Golden Gate University Law Review

Volume 52 | Issue 1 Article 3

November 2022

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AVA LAU-SILVEIRA

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*AVA LAU-SILVEIRA**

INTRODUCTION

The Financial Services Modernization Act of 1999 partially deregulated the financial industry under the premise of helping "everyone attain the American dream of homeownership."[1] In 1999, the Federal National Mortgage Association ("Fannie Mae") made subprime mortgage loans readily accessible to those who normally would not qualify.[2] People in the Oakland neighborhood, who "used to find it difficult to obtain mortgages," were suddenly able to obtain mortgage loans, but with subprime terms.[3] These subprime mortgage loans typically started with low monthly payments, but would subsequently increase based on changes in the market interest rates.[4] By the fall of 2008, subprime borrowers began defaulting on their loans at an unprecedented rate.[5] As a result, the stock

* J.D. Candidate, Golden Gate University School of Law, May 2022, Associate Editor, 2021-22, *Golden Gate University Law Review*.

[1] Will Kenton, *Financial Services Modernization Act of 1999*, INVESTOPEDIA (Nov. 25, 2020), https://www.investopedia.com/terms/f/financial-services-act-of-1999.asp; Paul Kosakowski, *The Fall of the Market in the Fall of 2008*, INVESTOPEDIA (Aug. 9, 2021).

[2] Kosakowski, *supra* note 2.

[3] Barbara Grady, *East Oakland Shows Signs of Being Epicenter for Foreclosure Crisis*, E. BAY TIMES (June 26, 2008), https://www.eastbaytimes.com/2008/06/26/east-oakland-shows-signs-of-being-epicenter-of-foreclosure-crisis/.

[4] Kosakowski, *supra* note 2; Grady, *supra* note 4.

[5] Kosakowski, *supra* note 2.

market and housing market crashed, the banks collapsed, and a global recession ensued.[6]

During the 2008 mortgage crisis, Oakland residents counted more than 150 properties in foreclosure across a 1.5-mile swath.[7] Many residents lost their homes, gang graffiti adorned the buildings, and the abandoned homes became a breeding ground for drug dealers.[8] Across the state, a similar scenario plagued the City of Cleveland.[9] Residents abandoned entire city blocks as their homes got repossessed.[10] Widespread foreclosures led to crimes like arson and other nuisances that the city expended resources to ameliorate, costing the city hundreds of millions of dollars in damages.[11] Like many cities and counties across the United States, the City of Cleveland blamed the financial crisis on banks for knowingly "flooding the local housing market with subprime mortgage loans to those who could never repay."[12] The City of Cleveland also alleged that the banks violated the Fair Housing Act ("FHA" or the "Act") for unfairly targeting African Americans with high-interest, subprime mortgage loans.[13]

In April 1968, during a time of civil unrest and injustice, Congress enacted the FHA to eliminate housing segregation and overt discrimination in the sale, renting, and financing of housing.[14] The Act made it unlawful for any person or business engaged in real estate-related transactions to discriminate based on race, color, religion, sex, handicap, familial status, or national origin.[15] Specifically, it prohibited banks and any loan association or corporation from fixing the amount, interest rate, duration, or other terms and conditions of a commercial real estate loan based on race, color, religion, sex, handicap, familial status, or national origin.[16]

Following the 2008 housing market crash and subsequent recession, many local governments across the country suffered economic harm and

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[6] Kosakowski, *supra* note 2.

[7] Grady, *supra* note 4.

[8] Grady, *supra* note 4.

[9] Christopher Maag, *Cleveland Sues 21 Lenders Over Subprime Mortgages*, N.Y. TIMES (Jan. 12, 2008), https://www.nytimes.com/2008/01/12/us/12cleveland.html?searchResultPosition=1.

[10] Maag, *supra* note 10.

[11] Maag, *supra* note 10.

[12] Maag, *supra* note 10 (alteration in original).

[13] Maag, *supra* note 10.

[14] Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/.

[15] 42 U.S.C. § 3605(a).

[16] *See id.* § 3605.

turned to the FHA for redress.[17] Within the past decade, many cities and counties filed suit against major banks and lenders under the Act.[18] These cities and counties claimed injuries of reduced tax revenue and increased municipal spending, caused by the lenders' decades-long practices of predatory lending.[19] Litigants included California, Illinois, Georgia, Ohio, Florida, and major cities such as Los Angeles, Miami, Memphis, and Baltimore.[20]

In the suits, the plaintiffs alleged that banks such as Wells Fargo, Bank of America, and Citigroup exacerbated the housing crisis by providing African American and Latinx borrowers with less favorable loan terms than similarly situated white borrowers.[21] The loan terms allegedly caused widespread foreclosures and blight[22] in minority neighborhoods, increasing municipal spending and diminishing the city and county's property tax revenues.[23] However, the courts largely dismissed or resolved the lawsuits on summary judgment[24] in favor of the banks, on statute of limitation grounds, lack of standing, or for failure to plausibly allege proximate cause for the injuries suffered.[25]

On appeal, the only suits that made any significant breakthrough were *Bank of America v. City of Miami ("Miami I")*, and more recently, *City of Oakland v. Wells Fargo ("City of Oakland I")*.[26] In *Miami I*, the City of Miami brought suit against Bank of America in 2013, alleging the bank steered minority borrowers toward loans with predatory terms, causing unnecessary foreclosures and blight conditions that reduced the city's tax revenue and increased the city's spending.[27] However, the district court dismissed the city's claims on three grounds: (1) lack of statu-

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[17] Nicholas Agnello, *Cities Are Looking to Fair Housing Act to Fight Redlining*, LAW360 (Nov. 5, 2015, 11:26 AM), https://www.law360.com/articles/723243/cities-are-looking-to-fair-housing-act-to-fight-redlining.

[18] Agnello, *supra* note 18.

[19] Agnello, *supra* note 18.

[20] Agnello, *supra* note 18.

[21] Agnello, *supra* note 18.

[22] *See* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1266 (11th Cir. 2015) ("Bank of America caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure, depriving the City of tax revenue and forcing it to spend more on municipal services (such as police, firefighters, trash and debris removal, etc.) to combat the resulting blight.").

[23] Agnello, *supra* note 18.

[24] Summary judgment is "a judgment entered by a court for one party and against another party without a full trial." *Summary Judgment*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/summary_judgment (last visited Mar. 22, 2021).

[25] Agnello, *supra* note 18.

[26] *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017); City of Oakland v. Wells Fargo & Co., 972 F.3d 1112 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[27] *City of Miami*, 800 F.3d at 1267.

tory standing;[28] (2) lack of proximate cause; and (3) statute of limitations.[29]

Two years later, the United States Court of Appeals for the Eleventh Circuit reversed the district court's ruling on appeal.[30] The Eleventh Circuit held that the city had statutory standing to sue and that the city adequately alleged proximate cause.[31] The court also found that the city may overcome the statute of limitations if it could show the bank's "discriminatory practices continued into the statutory period."[32] The Eleventh Circuit remanded the case, instructing the district court to grant leave to amend and allow the city to proceed with its FHA claims.[33]

Following this decision, the bank appealed and the Supreme Court of the United States granted certiorari, making Miami the first city to reach the Supreme Court in a predatory lending dispute.[34] The Supreme Court agreed that the city's property tax and municipal spending injuries fell within the FHA's zone of interest.[35] However, the Court found that a plaintiff showing its injuries were foreseeable was not sufficient to establish proximate cause under the FHA.[36] Rather than ordering a dismissal, the Court remanded with instructions to "define the contours of proximate cause under the FHA" without determining "which side of the line the City's financial injuries fall."[37] This left the lower courts to ultimately decide the "precise boundaries of proximate cause under the FHA."[38]

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[28] "Statutory standing . . . is a question of whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Constitutional And Statutory (fka "Prudential") Standing*, PAT. DEFS., https://patentdefenses.klarquist.com/constitutional-standing/ (last visited Mar. 22, 2021).

[29] *City of Miami*, 800 F.3d at 1266.

[30] *Id.* at 1289.

[31] *Id.* at 1266.

[32] *Id.* at 1283-84.

[33] Agnello, *supra* note 18.

[34] *See* Trevor C. Hoffberger, Comment, *Still Standing, Barely: Bank of America Corp. v. City of Miami and the Impact on Fair Lending Litigation*, 78 MD. L. REV. 967 (2019).

[35] Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305 (2017). *See* Michael P. Healy, *The Claims and Limits of Justice Scalia's Textualism: Lessons from his Statutory Standing Decisions*, 40 CARDOZO L. REV. 2861, 2862 (2019) (The zone-of-interests test determines whether a party has statutory standing and "necessitated a showing that the claimed illegality proximately caused the injury to the person bringing the claim.").

