provide a crucial backdrop for this analysis. Through the 1960s, cities across the United States witnessed widespread protests against segregated housing policies and urban inequality. In response, President Johnson convened the National Advisory Commission on Civil Disorders, commonly known as the Kerner Commission. Exec. Order No. 11365, 3 C.F.R. § 674 (1966–1970 Comp.). Its report, released in February of 1968, described the nation as "moving toward two societies, one black, one white—separate and unequal." Nat'l Advisory Comm'n on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* 1 (1968). The report determined that housing discrimination, residential segregation, and economic inequality were causes of the increasing societal division, and recommended that Congress "enact a comprehensive and enforceable open housing law." *Id.* at 13.

After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, widespread civil unrest broke out in cities throughout the nation. One week later, Congress passed the FHA "to provide, within constitutional limitations, for fair

housing throughout the United States." 42 U.S.C. § 3601; *see also* H.R. Rep. No. 100–711, at 15 (1988) (explaining the FHA "provides a clear national policy against discrimination in housing"). Senator Mondale, the primary drafter of the FHA, 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." 114 Cong. Rec. 2274 (1968).[2] Congress therefore enacted an ambitious bill, one with "teeth and meaning," as Senator Mondale described it, to address the conditions that fostered civil unrest. *Id.* at 2275.

The legislative record makes clear that Congress had a broad understanding of the harms housing discrimination caused, including the harms to the nation's cities and communities. It focused on discrimination in the sale, rental, and financing of housing and recognized that discriminatory housing practices hurt not only individuals who were denied access to housing but "the whole community." *Id.* at 2706. Senator Mondale emphasized that citywide problems are "directly traceable to the existing patterns of racially segregated housing." *Id.* at 2276. The scope of the remedy Congress created in the FHA, therefore, matched the scale of the problem. The FHA aimed to replace racial segregation with "truly integrated

[2] The term 'ghetto' was used by the FHA's drafters to describe highly segregated neighborhoods with high concentrations of poverty, which resulted from deliberate racial discrimination by both government and private actors.

neighborhoods." *Id*. at 3422. As the Supreme Court recognized in 1972 in its first FHA 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." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972).

Congress intended the FHA to address exactly the types of shared, municipal harms that the City of Miami alleges here. The Kerner Commission drew attention to the financial plight of Detroit as one of the causes of unrest there: "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." Nat'l Advisory Comm'n on Civil Disorders, *supra*, at 51. The sponsors of the FHA argued that cities were overburdened and underfinanced as a result of discrimination in housing. For instance, Senator Mondale stated that the bill was necessary to address the "*[d]eclining tax base*, poor sanitation, loss of jobs, inadequate education opportunity, and urban squalor" that central cities faced. 114 Cong. Rec. 2274 (emphasis added). Senator Brooke similarly emphasized that the "*tax base* on which adequate public services, and especially adequate public education, subsists has fled the city, leaving poverty and despair as the general condition" of segregated neighborhoods and suggested the FHA would move toward that goal of reestablishing adequate services. *Id.* at 2280 (emphasis added). The drafters of the

FHA recognized that housing discrimination perpetuates racial segregation and that racial segregation leads to substantial economic disparities between neighborhoods that existed then and continue to the present.

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." 42 U.S.C. § 3602(i). The Supreme Court has consistently interpreted that phrase broadly, and expressly to include local municipalities. In this case, it recognized that when Congress amended the FHA in 1988, "it retained without significant change the definition of 'person aggrieved' that this Court had broadly construed." *City of Miami*, 137 S. Ct. at 1303 (*citing Texas Dep't of Hous. & Cmty. Affairs*, 135 S. Ct. 2507, 2519 (2015)).

