**No. 19-15169**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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CITY OF OAKLAND, A MUNICIPAL CORPORATION,

*Plaintiff-Appellee,*

v.

WELLS FARGO & COMPANY; WELLS FARGO BANK, N.A.

*Defendants-Appellants*

On Appeal from the United States District Court
for the Northern District of California
No. 1:15-cv-04321-EMC
The Honorable Edward M. Chen

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# BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA, THE AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES, AARP, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., NATIONAL FAIR HOUSING ALLIANCE, INC., POVERTY & RACE RESEARCH ACTION COUNCIL AND TWELVE LOCAL FAIR HOUSING CENTERS IN THE NINTH CIRCUIT AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE CITY OF OAKLAND

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Jamie Crook
American Civil Liberties Union
Foundation of Northern California
39 Drumm Street,
San Francisco, CA 94111
(415) 621-2493
jcrook@aclunc.org

D. Scott Chang
Housing Rights Center
3255 Wilshire Blvd., Suite 1150
Los Angeles CA 90010
(213) 387-8400
schang@housingrightscenter.org

David Loy
American Civil Liberties Union
of San Diego & Imperial Counties
P.O. Box 87131
San Diego, Ca 92138-7131
(619) 232-2121
davidloy@aclusandiego.org

Julia Devanthéry
American Civil Liberties Union
of Southern California
1818 W 8th Street
Los Angeles, CA 90027
714-221-2781
jdevanthery@aclusocal.org

Sandra S. Park
Alejandro Ortiz
American Civil Liberties Union
Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2500
spark@aclu.org
ortiza@aclu.org

Morgan Williams
National Fair Housing Alliance
1331 Pennsylvania Ave. NW
Suite 610
Washington, DC 20004
(202) 898-1661
mwilliams@nationalfairhousing.org

Ajmel Quereshi
NAACP Legal Defense &
Education Fund, Inc.
1441 I St., NW, 10th Floor
Washington, DC 20005
(202) 682-1300
aquereshi@naacpldf.org

*Counsel for Amici Curiae*

## CORPORATE DISCLOSURE STATEMENT

*Amici curiae* are all nongovernmental, nonprofit corporate parties. None of the *amici curiae* have any parent corporations and none have any stock or stock owned by any other person or entity.

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality. 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. The three California affiliates of the ACLU share the national ACLU's commitment to combating discrimination and economic marginalization.

The National Fair Housing Alliance, Inc. ("NFHA") is a non-profit corporation that represents approximately 75 private, nonprofit fair housing organizations throughout the country. Through education, outreach, policy initiatives, advocacy and enforcement, NFHA promotes equal housing, lending and insurance opportunities.

The Housing Rights Center, Fair Housing Advocates of Northern California, Fair Housing Center of Washington, Fair Housing Council of Orange County, Fair Housing Council of Oregon, Fair Housing Council of the San Fernando Valley, Fair Housing Napa Valley, Inland Fair Housing and Mediation Board, Intermountain Fair Housing Council, Northwest Fair Housing Alliance, Project Sentinel, and Southwest Fair Housing Council are fair housing organizations

within the Ninth Circuit. Each works to eliminate housing discrimination and to ensure equal housing opportunities.

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, AARP advocates for the elimination of housing discrimination and for affordable, accessible housing through vigorous enforcement of fair housing laws.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit 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.

The Poverty & Race Research Action Council ("PRRAC") is a civil rights policy organization, committed to bringing the insights of social science research to civil rights and poverty law. PRRAC's housing work focuses on the patterns and consequences of racial and economic segregation and the government policies that are necessary to remedy these disparities.

Western Center on Law and Poverty ("WCLP") represents low-income Californians in securing housing, health care, racial justice, public benefits and access to justice. Using tools like high-impact litigation and policy advocacy,

WCLP protects the rights of low-income renters and homeowners, promotes equitable land use policies, prevents displacement, furthers fair housing, and ensures adequate production of affordable housing.

The National Housing Law Project ("NHLP") advances housing justice for poor people and communities through technical assistance, training, policy advocacy, and litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the supply of safe and affordable homes.

The Public Law Center ("PLC") has championed the rights of low-income residents in Orange County since 1981. PLC's services include community education, strategic policy advocacy, and impact litigation to challenge societal injustices.

Each *amicus* is a non-profit organization that seeks to promote equal housing opportunity and is dedicated to the vigorous enforcement of the Fair Housing Act. *Amici*'s interests will be adversely affected by a decision that unduly restricts the definition of proximate cause under the Fair Housing Act and therefore limits the strength of the Fair Housing Act as a tool for combatting segregation and housing discrimination.

Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, this brief is filed by consent of all parties. Pursuant to Rule 29(b)(4)(E), the

undersigned counsel for *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money for the preparation or submission of this brief, and no other person beyond *amici* contributed money for the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

*Amici* urge the Court to uphold the District Court's order denying Defendants-Appellants Wells Fargo & Co. *et al.*'s ("Wells Fargo") Motion to Dismiss. Plaintiff-Appellee City of Oakland ("Oakland") has adequately pled facts to establish that Wells Fargo's alleged predatory lending practices targeted at communities of color in Oakland violate the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and that this violation proximately caused injuries suffered by the city as a whole. Those injuries—including increased municipal expenditures and decreased property-tax revenues—are the very types of city-wide harms Congress intended to remedy when it passed the Fair Housing Act, promoting the ambitious goal of ending racial segregation and providing for fair housing throughout the nation.

As the Eleventh Circuit recognized in a similar series of predatory lending challenges brought by the City of Miami, cities with large Black and Latinx neighborhoods that were devasted by the foreclosure crisis are uniquely well-situated to pursue fair housing cases seeking redress for conduct that harms the entire community. The legislative history of the Fair Housing Act, which illustrates

the Act's broad remedial purpose and community-wide focus, and the Supreme Court's consistent instruction that the Fair Housing Act be afforded a broad construction, compel a holding that Oakland has alleged sufficient facts to satisfy the proximate-cause requirements of the Fair Housing Act.

## ARGUMENT

### I. THE PROXIMATE-CAUSE INQUIRY MUST ACKNOWLEDGE CONGRESSIONAL INTENT THAT THE FAIR HOUSING ACT BE A POWERFUL TOOL FOR CHALLENGING SEGREGATION

#### A. The Proximate-Cause Analysis Depends on the Legislative Intent and Policy Furthered by the Statute at Issue

Proximate cause asks where a court should set the scope of liability, as a matter of judicial economy and policy. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1271-72 (11th Cir. 2019) ("*City of Miami II*"); *see also Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) ("The doctrine of proximate cause serves merely to protect defendants from unforeseeable results of their negligence when too many unexpected things have happened between the defendant's wrongdoing and the plaintiff's injury." (internal quotation marks and brackets omitted)).

Congress has multiple tools to set the scope of liability. Proximate cause is one of those tools, but Congress might alternatively "express limits by defining the parties who may sue, by using affirmative defenses, by providing limited remedies, by narrowly proscribing prohibited conduct, or by defining statutory terms." *City*

*of Miami II*, 923 F.3d at 1278 (quoting Sandra F. Sperino, *Statutory Proximate Cause*, 88 Notre Dame L. Rev. 1199, 1236 (2013)). Thus, proximate cause is just one of "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. . . . [P]roximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient." *City of Miami II*, 923 F.3d at 1272 (quoting *Holmes v. Sec. Investor Protection Corp.*, 503 U.S. 258, 268 (1992)).

The Supreme Court has repeatedly held that the determination of the proper proximate-cause standard for a given statute depends upon Congress's policy goals in passing the statute. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 131 (2014); *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688, 703 (2011); *City of Miami II*, 923 F.3d at 1278-79. Thus, when conducting the proximate-cause analysis, courts must consider the "nature of the statutory cause of action" and "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) ("*City of Miami I*") (citing *Lexmark*, 572 U.S. at 132). The Supreme Court thus invited lower courts to think through the proximate-cause inquiry in light of the purpose of the Fair Housing Act and the injuries Congress intended it to remedy.

### B. Congress Enacted the Fair Housing Act to Remedy Discriminatory Practices That Contributed to Housing Segregation and the Harms Segregation Inflicts on Urban Communities

When it enacted the Fair Housing Act, Congress had a broad understanding of the harms that discrimination caused, including the harms to the nation's cities and communities. Throughout 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.); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) ("*ICP*"). In a report released in February 1968 ("Kerner Commission Report"), the Kerner Commission described the nation as "moving toward two societies, one black, one white—separate and unequal," Kerner Commission Report at 1, and urged Congress to "enact a comprehensive and enforceable federal open housing law," *id*. at 13.

The Kerner Commission emphasized that segregated, economically distressed inner-city communities required greater municipal expenditures on "every kind of public service: education, health, police protection, [and] fire protection," and that the expenditures "strikingly outpaced tax revenues." *Id.* at 393. Concluding that housing discrimination, residential segregation, and economic inequality were causes of increasing societal division, the Commission

recommended that Congress "enact a comprehensive and enforceable open housing law" and warned that "a commitment to national action on an unprecedented scale" was necessary to preserve the vitality of the country's urban centers. *Id.* at 23.