[36] Bank of Am. Corp. v. City of Miami, 137 S. Ct. at 1301.

[37] *Id.* at 1301, 1306.

[38] City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1271 (11th Cir. 2019) (quoting City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1307 (11th Cir. 2015)).

Around the same time the Supreme Court ruled in *Miami I*,[39] the City of Oakland ("Oakland") initiated a similar predatory lending suit against Wells Fargo alleging virtually the same violations under the FHA.[40] In *City of Oakland I*, Oakland alleged that Wells Fargo intentionally steered African-American and Latinx borrowers into high-cost, subprime loans.[41] Oakland further alleged that Wells Fargo used race as a factor in deciding what loans to offer minority borrowers.[42] According to Oakland, this resulted in high rates of foreclosures and both economic and non-economic injuries to the city.[43] In response, Wells Fargo filed a motion to dismiss Oakland's claims.[44] The district court granted in part and denied in part Wells Fargo's motion to dismiss.[45]

Wells Fargo appealed, and the United States Court of Appeals for the Ninth Circuit denied Wells Fargo's motion to dismiss Oakland's alleged property tax injuries and request for injunctive and declaratory relief.[46] However, the court granted the bank's motion to dismiss the allegations related to increased municipal spending.[47] A year later, the Ninth Circuit ("en banc court") vacated its prior decision and granted a rehearing en banc.[48] The en banc court affirmed the district court's dismissal of Oakland's increased municipal expenditures claim.[49] The court also reversed the district court's denial of Wells Fargo's motion to dismiss Oakland's lost property tax revenue and injunctive and declaratory relief claims.[50] Essentially, the en banc court dismissed Oakland's entire damages claims.[51]

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[39] *Miami I* refers to Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296 (2017); *Miami II* refers to City of Miami v. Wells Fargo & Co., 923 F.3d 1260 (11th Cir. 2019), *vacated as moot*, 140 S. Ct. 1259 (2020).

[40] *See* City of Oakland v. Wells Fargo Bank, 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018), *aff'd in part* and *rev'd in part*, 972 F.3d 1112 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021) (The amended complaint "allege that WF offered mortgage loans to Oakland residents on a race-discriminatory basis, constituting both intentional and disparate-impact discrimination. This discrimination allegedly caused high rates of foreclosure which heavily impacted minority borrowers and harmed Oakland in various ways.").

[41] *Id.* at *4.

[42] *Id.*

[43] *Id.* at *8.

[44] *Id.* at *3 ("WF brings this motion to dismiss primarily challenging Oakland's ability to demonstrate proximate cause.").

[45] *Id.*

[46] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1137 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[47] *Id.*

[48] *See* City of Oakland v. Wells Fargo & Co., 14 F.4th 1030 (9th Cir. 2021).

[49] *Id.* at 1042.

[50] *Id.*

[51] *Id.*

This Note argues, as the en banc court affirmed, that the Ninth Circuit erred in denying Wells Fargo's motion to dismiss Oakland's reduced property tax claim.[52] The en banc court held that Oakland did not satisfy proximate cause for its reduced tax revenue claim because Oakland's harm ran far beyond the first step.[53] Similarly, this Note argues that Oakland failed to satisfy the FHA's proximate cause requirement because Oakland failed to establish a direct connection between its asserted injuries and Wells Fargo's alleged predatory lending practices.[54] While this Note reached the same conclusion as the en banc court, this Note applied a different interpretation of the *Holmes* three-factor feasibility test[55] in reaching that decision.

Part I of this Note provides an overview of *City of Oakland I*[56] and the Ninth Circuit's application of the three-factor feasibility test.[57] Part II traces the proximate cause doctrine under common law and the doctrine's recent application in statutory claims. Using relevant cases preceding *City of Oakland I*, this Note unpacks the various standards of proximate cause applied in similar statutory causes of action. Part III confronts the flaws in the Ninth Circuit's *City of Oakland I* holding, particularly with respect to the ruling that Oakland's reduced property tax claim satisfied the proximate cause requirement under the FHA. It also describes the basis for the en banc court's decision and how the court's reasoning differs from this Note.

I. OVERVIEW OF *CITY OF OAKLAND V. WELLS FARGO CO.*

On September 21, 2015, Oakland filed a lawsuit against Wells Fargo, alleging injuries caused by Wells Fargo's predatory loan practices.[58] Specifically, Oakland claimed injury in three ways.[59] First, Wells

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[52] *Id. See City of Oakland*, 972 F.3d at 1132.

[53] *City of Oakland*, 14 F.4th at 1035-36.

[54] *City of Oakland*, 972 F.3d at 1132. *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017) ("[P]roximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'") (quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992)).

[55] *Holmes*, 503 U.S. at 269-70 (The three-factor feasibility test was established in *Holmes v. Securities Investor Protection Corporation*).

[56] *City of Oakland I* refers to City of Oakland v. Wells Fargo & Co., 972 F.3d 1112 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021); *City of Oakland II* refers to City of Oakland v. Wells Fargo & Co., 14 F.4th 1030 (9th Cir. 2021).

[57] *City of Oakland*, 972 F.3d at 1128-30.

[58] City of Oakland v. Wells Fargo Bank, 15-cv-04321-EMC, 2018 U.S. Dist. LEXIS 100915, at *3 (N.D. Cal. June 15, 2018), *aff'd in part* and *rev'd in part*, 972 F.3d 1112 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

Fargo's unlawful lending practices allegedly led African American and Latinx homebuyers to default on their home loans more often than white borrowers.[60] Oakland argued this affected the property values of homes and led to a disproportionate number of foreclosures in minority neighborhoods.[61] As a result, Oakland suffered economic harm because it collected lower property tax revenues.[62] Second, Oakland claimed that property foreclosures increased criminal activity, arson, vagrancy, and other threats to the public's health and safety, which Oakland expended resources to ameliorate.[63] Third, Wells Fargo's unlawful conduct allegedly caused a large number of minorities to lose their homes, impairing Oakland's goals of promoting a racially integrated community and ending racial disparities within the city.[64] Wells Fargo responded with a motion to dismiss Oakland's claims, pursuant to Federal Rules of Civil Procedure ("FRCP"), rule 12(b)(6), for failure to state a claim.[65] The district court denied in part and granted in part the motion to dismiss, permitting Oakland to proceed with both its request for declaratory or injunctive relief and reduced property tax claim.[66] However, the district court dismissed Oakland's claim related to increased municipal spending.[67] The Ninth Circuit subsequently granted interlocutory appeal.[68]

Reviewing the case *de novo*,[69] the Ninth Circuit started by examining the "contours of proximate cause under the FHA" and how that standard applied to Oakland's proclaimed injuries.[70] To determine the contours of proximate cause, the court evaluated the nature of the statutory cause of action by reviewing the FHA's text and legislative history.[71] The Ninth Circuit's inquiry concerned whether Congress passed the FHA in 1968 to provide redress for aggregate, city-wide injuries.[72] The Ninth Circuit determined that Congress intended the statute to allow

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[59] *Id.*

[60] *Id.* at *5-6.

[61] *Id.* at *3.

[62] *Id.* at *7.

[63] *Id.*

[64] *Id.* at *7-8.

[65] *Id.* at *3.

[66] *Id.*

[67] *Id.*

[68] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1121 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021); *In re* Cement Antitrust Litig., 673 F.2d 1020, 1025-26 (9th Cir. 1982) (An interlocutory appeal is "a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals.").

[69] Collier & Wallis, Ltd. v. Astor, 9 Cal.2d 202, 205 (1937) ("A hearing de novo literally means a new hearing, or a hearing the second time.").

[70] City of Oakland v. Wells Fargo & Co., 972 F.3d at 1124.

[71] *Id.*

[72] *Id.*

suits by a wide range of plaintiffs, including victims who were not the immediate victims of direct discrimination under the FHA.[73] The Ninth Circuit also found that Congress wanted to help reverse segregation, suburban flight, and urban decay caused by racially discriminatory housing practices in cities.[74] Most significantly, Senator Mondale specifically "referenced cities' 'declining tax base' as one of the large-scale injuries that the FHA was designed to mitigate."[75] Accordingly, the Ninth Circuit found that Congress intended the FHA to reach "neighborhood-wide and city-wide injuries" including those brought by Oakland.[76]

After the Ninth Circuit established that Oakland's city-wide financial injury claims were within the zone of interests protected by the FHA, the Ninth Circuit considered what is administratively feasible by applying the three-factor feasibility test outlined in *Holmes v. Securities Investor Protection Corporation*.[77] The purpose of this analysis is to determine if "a plaintiff's alleged injuries are 'too remote' to satisfy the proximate-cause requirement of the statute . . . ."[78] The first *Holmes* factor asks if it would be possible to determine the portion of Oakland's damages that are attributable to Wells Fargo's unlawful conduct.[79] According to Oakland, a regression analysis would be used to "quantify the loss" attributable to Wells Fargo's discriminatory lending.[80] Oakland explained in considerable length how the regression analysis could be used to quantify the precise loss attributable to Wells Fargo."[81] The Ninth Circuit found the harm plausible[82] on its face because the analysis used to measure damages was "sophisticated, reliable, and scientifically rigorous" and neither speculative nor conclusory.[83] Relying on Oakland's ex-

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[73] *Id.* at 1125.