Indeed, an expansive view of those *directly* harmed by housing discrimination has been central to the FHA and to courts' holdings concerning standing under the FHA. In *Trafficante v. Metropolitan Life Insurance Company*, the Supreme Court confirmed that the FHA protects both immediate and secondary victims of discrimination. 409 U.S. at 208. There, two tenants, one White and one Black, alleged that their landlord had discriminated against non-White tenants. Neither of the plaintiffs were the immediate 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 that would have accrued if they lived with members of minority groups; and suffered economic damage in their social, business, and professional activities. *Id.* The Court explicitly recognized that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices," *id.* at 368, that is, not the only entity directly harmed. It also noted that the only way to "give vitality" to the FHA is through the generous construction of the statute's standing and causation requirements that Congress intended, *id.*

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), the Court made clear that housing discrimination can directly harm cities. The Village of Bellwood alleged that racial steering negatively affected the local housing market, exacerbating segregation and reducing home values in the town. *Id.* at 109–11. The Court concluded that a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services," and creating an FHA claim. *Id.* at 110–11; *see also City of Miami*, 137 S. Ct. at 1304–05 (citing *Gladstone*).[3] Likewise here, direct harm to the City of Miami from the Bank

[3] The Court in *Gladstone* disapproved of the district court's resolution of the standing issue there at the summary judgment stage as opposed to waiting for a full record at trial. *See Gladstone*, 441 U.S. at 115; *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377–78 (1982); *Trafficante*, 409 U.S. at 209–10. The same concern is, of course, even more appropriate here in evaluating the Defendants-

Defendants' violation of the FHA extends beyond the immediate victim of the discriminatory act to the shared harms the City has experienced. *See also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding that fair housing organization unquestionably suffered injury in fact if discriminatory practices impaired its "ability to provide counseling and referral services for low-and moderate-income homeseekers").

In sum, the breadth of the FHA's scope and vision requires recognition that the housing discrimination and the harms experienced by our nation's cities are linked closely and satisfy the directness requirement the Court articulated in *City of Miami*.

II. THE PROXIMATE CAUSE STANDARD UNDER RICO DOES NOT DICTATE THE PROXIMATE CAUSE STANDARD UNDER THE FHA.

The Supreme Court's decision in this matter referenced Racketeer Influenced and Corrupt Organizations Act ("RICO") and antitrust cases discussing proximate cause. However, given that the Court also made clear that the analysis of proximate cause depends on the "nature of the statutory cause of action," 137 S. Ct. at 1306 (citations omitted), this Court cannot import the analysis developed in those very different statutory contexts. The Supreme Court's citation to these cases should instead be read to require careful examination of the legislative intent

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Appellees' motion to dismiss under Fed. R. Civ. P. 12(b)(6), where the Plaintiff-Appellant proximate-cause allegations must only meet a "plausibility" standard.

and policy considerations behind a statute in drawing the boundaries of proximate cause. As the Supreme Court noted in *Holmes*, "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the [statutory] text." 503 U.S. 258, 288 n.20.

In *Holmes*, the first RICO case the Supreme Court cited, the Court narrowed the scope of proximate cause under RICO by importing the "first step" proximate cause standard used under the Clayton Antitrust Act. 503 U.S. at 271–72 (*quoting Southern Pac. Co. v. Darnell Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). The Court provided two reasons for this decision. First, it held that Congress had intended to import proximate cause from the Clayton Act by using the Clayton Act's language. *Id*. at 268. Second, the Court found that policy considerations under RICO paralleled policy considerations behind antitrust laws such as the Clayton Act. *Id.* at 272–74. Among these considerations was the expectation that directly-injured victims "could be counted on to bring suit for the law's vindication." *Id.* at 273; *see also Moore*, 189 F.3d at 178 (Calabresi, J., concurring) ("[T]he pertinent requirements of proximate cause in a RICO case are those intended by the legislature that passed the statute, and not those of the common law.").