[74] *Id.* at 1126.

[75] *Id.* ("Declining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor will persist as long as discrimination forces millions to live in the rotting cores of central cities.") (quoting 114 CONG. REC. 3421, 2274 (1968) (internal quotation marks omitted)).

[76] *Id.* at 1126-27.

[77] *Id.* at 1127-28; *Id.* at 1128 (the administratively feasible analysis asks whether an alleged harm is too remote from the defendant's conduct to satisfy proximate cause).

[78] *Id.* at 1128 (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014)).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'") (quoting Bell Atl. Corp. v. Twombly 550 U.S. 544, 570, 556 (2007)).

[83] *City of Oakland*, 972 F.3d at 1128.

planation as to how it would calculate precisely which lost property-tax revenues were attributable to Wells Fargo, the court found that Oakland satisfied the first *Holmes* factor.[84]

The second *Holmes* factor inquires whether it would be possible to apportion damages among each plaintiff to avoid double recovery arising from the same harm.[85] The Ninth Circuit concluded that the risk of duplicative recovery did not exist because individual borrowers cannot recover Oakland's reduced property-tax revenues or increased municipal spending.[86] Moreover, the minority borrowers' injuries that resulted from Wells Fargo's alleged predatory lending practices were completely separate from Oakland's damages.[87] Therefore, there was no risk of duplicative recovery.[88]

Finally, the third *Holmes* factor asks if allowing recovery of indirect injuries would deter Wells Fargo's unlawful conduct more effectively because directly injured victims cannot be relied on to sue.[89] Courts primarily applied the third factor to antitrust cases because suits brought by indirectly harmed plaintiffs were typically less effective in deterring wrongdoers.[90] The Ninth Circuit explained that Oakland could better deter Wells Fargo's wrongdoing "because it can sue to remedy the Bank's systematic misconduct across thousands of home loans," whereas individual borrowers can only raise individual allegations.[91] The Ninth Circuit held that all three factors supported the finding that Oakland's injuries were administratively feasible and convenient under the FHA.[92]

The Ninth Circuit then turned to the two questions certified for interlocutory appeal: (1) whether Oakland's reduced property tax revenue and increased municipal spending charges satisfied the FHA's proximate-cause requirement; and (2) whether the FHA's proximate cause requirement applied to claims for injunctive or declaratory relief.[93] The Ninth Circuit held that Oakland's reduced property-tax revenue claim met the proximate cause standard because Oakland could isolate the lost property value attributable to Wells Fargo, as opposed to other potential causes.[94] As to Oakland's increased municipal spending claim, the court held that it could not survive a motion to dismiss under FRCP 12(b)(6) because

[84] *Id.* at 1128-29.
[85] *Id.* at 1129.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 1129-30.
[92] *Id.* at 1128.
[93] *Id.* at 1121.
[94] *Id.* at 1132, 1135.

Oakland merely concluded that Wells Fargo's loans caused it to expend additional resources.[95] As to Oakland's last claim, the Ninth Circuit held that the proximate cause requirement applied to claims for injunctive and declaratory relief because plaintiffs must establish proximate cause "to receive any form of relief."[96] Therefore, the Ninth Circuit remanded the case to the district court to determine whether Wells Fargo's predatory lending practices proximately caused Oakland's injuries.[97]

II. THE PROXIMATE CAUSE DOCTRINE

A. PROXIMATE CAUSE UNDER COMMON LAW

At common law, causation requires both cause-in-fact and proximate cause.[98] Cause-in-fact, or factual cause, is found when the injuries would not have occurred, but-for the defendant's conduct.[99] By contrast, proximate cause focuses on the degree of connection between the harm and the wrongful conduct.[100] It is concerned with whether the defendant's conduct is the "actual" cause of the plaintiff's injuries.[101] However, even if there is "actual" cause, courts will deny recovery if the causal relationship is too attenuated or remote.[102]

The concept of proximate cause can be traced back to *Palsgraf v. Long Island Railroad Company*, a seminal torts case where the New York Court of Appeals[103] held that defendant, Long Island Railroad, was not liable for injuries sustained by an innocent bystander.[104] Writing for the majority, Judge Cardozo framed the issue as whether the defendant owed a duty of care to the plaintiff."[105] Judge Cardozo reasoned that the defendant was only liable to those within the zone of danger, meaning those who the defendant could have reasonably foreseen would be injured.[106] Because the guard could not have reasonably foreseen that the

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[95] *Id.* at 1136.

[96] *Id.*

[97] *Id.* at 1137.

[98] Nicole Summers, *Setting the Standard for Proximate Cause in the Wake of Bank of America Corp. v. City of Miami*, 97 N.C.L. REV. 529, 542 (2019).

[99] *Id.*

[100] *Id.* at 542-43.

[101] *See* John L. Diamond, Lawrence C. Levine & Anita Bernstein, Understanding Torts 179 (6th ed. 2018).

[102] *Id.*

[103] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (At the time, the court was called Court of Appeals of New York).

[104] *See id.* at 101.

[105] Thomas A. Cowan, *The Riddle of the Palsgraf Case*, 23 MINN. L. REV 46, 48 (1938), https://core.ac.uk/download/pdf/217208392.pdf.

[106] Summers, *supra* note 99, at 543.

man's package contained explosives and that the explosion would injure the plaintiff who was standing far away, the plaintiff could not hold the defendant liable for her injuries.[107] Judge Cardozo also declined to extend negligence liability to the defendant because there was no duty of care owed to the plaintiff.[108]

By contrast, Judge Andrews characterized the issue as one of proximate cause and not of negligence.[109] This set the stage for the present-day debate over which standards of proximate cause should apply.[110] Judge Andrews, in his dissent, criticized the fact that because of public policy, "the law arbitrarily declines to trace a series of events beyond a certain point."[111] He took the view that "negligent conduct entailed liability for all harmful consequences of which it was the proximate cause" regardless of foreseeability.[112] In his view, a person owes "the world at large the duty not to engage in conduct" that creates an unforeseeable risk of harm to others.[113] If harm results from such conduct, that individual should be liable for all injuries so long as he proximately caused the injuries.[114]

In Judge Cardozo's view, proximate cause is "rooted in the same principles as the standard of care for negligence liability," which extends liability if the alleged injurious conduct poses a foreseeable risk of harm to others.[115] Conversely, Judge Andrews's view of proximate cause demands an inquiry into whether the injury was too remote.[116] Under this standard, the court must ask "whether there was a natural and continuous sequence between cause and effect."[117] Other inquiries used to determine proximate cause include: whether the conduct was a substantial factor in causing the harm; whether there was a direct connection between the harm and the conduct, without too many intervening factors; and whether the cause and effect were too attenuated.[118]

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[107] *Palsgraf*, 162 N.E. at 99.

[108] Cowan, *supra* note 106, at 48.

[109] Summers, *supra* note 99, at 543.

[110] *Id.* at 544.

[111] *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting).

[112] Cowan, *supra* note 106, at 48.

[113] *Id.* at 50.

[114] *Id.*

[115] Summers, *supra* note 99, at 544.

[116] Cowan, *supra* note 106, at 47.

[117] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting).

[118] *Id.*

B. PROXIMATE CAUSE IN STATUTORY CLAIMS

No statutory text has ever expressly necessitated a plaintiff bringing a statutory claim to show that the defendant proximately caused its injuries.[119] There is no clear proximate cause standard for any one statutory claim, and "no clear precedent which dictates how to determine . . . proximate cause in a given statutory context."[120] Yet, the Supreme Court has incorporated the proximate cause requirement into statutory claims since 1983.[121] In 2014, the Supreme Court declared that all statutory causes of action must establish proximate cause to recover on a damages claim.[122]

In *Lexmark International, Inc. v. Static Control Components, Inc.*, Justice Scalia opined that for centuries, "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."[123] Under well-established common law principles, courts must attribute all cases of loss to proximate cause.[124] This principle reflects the notion that not every conceivable harm can be traced to the alleged wrongdoing.[125] Thus, the courts have required federal causes of action under different contexts to establish proximate causation.[126] According to Justice Scalia, the proximate cause inquiry requires asking "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."[127] Generally, a plaintiff is barred from recovery if the alleged harm is too remote from the defendant's conduct.[128] If a plaintiff's harm is derivative of a third party's injuries, courts have generally deemed the harm too remote.[129]

1. The Direct-Relation Standard

The directness standard applied to establish proximate cause in FHA claims is narrower than the common law foreseeability standard.[130] Due to the broad reach of plaintiffs under the foreseeability standard, courts have often declined to apply the foreseeability standard because of the

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[119] Healy, *supra* note 36, at 2862.
[120] Summers, *supra* note 99, at 548 (alteration in original).
[121] *Id.* at 547.
[122] *Id.* at 540-41.
[123] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014).
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.* at 133.
[128] *Id.*
[129] *Id.*
[130] *See* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017) (Allowing plaintiffs to recover for any foreseeable injury resulting from an FHA violation "would risk 'massive and complex damages litigation.'") (quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 274 (1992)).

need to limit liability.[131] Rather, courts have applied the directness standard, which has been one of the central elements required to establish proximate cause for several reasons.[132] First, the more indirect the injury, the more difficult it is to ascertain damages attributable to the defendant.[133] Second, recognizing indirect injuries would "force courts to adopt complicated rules" to divide damages among different plaintiffs at multiple levels.[134] Third, directly injured victims can sue without the problems that accompany suits by plaintiffs who were more remotely injured.[135] Fourth, allowing those indirectly injured to sue would "open the door to 'massive and complex damages litigation . . . .'"[136]

In *Holmes*, the Supreme Court applied the directness standard to establish proximate cause and found that the defendants were not responsible for the plaintiff's harm.[137] The plaintiff, a securities protection company, alleged that the defendants' stock-manipulation scheme caused multiple stocks to plummet.[138] The broker dealers, who invested a substantial amount in the stocks, suffered significant financial losses.[139] As a result, the plaintiff, a corporation with a duty to reimburse the registered broker-dealers' customers, had to advance $13 million to reimburse the customers.[140] The Court found that the link between the harm and the defendant's alleged conduct was too remote to establish proximate cause, reasoning that the plaintiff suffered injuries "only insofar as the stock manipulation first injured the broker-dealers . . . ."[141] Based on the general tendency "not to go beyond the first step," the Court in *Holmes* concluded that the plaintiff's claim, as a secondary victim who suffered indirect injuries, did not satisfy the proximate cause standard.[142]

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[131] Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 980 (E.D. Va. 1981). *See Holmes*, 503 U.S. at 274 ("[A]llowing suits by those injured only indirectly would open the door to massive and complex damages litigation . . . .").

[132] *Holmes*, 503 U.S. at 269.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 269-70.

[136] *Id.* at 274 (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)).

[137] *Id.* at 268-69.

[138] *Id.* at 262.

[139] *Id.* at 263.

[140] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 465 (2006).

[141] *Holmes*, 503 U.S. at 271.

[142] *Id*. at 271-74 (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983)) (internal quotation marks omitted).

2. Redefining the Directness Standard

In *Lexmark*, the Supreme Court redefined the directness standard by holding that proximate cause can be satisfied even if there is a multi-step causal chain connecting the alleged injury to the violation.[143] The plaintiff, a replacement part maker company, alleged that Lexmark misled its users to believe that it was illegal to use the plaintiff's products to refurbish and sell Lexmark's Prebate Program ink cartridges.[144] Lexmark's misrepresentations allegedly diverted the plaintiff's sales and hurt its business reputation, which resulted in business losses.[145]

The Court held that the plaintiff's allegations satisfied the proximate cause requirement because there was no discontinuity between the plaintiff's injury and Lexmark's conduct.[146] The plaintiff argued that if remanufacturers withheld 10,000 refurbished cartridges due to Lexmark's false advertisement, it would follow that the plaintiff sold $10,000 fewer microchips.[147] The plaintiff was able to link its damages to Lexmark's false advertisement because there was "a 1:1 relationship" between the number of microchips and refurbished cartridges sold.[148] This allowed the plaintiff to calculate damages attributable to Lexmark without speculation and inquiries into whether other intervening factors caused its business losses.[149] Thus, this satisfied the directness element required to establish proximate cause.[150]

3. A Plaintiff's Damages Must Not be Too Remote or Speculative

An important question courts consider when determining proximate cause is whether the plaintiff's asserted damages could be attributed to the defendant's wrongful conduct.[151] In *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.* ("*Oregon Laborers*"), the Ninth Circuit held that the plaintiffs' alleged injury was too remote to support its claims.[152] The plaintiffs alleged that the defendants defrauded the public by concealing the risks of smoking and by sup-

[143] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139-40 (2014).

[144] *Id.* at 122-23.

[145] *Id.* at 123.

[146] *Id.* at 140.

[147] *Id.* at 139-40.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 140.

[151] Oregon Laborers-Emps. Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957, 964 (9th Cir 1999).

[152] *Id.*

pressing product information.[153] The plaintiffs further alleged this led to higher medical costs because it prevented them from taking measures to reduce smoking among their participants.[154]

The Ninth Circuit agreed with the Third Circuit's position in *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris*,[155] opining that it would be difficult to ascertain the plaintiffs' damages because the plaintiffs would have to demonstrate: (1) which of the participants would have quit smoking if provided safer smoking information; (2) how many participants would have smoked less; (3) the health conditions of the participants if they had taken action; and (4) how much plaintiffs would have saved.[156] The plaintiffs argued "that they can demonstrate all of this through aggregation and statistical modeling . . . ."[157] However, the Ninth Circuit was unconvinced and did not believe that aggregation and statistical modeling would be sufficient to overcome "the AGC factor"[158] focusing on whether the claim was too speculative.[159]

4. A Damages Claim Requiring Courts to Engage in Intricate, Uncertain Inquiries is Generally Barred from Recovery

Another relevant factor to consider in the proximate cause analysis is the question of whether maintaining a plaintiff's claims would force the court to engage in "intricate, uncertain inquiries."[160] In *Canyon County v. Syngenta Seeds, Inc.*, Canyon County ("County") brought an action against the defendants under the civil Racketeer Influenced and Corrupt Organizations statute ("RICO"), alleging that the defendants illegally employed and harbored undocumented immigrant workers.[161] As a

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[153] *Id.* at 961.

[154] *Id.* at 962.

[155] Steamfitters Loc. Union No. 420 Welfare Fund v. Philip Morris, Inc. 171 F.3d 912, 918 (3d Cir 1999) (a suit brought by union health and welfare funds against tobacco companies that essentially alleged the same claims as in *Oregon Laborers*).

[156] *Oregon Laborers-Emps. Health*, 185 F.3d at 964-65 (quoting *Steamfitters*, 171 F.3d at 929).

[157] *Id.* at 965.

[158] Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983) (AGC factors: "the nature of the injury, the tenuous and speculative character of the relationship between the alleged violation and the alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy . . . .") (alteration in original).

[159] *Oregon Laborers-Emps. Health*, 185 F.3d at 964-65 (quoting *Steamfitters*, 171 F.3d at 929).

[160] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460 (2006).

[161] Canyon County v. Syngenta Seeds, Inc., 519 F.3d 969, 971 (9th Cir. 2008). *See* 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962

result, the County allegedly expended millions in health care and law enforcement services on the illegal immigrants that the defendants employed.[162]

The court applied the rationales described in *Anza v. Ideal Steel Supply Corporation*[163] and found too many alternative causes for the County's alleged harm to establish proximate cause, such as: demographic changes; changes in public health practices; insurance coverage, and more.[164] The Ninth Circuit found that the County's claim would force the court to evaluate the extent to which the defendants' hiring practices had created increased expenditures for the County, "an 'intricate, uncertain' inquiry of the type that the *Anza* Court warned against."[165] Precisely, the *Anza* Court warned against allowing a plaintiff to maintain its claim if it would burden the courts with calculating complex damages attributable to the defendant's conduct.[166] According to *Anza*, the proximate cause requirement is meant to prevent suits requiring "intricate, uncertain inquiries" from overrunning the court.[167]

C. PROXIMATE CAUSE UNDER THE FHA

Following the Supreme Court's decision in *Lexmark*,[168] the district court held for the first time that a city claiming an FHA violation must demonstrate proximate cause for its injuries.[169] Both the district court and Eleventh Circuit applied the foreseeability test for proximate cause, which asks whether the bank could have reasonably foreseen the city's injuries.[170] However, the Supreme Court rejected the foreseeability stan-

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of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains . . . .").

[162] *Canyon County*, 519 F.3d at 971-72.