The "first step" proximate cause standard described under RICO—as noted in *Holmes*, and later, in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and

Hemi Group LLC v. City of New York, 559 U.S. 1 (2010)—cannot be transplanted to the FHA context for multiple reasons. First, as discussed above, Congress intended a broad reading of proximate cause under the FHA. Second, it did not reference the standards under either the RICO or the Clayton Act. Third, the expectation that directly injured victims can be "counted on to vindicate the law" does not exist here. *Holmes*, 503 U.S. at 269. The harm to the City of Miami from discriminatory lending is separate and distinct from the harm done to individual victims. Individual borrowers cannot fully vindicate the separate harms sustained by a City in the form of decreased revenues and increased costs; harms not suffered by the individual borrowers, but which were also caused by the discriminatory lending practices.

The inapplicability of a strict "first step" analysis to the FHA becomes even clearer when the FHA is compared with the original source of the "first step" proximate cause standard in *Holmes*—the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53, and other antitrust laws. A monopolist 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." Richard A. Posner, *Economic Analysis of Law* at 316–17 (4th ed. 1992). The nature of the harm in the context of an antitrust violation thus passes

through a series of actors, but erases itself at each step, leaving only the final buyers to bear the injury. *Id.*

A long-established principle of antitrust jurisprudence is that only direct buyers—the "first step" along the consumer chain—may recover from the monopolist. *See, e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977). The justification for cutting off proximate causation at the first step in this context is rooted in policy considerations. As Judge Posner has noted:

> 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 . . . the [direct buyers] may yield them 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.

Posner, *supra*, at 317. The nature of the harm done to the City of Miami in violation of the FHA is markedly different. First, there is no "passing on" the injury a FHA violation causes an individual victim of mortgage discrimination. Far from erasing itself in a subsequent transaction, this injury creates additional injuries to the City. If recovery were limited to the borrowers, the full scope of the injury caused would not be redressed. Individual borrowers could not recover for the City's injuries, and Bank Defendants would be relieved from liability for the full scope of the harms they caused, thus reducing the FHA's deterrent effect and

ultimately thwarting Congress' goals. The policy considerations for limiting proximate causation to the first step under antitrust laws, therefore, do not apply.

Considerations of judicial economy further support the application of a first step analysis in the antitrust context but not here. As the hiked price extends outward through the chain of buyers, the more "distant" buyers are subject to smaller injuries, since they are less likely to buy in bulk. Indirect buyers are thus "less efficient antitrust enforcers" than direct buyers due to the splintering of the harm. *Id.* at 318–19. No such concern presents itself in the FHA context. In fact, judicial economy weighs in favor of adjudicating the City's larger injury, which addresses the harms from numerous individual incidents of lending discrimination.

Finally, the individual minority borrowers targeted by the Bank Defendants' discriminatory loans face significant obstacles to bringing suit and therefore cannot be counted upon to vindicate the aims of the statute. For instance, an individual must file suit within two years of the origination of the discriminatory loan unless the individual plaintiff possesses concrete information that the conduct was part of a larger discriminatory scheme. 42 U.S.C. § 3613(a)(1)(A); *Cervantes v. Countrywide Home Loans, Inc.*, 2009 WL 3157160, at *7 (D. Ariz. Sept. 24, 2009), *aff'd*, 656 F.3d 1034 (9th Cir. 2011). Unlike corporate plaintiffs in the antitrust and RICO context who are likely to have a great deal of resources and financial sophistication, victims of discriminatory lending practices rarely have the

numbers, resources or statistical expertise necessary to show systemic discrimination.[4] As a result, municipalities play a special role in vindicating FHA rights and fulfilling it purposes.

An examination of the RICO and antitrust contexts makes clear that the reasons for the Supreme Court's strict and narrow reading of the "first step" in those contexts do not apply to the FHA. Under the FHA, the harms that Bank Defendants' discriminatory lending caused to the City cannot be dismissed as "mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014).

CONCLUSION

For these reasons, this Court should deny the Defendants' motions to dismiss and allow the City of Miami's claims to proceed.

Respectfully submitted,

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[4] *See* Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 18:3, 18–19, 20 (2017) (noting that the information needed to show that a defendant-lender's differential treatment violates 42 U.S.C. § 3605 is rarely "readily available" and that "only a few § 3605 cases have been reported in which the plaintiff was able to produce sufficient evidence of differential treatment").

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