[163] Anza, 547 U.S. at 458-59 (The rationales were: "difficulty that can arise when a court attempts to ascertain the damages . . . the attenuated connection between plaintiff's injury and defendant's injurious conduct . . . risk of duplicative recoveries, . . . whether the immediate victims of an alleged . . . violation can be expected to vindicate the laws by pursuing their own claims.") (alteration in original).

[164] *Canyon County*, 519 F.3d at 983.

[165] *Id.* (quoting *Anza*, 547 U.S. at 460.)

[166] *See Anza*, 547 U.S. at 459.

[167] *Id.* at 460.

[168] Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1307 (2017) (the Court made clear in *Lexmark* that proximate cause is applied "to all statutorily created causes of action . . . unless it is expressly negated.") (Thomas, J., concurring in part and dissenting in part) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014)) (internal quotation marks omitted).

[169] Summers, *supra* note 99, at 539-40.

[170] *See* City of Miami v. Bank of Am. Corp., 800 F.3d 1262, 1282 (11th Cir. 2015); Summers, *supra* note 99, at 540-41.

dard, reasoning that it "does not ensure the close connection that proximate cause requires."[171]

1. Proximate Cause Under the FHA Requires Some Direct Relation Between the Claimed Injury and Alleged Illegality

Writing for the majority opinion, Justice Breyer held that proximate cause requires "some direct relation" between the alleged injurious conduct and asserted injury.[172] The Supreme Court explained that the housing market is closely connected with "economic and social life."[173] Therefore, an FHA violation may cause "'ripples of harm' . . . far beyond the defendant's conduct."[174] However, Congress did not intend the FHA to "provide a remedy wherever those ripples travel."[175] Justice Breyer opined that allowing plaintiffs to recover for any foreseeable injury resulting from an FHA violation "would risk 'massive and complex damages litigation.'"[176]

2. Justice Thomas Found the City's Injuries Too Remote to Satisfy Proximate Cause Under the FHA

Although Justice Thomas, in his *Miami I* dissent, disagreed with the majority's zones-of-interests holding, he agreed with the Court's holding regarding proximate cause.[177] Justice Thomas agreed that the FHA statute required "some direct relation" between the bank's alleged misconduct and the city's asserted injuries to satisfy proximate cause.[178] He also concurred that foreseeability was not enough to establish proximate cause.[179] Whereas the majority declined to decide the critical question of whether the city's asserted injuries fell within the "contours of proximate cause under the FHA," Justice Thomas concluded that the city's injuries were "too remote to satisfy the FHA's proximate-cause requirement."[180]

Justice Thomas asserted that neither the city "nor any similarly situated plaintiff" could satisfy the "rigorous standard for proximate cause"

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[171] *Bank of Am. Corp.*, 137 S. Ct. at 1306.

[172] *Id.*

[173] *Id.*

[174] *Id.* (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983)).

[175] *Id.*

[176] *Id.* (quoting Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 274 (1992)).

[177] *Id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

[178] *Id.* (Thomas, J., concurring in part and dissenting in part) (quoting *Holmes*, 503 U.S. at 268) (internal quotation marks omitted).

[179] *Id.* (Thomas, J., concurring in part and dissenting in part).

[180] *Id.* at 1307 (Thomas, J., concurring in part and dissenting in part).

because the link between the asserted injuries and alleged FHA violation was too attenuated.[181] Justice Thomas illustrated the multi-step causal chain connecting the city's injuries to the defendant's alleged FHA violation as follows: the bank's discriminatory lending practices led "borrowers from predominantly minority neighborhoods" to default, which led to foreclosures, which led to vacant homes, which led to "decreased property values for surrounding homes," which led to "reduced property taxes and urban blight."[182] Based on this attenuated causal chain, Justice Thomas found the city's injuries too far removed from the bank's alleged conduct.[183]

Furthermore, Justice Thomas contended that the city's injuries, being "one step further removed" from the neighboring homeowners' injuries, cannot "sufficiently plead proximate cause" because the neighboring homeowners, whose home values declined, cannot sue under the FHA to recover damages as an indirect victim.[184] Although the majority remanded for the lower court to decide the proximate cause issue, Justice Thomas felt confident that it would not take long for the circuit court to discover that other, independent events may well have caused the city's injuries.[185]

III. ANALYSIS

A. APPLYING THE *HOLMES* THREE-FACTOR TEST WEIGHED IN FAVOR OF FINDING OAKLAND'S PROPERTY TAX REVENUE CLAIM NOT ADMINISTRATIVELY FEASIBLE AND CONVENIENT

Precedent makes clear that a direct causal connection is required to establish proximate cause in a statutory damages action.[186] A direct connection means the link between the asserted injury and violative conduct cannot be "'too remote,' 'purely contingent,' or 'indirec[t].'"[187] In a

[181] *Id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

[182] *Id.* (Thomas, J., concurring in part and dissenting in part) (alteration in original).

[183] *Id.* at 1311-12 (Thomas, J., concurring in part and dissenting in part).

[184] *Id.* at 1312 (Thomas, J., concurring in part and dissenting in part).

[185] *Id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

[186] *See generally* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) ("'[P]roximate cause' requires some direct relation between the injury asserted and the injurious conduct alleged"); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question . . . is whether the alleged violation led directly to the plaintiff's injuries."); *Bank of Am. Corp.*, 137 S. Ct. at 1306 ("[P]roximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.") (quoting *Holmes*, 503 U.S. at 268).

[187] Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010) (quoting *Holmes*, 503 U.S. at 274).

damages case, the tendency is "not to go beyond the first step."[188] "What falls within that first step depends in part on the 'nature of the statutory cause of action,' and an assessment 'of what is administratively possible and convenient.'"[189]

Determining the nature of the statutory cause of action "requires a close review of the FHA's text and legislative history" whereas considering "'what is administratively possible and convenient'" requires asking whether the plaintiff's injuries are too remote to satisfy proximate cause.[190] In an administrative feasibility analysis, the court must weigh the following factors outlined in *Holmes*: (1) the level of difficulty in ascertaining damages attributable to the defendant; (2) the need to "adopt complicated rules" to apportion damages among different plaintiffs to avoid risk of multiple recoveries; and (3) whether the immediate victim could be counted on to sue.[191]

1. Factor One: The Difficulty in Ascertaining Damages

It is undisputed that Wells Fargo issued discriminatory loans to Oakland residents and that Wells Fargo's predatory lending practices did not directly cause Oakland's reduced property tax injuries.[192] Rather, Oakland suffered injuries through a five-step causal chain.[193] That is, Wells Fargo allegedly issued predatory loans to minority Oakland residents in violation of the FHA; the residents defaulted on the loans; Wells Fargo foreclosed on the homes; this led property values to drop; and Oakland's tax revenues diminished.[194] To satisfy proximate cause, Oakland must establish there was no discontinuity, or intervening factors, which broke the chain connecting Wells Fargo's misconduct to its indirect tax revenue injuries.[195]

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[188] *Bank of Am. Corp.*, 137 S. Ct. at 1299 (quoting *Hemi Grp.*, 559 U.S. at 10).

[189] *Id.* at 1306 (first quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133 (2014); then quoting *Holmes*, 503 U.S. at 268)).

[190] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1124, 1128 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021) (quoting *Bank of Am. Corp.*, 137 S. Ct. at 1306 (2017)).

[191] *Holmes*, 503 U.S. at 269; *City of Oakland*, 972 F.3d at 1128.

[192] *See City of Oakland*, 972 F.3d at 1119 (Oakland alleged Wells Fargo issued predatory loans to its Black and Latinx residents. Those loans caused foreclosures, which reduced property values. Consequently, Oakland collected less property tax revenues.)

[193] *Cf. Bank of Am. Corp.*, 137 S. Ct. at 1307 ("[P]etitioners' allegedly discriminatory mortgage-lending practices led to defaulted loans, which led to foreclosures, which led to vacant houses, which led to decreased property values, which led to reduced property taxes . . . .") (Thomas, J., concurring in part and dissenting in part).

[194] *See City of Oakland*, 972 F.3d at 1119.

[195] *Cf. id.* at 1132 ("[A]n intervening step does not necessarily break the causal chain if there is continuity between the . . . injuries and . . . misconduct.").

In *Lexmark*, the plaintiff was able to link its damages to the defendant's false advertisement because if remanufacturers withheld 10,000 refurbished cartridges due to Lexmark's false advertisement, it would follow that the plaintiff sold $10,000 fewer microchips.[196] This meant that the Court did not have to speculate or engage in complex inquiries to determine whether other intervening factors caused the plaintiff's business losses.[197] This is distinguished from *City of Oakland I*, because if there were 100,000 foreclosures due to Wells Fargo's predatory lending practices, it would not necessarily follow that those 100,000 foreclosures caused surrounding property values to decrease.[198] For instance, crime increase in the neighborhood, leading to robberies and mindless vandalism, could negatively affect home values and break the causal chain between Oakland's tax revenue losses and Wells Fargo's unfair lending practices.[199]

In *Anza*, the Court denied the plaintiff's damages claim because businesses lose customers for many reasons, and it would require a complex assessment to establish what portion of lost sales were the product of the defendant's misconduct.[200] If allowed to proceed, the district court would need to calculate the portion of the price drop attributable to the alleged illegal conduct, and then "calculate the portion of . . . lost sales attributable to the relevant part of the price drop."[201] Similarly, in *City of Oakland I*, property values fluctuate for many reasons, and it would be difficult to determine which properties' values decreased due to Wells Fargo's predatory loans, as opposed to other factors.[202] Assuming Oakland's Hedonic regression analysis[203] could "precisely calculate the exact

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[196] Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139-40 (2014).

[197] *See id.*

[198] *See* DIAMOND, *supra* note 102, at 171 (proximate cause extends liability if the alleged conduct materially contributed to the injury asserted; however, a defendant is not the direct cause of harm if any new or intervening force causes the injury); Herrera v. Quality Pontiac, 134 N.M. 43, 191-92 (2003) ("An independent intervening cause is 'a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable results of the original act or omission, and produces a different result, that could have been reasonably foreseen.'") (quoting Torres v. El Paso Elec. Co. 127 N.M. 729, 734 (1999)).

[199] *See* Stanfield v. Neubaum, 494 S.W.3d 90, 97 (2016) ("[A] new and independent, or superseding, cause may 'intervene[ ] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause'") (quoting Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 450 (2006)); Michelle Miley, *What Causes Housing Prices to Rise in the United States?*, SFGATE (June 20, 2018), https://homeguides.sfgate.com/causes-housing-prices-rise-united-states-56413.html.

[200] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459 (2006).

[201] *Id.*

[202] *See* Miley, *supra* note 200.

[203] "'Hedonic regression' is a technique that isolates the factors that contribute to the value of a property by studying thousands of transactions. Hedonic analysis determines the contribution of each of these factors to the value of a home." City of Oakland v. Wells Fargo & Co., 972 F.3d 1112,

loss in property values attributable to foreclosures caused by Wells Fargo's predatory loans, isolated from any losses attributable to . . . other independent causes," the court would still need to engage in "intricate, uncertain inquiries" to ascertain damages because the court would need to address any issues raised regarding Oakland's regression analysis.[204]

For instance, Wells Fargo argued that Oakland's regression analysis was invalid because it did not account for "well-recognized causes of foreclosure like job loss, medical hardships, or divorce."[205] The Ninth Circuit was unpersuaded, and held that the variables were irrelevant because they did not correlate with how likely a person would receive a predatory loan.[206] However, a borrower's divorce or job loss could arguably sever the causal chain between Oakland's losses and Wells Fargo's unfair lending practices.[207] Unlike the foreseeability standard, where the "existence of intervening factors do not preclude liability" so long as the injury is foreseeable, proximate cause under the directness standard requires a direct connection between the asserted harm and alleged violative conduct.[208] That means Oakland must prove the "absence of any intervening forces" rather than that Wells Fargo created a foreseeable risk of harm to Oakland.[209] Thus, factors like job loss, divorce, and medical hardships should be relevant, unless Oakland could establish that Wells Fargo is liable, notwithstanding an individual's failure to pay, because any individual who received a predatory loan is doomed to default.[210]

1120 n.11 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[204] *Anza*, 547 U.S. at 46; *City of Oakland*, 972 F.3d at 1128, 1134 ("Wells Fargo . . . attacks the City's foreclosure regression on multiple fronts . . ."); *cf.* Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, 171 F.3d 912, 929 (3d Cir. 1999) ("[A]ggregation and statistical modeling are [in]sufficient to get . . . over the hurdle of whether the 'damages claim is . . . highly speculative.'") (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 549 (1983)).

[205] *City of Oakland*, 972 F.3d at 1134.

[206] *Id.*

[207] *See* DIAMOND, *supra* note 102, at 184 ("Highly improbable and extraordinary intervening forces are generally found superseding and preclude liability."); *see also* Stanfield v. Neubaum, 494 S.W.3d 90, 97 (2016) ("[A] new and independent, or superseding, cause may 'intervene[ ] between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause'") (quoting Dew v. Crown Derrick Erectors, Inc., 208 S.W.3d 448, 450 (2006)).

[208] DIAMOND, *supra* note 102, at 187; Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 259 (1992).

[209] DIAMOND, *supra* note 102, at 187; *cf.* Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1299 (2017).

[210] *See generally* Lauren Thomas, *Understanding Confounding Variables*, SCRIBBR (Apr. 2, 2021), https://www.scribbr.com/methodology/confounding-variables/ ("In research that investigates a potential cause-and-effect relationship, a confounding variable is an unmeasured third variable that influences both the supposed cause and the supposed effect. It's important to consider potential

Contrary to being a straightforward process to determine damages, using a Hedonic regression analysis to prove damages requires a court to engage in comprehensive inquiries to ascertain damages.[211] As the Ninth Circuit noted, Oakland's property tax claim would need to be "tested through discovery, including the rigors of expert rebuttal."[212] For example, Wells Fargo challenged Oakland's reduced property values, reasoning that California caps property tax increases at two percent.[213] The court would thus have to "evaluate competing evidence to determine if the two-percent cap undermines Oakland's regression analyses."[214] Furthermore, Oakland's Hedonic regression analyses would need to be "scrutinized during discovery and at trial" to determine if Wells Fargo's predatory lending practices proximately caused Oakland's diminished tax base.[215]

These are precisely the type of inquiries that *Holmes* and *Miami I* warned against because they go "beyond the first step."[216] As a general rule, the less direct an injury, the more difficult it is to ascertain "the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors."[217] In *Holmes*, the Court held that to award damages to the plaintiff, the district court must first determine if the plaintiff was injured due to the defendants' alleged stock manipulation scheme, or due to the broker dealers' failure to recognize market developments.[218]

Similarly, in *City of Oakland I*, the court must determine if Oakland collected less tax revenues due to market conditions (e.g. supply and demand), area desirability, the economy or other circumstances, leading to lower property values.[219] Conducting a Hedonic regression analysis would not overcome the difficulty of determining the amount of damages that are attributable to Wells Fargo or alleviate the court from needing to

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confounding variables and account for them in your research design to ensure your results are valid.").

[211] *See City of Oakland*, 972 F.3d at 1128, 1134 ("Wells Fargo . . . attacks the City's foreclosure regression on multiple fronts . . ."); *see generally* Thomas, *supra* note 211 (the court may need to ensure the internal validity of Oakland's regression analysis).

[212] *See City of Oakland*, 972 F.3d at 1135.

[213] *Id.* at 1135-36.

[214] *Id.* at 1136.

[215] *Id.*

[216] *See* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 271 (1992) (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 534 (1983)) (internal quotation marks omitted); Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1299 (2017) (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 10 (2010)) (internal quotation marks omitted).

[217] Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458 (2006) (quoting *Holmes*, 503 U.S. at 271) (internal quotation marks omitted).

[218] *Holmes*, 503 U.S. at 272-73.

[219] *See* Miley, *supra* note 200.

engage in comprehensive inquiries to ascertain damages.[220] Considering the complexity in attributing Oakland's tax revenue loss to Wells Fargo's predatory lending practices, the first factor weighs against Oakland's reduced tax revenue claim.[221]

2. Factor Two: The Risk of Duplicative Recoveries

On the one hand, individual borrowers cannot recover the same reduced property-tax revenues as Oakland, so there is no risk of double-counting the damages owed to Oakland versus to individual borrowers.[222] On the other hand, there is duplicative recovery because Wells Fargo could potentially "pay repeatedly" for the same alleged misconduct.[223] In *City of Oakland I*, the Ninth Circuit held that there was "no risk of duplicative recoveries" because individual borrowers cannot recover Oakland's reduced property tax revenues.[224] Therefore, there was no need to apportion damages between multiple plaintiffs because the damages suffered by individual borrowers were entirely independent of the damages suffered by Oakland.[225] However, another way of looking at this factor is asking whether there is a danger of duplicative litigation raising identical issues, resulting in multiple recoveries arising from the same conduct.[226]

The court in *Pruitt*, for instance, denied the plaintiffs' claims for lost profits, despite the fact that allowing the plaintiffs' recovery would not result in double-counting of damages.[227] Judge Merhige in *Pruitt* rea-

[220] *See* Steamfitters Loc. Union No. 420 Welfare Fund v. Philip Morris, Inc. 171 F.3d 912, 929 (3d Cir 1999) (rejecting use of statistical modeling to measure damages because it would not "overcome the difficulty of proving the amount of damages."); *see also* Thomas, *supra* note 211 (if you fail to account for confounding variables, your results may not reflect the actual relationship between the variables you are measuring).

[221] *See Holmes*, 503 U.S. 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 violation, as distinct from other, independent, factors.").

[222] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1129 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[223] *See* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 979 (E.D. Va. 1981); *see also City of Oakland*, 972 F.3d at 1129 ("[T]he Supreme Court has limited lawsuits to directly harmed individuals due to 'the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages" from a single violation.") (quoting Blue Shield of Va. v. McCready, 457 U.S. 465, 474-75 (1982)).

[224] *City of Oakland*, 972 F.3d at 1129.

[225] *Id.*

[226] *See Pruitt*, 523 F. Supp. at 979 ("Considerations both of equity and social utility suggest that just as defendant should not be able to escape liability for destruction . . . , it should not be caused to pay repeatedly for the same damage.").

[227] *Id.*

soned that allowing indirect victims to recover would cause the defendant to pay repeatedly for the same conduct and open the door to massive litigation.[228] While risking massive litigation was not part of the second *Holmes*-factor inquiry, it should be considered together with factor-two because *Miami I*, *Holmes*, and *Anza* all expressed the concern that allowing indirect victims to sue "would risk 'massive and complex damages litigation.'"[229]

For instance, the *Anza* Court held that there was no risk of duplicative recoveries, but the "attenuated connection" between the plaintiff's injuries and the defendant's conduct "implicate[d] fundamental concerns expressed in *Holmes*."[230] In *Holmes*, the Court raised the concern that allowing indirect parties to sue would open the door to massive litigation and burden the courts with complex damages litigation.[231] Likewise, allowing Oakland to sue as an indirect victim for tax revenue injuries could prompt other cities and counties to pursue the same type of suit and open the door to massive litigation.[232] To deter indirect plaintiffs from filing massive suits and burdening the courts, courts have, in many cases, "raised an absolute bar to recovery" rather than allow plaintiffs to "risk failure to prove damages as their injuries become increasingly remote."[233]

However, permitting Oakland to proceed on its demand for injunctive and declaratory relief may weigh in favor of this factor.[234] The damages awarded to individual borrowers would not be duplicative and Wells Fargo would not be paying more than once for the same conduct.[235] Wells Fargo would potentially pay individual borrowers once,

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[228] *Id.* at 979-80 ("[B]ecause of the large set of potential plaintiffs, even the commentators most critical of the general rule on indirect damages have acknowledged that some limitations to liability . . . is advisable.").

[229] Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1306 (2017) (quoting Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)); Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 259 (1992); *see generally* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460 (2006) ("The element of proximate causation recognized in Holmes is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation.").

[230] *Anza*, 547 U.S. at 459.

[231] *Holmes*, 503 U.S. at 259 (citing *Associated Gen. Contractors*, 459 U.S. at 545).

[232] *See* Agnello, *supra* note 18; *cf. Pruitt*, 523 F. Supp. at 979 ("[T]he number of parties with a potential cause of action against defendant is hardly exhausted in plaintiffs' complaint. In theory, parties who bought and sold to and from the plaintiffs named here also suffered losses in business, as did their employees. In short, the set of potential plaintiffs seems almost infinite.").

[233] *Pruitt*, 523 F. Supp. at 980.

[234] *See Injunctive relief*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunctive_relief (last visited Mar. 22, 2021) ("Injunctive relief . . . is a remedy which restrains a party from doing certain acts or requires a party to act in a certain way.").

[235] *See* Anna Majestro, *Preparing for and Obtaining Preliminary Injunctive Relief*, ABA (June 4, 2018), https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/preliminary-injuction-relief/ (a request for injunctive relief is typically granted when there

and be forced to stop its alleged discriminatory lending practices.[236] However, granting declaratory or injunctive relief could potentially open the door to massive suits and burden the courts with ongoing review and oversight.[237] Therefore, the second factor, when considered in conjunction with the risk of massive litigation, weighs against Oakland's claims.

3. Factor Three: Whether Direct Victims Are Best Suited to Vindicate the Law

In 2012, the U.S. Department of Justice succeeded in pursuing the same claims related to discriminatory subprime lending in the borrowers' stead and obtained relief for aggrieved borrowers.[238] However, individual suits brought by direct victims against Wells Fargo were largely unsuccessful because individual borrowers did not know that they were discriminated against or that they received a predatory loan until after the statute of limitations had passed.[239] Moreover, individual borrowers often lack the financial means to bring a suit in federal court.[240] Thus, the Ninth Circuit held that Oakland could better deter Wells Fargo's discriminatory lending practices because individual borrowers could only challenge the lending policies, whereas Oakland could "remedy the Bank's systematic misconduct."[241] However, like individual borrowers, a majority of the suits brought by cities and counties have largely resulted in dismissal.[242]

In *Hemi Group, LLC v. City of New York*, the city alleged that Hemi's failure to report its cigarette sales to the State of New York caused the city to lose tax revenue.[243] However, the Court held that the

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is no adequate remedy at law (i.e. difficultly in quantifying damages)); *see also* CAL. CIV. CODE § 525 ("An injunction is a writ or order requiring a person to refrain from a particular act.").

[236] *See* McGill v. Citibank, 2 Cal.5th 945, 951 (2017) (an injunctive relief prohibits the defendant from engaging in "unlawful acts that threaten future injury to the general public.").

[237] *See Injunctive Relief*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunctive_relief (last updated June 2020) ("Injunctive relief is generally only granted in extreme circumstances." Such orders, if not obeyed, may be punished as contempt. "Due to its coercive force, a grant of injunctive relief is subject to immediate review by an appellate court.").

[238] *See* Joint Motion for Entry of Consent Order & Statement of Points and Authorities at 13, United States v. Wells Fargo Bank, N.A., (2012) (No: 1:12CV01150), 2012 WL 2849462. *See also* Notice of Motion & Motion to Dismiss Plaintiff's First Amended Complaint; Memorandum of Points and Authorities in Support Thereof at 9, City of Oakland v. Wells Fargo & Co., 2017 WL 9854955 (N.D. Cal. Oct. 6, 2017) (No. 3:15-cv-04321-EMC).

[239] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1133 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[240] *Id.*

[241] *Id.* at 1129-30.

[242] Agnello, *supra* note 18.

[243] Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010).

customers' failure to pay taxes was the direct cause for the city's injuries—not Hemi's failure to report to the State.[244] Moreover, the State, rather than the city, was better situated to sue because it imposed its own $2.75 taxes on each pack of cigarette sold.[245]

Likewise, individual borrowers, as immediate victims of Wells Fargo's discriminatory lending practices, are still in the best position to sue and recover damages despite noted challenges.[246] To deter Wells Fargo's systemic misconduct, perhaps the most effective course of action is for the Attorney General to commence a civil action on behalf of the residents.[247] This would avoid dismissal for failure to adequately plead proximate cause.[248] Since directly injured victims could sue without the proximate cause problems that accompany suits brought by plaintiffs who are remotely injured, the third factor weighs against Oakland.[249]

B. APPLYING THE DIRECTNESS OF HARM STANDARD TO CITY OF OAKLAND'S REDUCED PROPERTY TAX REVENUE CLAIM WOULD PRECLUDE RECOVERY

In *Miami I*, the Court held that mere foreseeability is not enough to establish proximate cause in the context of the FHA.[250] Instead, the directness standard should be used to establish proximate cause.[251] Under this standard, Oakland must prove a direct connection between Wells Fargo's predatory lending practices and its alleged injuries "without too many intervening causes,"[252] rather than show that Wells Fargo created a foreseeable risk of harm to Oakland.[253]

In *Holmes*, the Court held that the link between the plaintiff's harm and the defendants' stock manipulation was too remote to establish proximate cause because the plaintiff's harm was contingent on the harm the

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[244] *Id.* at 11.

[245] *Id.* at 12.

[246] *Cf.* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 981 (E.D. Va. 1981) (held that the "defendant may be held liable to plaintiff commercial fishermen, but not to those businesses which purchased fishermen's harvest.").

[247] *See* 42 U.S.C. § 3614(b)(1)(A) ("The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under . . . this title.").

[248] *See Pruitt*, 523 F. Supp. at 980 (courts have barred recovery rather than risk "failure of proof as damages become increasingly remote and diffuse . . .").

[249] *See id;* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 269-70 (1992).

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

[251] *Id.*

[252] Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting); DIAMOND, *supra* note 102, at 187.

[253] *See Bank of Am. Corp.*, 137 S. Ct. at 1306 ("With respect to the FHA, foreseeability alone does not ensure the required close connection.").

broker dealers suffered.[254] Likewise, in *City of Oakland I*, Oakland was harmed only insofar as Wells Fargo first harmed the individual borrowers.[255] The initial FHA violation that led up to Oakland's injuries required city residents to be injured first.[256] After that, the property must be foreclosed, and the value of the surrounding properties must decrease due to the foreclosures.[257] Due to the indirectness between Oakland's asserted harm and Wells Fargo's alleged violation, many other intervening factors may have well caused Oakland's injuries.[258] Thus, Oakland as a secondary victim did not satisfy the proximate cause standard needed to recover its reduced property tax claim.[259]

C. Comparing this Note's Application of the *Holmes* Three-Factor Test with the En Banc Court

The en banc court clarified that although the *Holmes* factors were instructive, they were not mandatory in the directness analysis.[260] Applying the *Holmes* factors to Oakland's tax revenue claim, the en banc court found Oakland's "theory of harm" failed all aspects of the test, except for the second factor.[261] According to the en banc court, Oakland failed the first factor because Oakland's " 'theory of liability rests not just on separate actions, but separate actions carried out by separate parties . . . .' "[262] The court also asserted that Oakland's regression analyses fell short because the analyses only showed the discriminatory loans' likeliness of foreclosure, rather than a causal connection between Wells Fargo's predatory loans and Oakland's decreased property tax revenues.[263] Thus, even if the court accepted the results as true, a court would still be left with the challenge of "isolating the 'damages attributable to the viola-

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[254] *Holmes*, 503 U.S. at 259.

[255] *See* City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1119 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021) (the loans issued by Wells Fargo first had to harm minority residents before diminishing Oakland's property tax revenues).

[256] *See id.* (the "predatory loans issued by Wells Fargo . . . caused injury to individual borrowers, namely in the form of foreclosures, also necessarily injured the City because the foreclosures caused a respective drop in property values and in turn reduced property-tax revenues.").

[257] *See Bank of Am. Corp.*, 137 S. Ct. at 1311 (Thomas, J., concurring in part and dissenting in part).

[258] *Cf. id.* (opined that the court of appeals would not have to "look far to discern other, independent events . . . might well have caused the injuries Miami alleges . . . .") (Thomas, J., concurring in part and dissenting in part).

[259] *Cf. Holmes*, 503 U.S. at 274 (held that "secondary victim[ ] does, and should, run afoul of proximate-causation standards . . .").

[260] City of Oakland v. Wells Fargo & Co., 14 F.4th 1030, 1039 (9th Cir. 2021).

[261] *Id.* at 1039-41.

[262] *Id.* at 1040 (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 11 (2010)).

[263] *Id.*

tion, as distinct from other, independent, factors.' "[264] This Note similarly argued that conducting a regression analysis would not alleviate a court from having to engage in comprehensive inquiries to ascertain damages, because utilizing a regression analysis to prove damages would raise complex damages issues that the court has to address.[265]

As to the second factor, the en banc court held that there was no risk of needing to adopt complicated rules to apportion damages among plaintiffs at different levels because individual borrowers cannot recover Oakland's property tax revenues."[266] This Note also recognized that individual borrowers cannot recover the same lost property tax revenues as Oakland.[267] However, this Note argued that factor two should weigh against Oakland's damages claim as a matter of public policy because allowing Oakland to sue as an indirect victim for tax revenue injuries could prompt other cities and counties to pursue the same type of suit and open the door to massive litigation.[268]

In terms of the third factor, the court held that individual borrowers could be counted on to sue and are "incentivized to do so through the availability of punitive damages, attorneys' fees, and equitable relief."[269] The court also noted that organizations, the Department of Justice ("DOJ"), and the Department of Housing and Urban Development could sue under the FHA.[270] This Note similarly argued that individual borrowers or the Attorney General are in the best position to sue, because they could sue without the issue of failing to satisfy proximate cause.[271] Having applied the *Holmes* three-factor test, the court held that it reinforced the court's view that Oakland did not meet the directness requirement of the proximate-cause standard.[272]

CONCLUSION

The prevailing standard of proximate cause under the FHA is a direct causal connection between the asserted claim and alleged miscon-

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[264] *Id.* (quoting *Holmes*, 503 U.S. at 269).

[265] *See* City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1124, 1135-36 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021).

[266] *City of Oakland*, 14 F.4th at 1040-41.

[267] *City of Oakland*, 972 F.3d at 1129.

[268] *See* Agnello, *supra* note 18; *Holmes*, 503 U.S. at 259.

[269] *City of Oakland*, 14 F.4th at 1041.

[270] *Id.*

[271] *See Holmes*, 503 U.S. at 269.

[272] *City of Oakland*, 14 F.4th at 1040.

duct.[273] Oakland's claim for loss of property tax revenues did not satisfy proximate cause under the directness standard set out in *Miami I* because the link between Oakland's alleged tax revenue injury and Wells Fargo's violative conduct was too attenuated.[274] The Supreme Court in *Miami I* specifically stated that the injury alleged must have some direct relation to the alleged misconduct.[275] The Court also advised that a damages claim should not "go beyond the first step" of the causal chain.[276] The first step depends on the "nature of the statutory cause of action" and "an assessment of what is administratively possible and convenient."[277] To determine whether an indirect injury is administratively possible and convenient under a given statute, the Supreme Court in *Holmes* considered three factors,[278] which, when applied to *City of Oakland I*, weighed against Oakland's reduced property tax claim.

As discussed above, Oakland did not meet the first factor, because the court would have to engage in intricate inquiries to ascertain damages attributable to Wells Fargo's misconduct, notwithstanding Oakland's claim that its hedonic regression analysis could "precisely calculate the exact loss in property values attributable to foreclosures caused by Wells Fargo's predatory loans . . . ."[279] Next, the second *Holmes* factor failed as a matter of public policy, because allowing Oakland to proceed when its tax revenue injuries were insufficiently direct would set a dangerous precedent, and would open the door to massive suits—an outcome courts have historically sought to avoid.[280] Finally, the third *Holmes* factor failed because the direct victims or the Attorney General could be

[273] *See Holmes*, 503 U.S. at 268; Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006) (held that when a court evaluates proximate cause, "the central question . . . is whether the alleged violation led directly to the plaintiff's injuries."); *Bank of Am. Corp.*, 137 S. Ct. at 1306 (held that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.' ") (quoting *Holmes*, 503 U.S. at 268).

[274] *Cf. Bank of Am. Corp.*, 137 S. Ct. at 1311 (opined that "neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause . . . .") (Thomas, J., concurring in part and dissenting in part).

[275] *Id.* at 1306.

[276] *Id.* at 1299 (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 10 (2010)) (internal quotation marks omitted).

[277] *Id.* (first quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 139 (2014); then quoting *Holmes*, 503 U.S. at 268)) (internal quotation marks omitted).

[278] *See Holmes*, 503 U.S. at 269-70.

[279] City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1136 (9th Cir. 2020), *vacated reh'g granted en banc*, 993 F.3d 1077 (9th Cir. 2021), *aff'd in part* and *rev'd in part*, 14 F.4th 1030 (9th Cir. 2021). *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460 (2006).

[280] Summers, *supra* note 99, at 540-41.

counted on to sue Wells Fargo for its alleged misconduct without running afoul of the proximate cause standard.[281]

Echoing Judge Merhige's conclusion in *Pruitt*, although Oakland's damages were insufficiently direct, it does not mean that Wells Fargo should not avoid liability.[282] It also does not mean that Oakland's injuries were "in any sense unforeseeable," or that Wells Fargo's alleged discriminatory conduct, if true, should go unpunished.[283] However, Oakland is not the proper plaintiff in a cause of action against Wells Fargo because Oakland's reduced property tax injuries were too remote to establish proximate cause under the FHA.[284] To seek redress for Oakland residents and to deter Wells Fargo's future systemic misconduct, the Attorney General, rather than Oakland, is better suited to bring suit against Wells Fargo.[285]

[281] *See* 42 U.S.C. § 3614(b)(1)(A) ("The Attorney General may commence a civil action in any appropriate United States district court for appropriate relief with respect to a discriminatory housing practice referred to the Attorney General by the Secretary under . . . this title.").

[282] *See* Pruitt v. Allied Chem. Corp., 523 F. Supp. 975, 979 (E.D. Va. 1981) (opined that "defendant should not be able to escape liability for destruction of publicly owned marine life . . .").

[283] *See id.* at 980.

[284] *Cf. Bank of Am. Corp.*, 137 S. Ct. at 1299 (held that "the link between the alleged FHA violation and its injuries is exceedingly attenuated.").

[285] *See* 42 U.S.C. § 3614(b)(1)(A).