After the assassination of Dr. Martin Luther King, Jr. on April 4, 1968, Congress responded to "a new urgency to resolve the social unrest in inner cities" by passing the Fair Housing Act. *ICP*, 135 S. Ct. at 2516. Congress made express its goal "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 that the Fair Housing Act "provides a clear national policy against discrimination in housing"). In passing the Fair Housing Act, Congress explicitly took aim at broad social ills "being felt on a citywide scale." *City of Miami II*, 923 F.3d at 1280. It "sought to reshape in meaningful ways the landscape of American cities" and "did not just target individual discriminatory landlords." *Id*. Instead, the Fair Housing Act was "directed at the neighborhood level," because the most effective way to combat societal problems like segregated schools was "to attack the segregated neighborhood." *Id.* (quoting 114 Cong. Rec. 3421 (1968) (statement of Sen. Mondale)).

Congress therefore recognized that the harms of housing discrimination included harms to the nation's cities and communities. *See* 114 Cong. Rec. at 2706 (1968) (statement of Sen. Mondale) (recognizing that discriminatory housing

practices hurt not only individuals who were denied access to housing but "the whole community"). Senator Mondale, the Fair Housing Act's primary drafter, cautioned that a failure to eliminate residential segregation would "reinforce the growing alienation of white and black America. It will ensure two separate Americas constantly at war with one another." *Id.* at 2274. He emphasized that citywide problems were "directly traceable to the existing patterns of racially segregated housing." *Id.* at 2276. Other members of Congress noted that residential segregation spawned segregation "in education, playgrounds, and all other aspects of our daily lives." 112 Cong. Rec. 18, 270 (1966) (statement of Rep. Scheuer); *see also* 114 Cong. Rec. 3015, 3127 (statement of Sen. Hatfield) (noting that segregation in housing also caused segregation in "employment, education, public accommodation, religious worship, and social relations"); *id.* at 2986 (explaining that segregation and discrimination threatened community social structures and civic institutions in ways that placed "increasing force upon the cities" and destabilized local communities (statement of Sen. Brooke)).

The scope of the remedy created by Congress matched the scale of the problem that motivated the Act's passage. Congress sought to replace racial segregation with "truly integrated neighborhoods." *Id.* at 3422 (statement of Sen. Mondale). Indeed, Congress intended that the Act would provide relief to cities that were overburdened and underfinanced because of housing discrimination—the

types of shared, municipal harms that Wells Fargo's predatory lending practices have imposed on Oakland. Senator Mondale, for example, stated that the Act was necessary to address the sorts of municipal harms that Oakland claims here: the "[d]eclining tax base, poor sanitation, loss of jobs, inadequate education opportunity, and urban squalor" in central cities. 114 Cong. Rec. 2274. Senator Brooke similarly emphasized that because of white flight and increasing residential segregation, "the tax base on which adequate public services . . . subsists has fled the city, leaving poverty and despair as the general condition" of segregated neighborhoods, and that an objective of the Fair Housing Act was to help reestablish adequate city services. *Id.* at 2280. Congress therefore recognized that the harms of segregation and discrimination affected the "urban centers of America" as well as individuals and neighborhoods. 114 Cong. Rec. 2987 (statement of Sen. Proxmire).

Protecting the Nation's cities has been one of the Act's primary goals since its enactment. Congress passed the Fair Housing Act against a backdrop of deep concern about the future of America's urban centers; intended that the Act would "extend through chains of causation," *City of Miami II*, 923 F.3d at 1280; and understood that discriminatory practices that create or entrench segregation or exacerbate its negative effects harm cities in direct, tangible ways.

### C. The Supreme Court Has Repeatedly Recognized That the Fair Housing Act Requires a Broad Construction to Achieve Congress's Ambitious Intent to Remedy the Harms of Segregation

An expansive view of whom the Fair Housing Act protects has been central to Fair Housing Act jurisprudence since its inception.

Congress defined an "aggrieved person" as any person "who claims to have been injured by a discriminatory housing practice" or who believes that such an injury "is about to occur." 42 U.S.C. § 3602(*i*). The Supreme Court has consistently interpreted the statutory term *aggrieved person* broadly, affirming that the Fair Housing Act's protections extend beyond the direct target of discrimination. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209-12 (1972) (instructing courts to give the Fair Housing Act a "generous construction" to carry out a "policy that Congress intended to be of the highest priority"); *see also Walker v. City of Lakewood*, 272 F.3d 1114, 1129 (9th Cir. 2001) (recognizing the mandate to interpret the Fair Housing Act broadly and inclusively); *Harris v. Itzhaki*, 183 F.3d 1043, 1049-50 (9th Cir. 1999) ("The Supreme Court has long held that claims brought under the Fair Housing Act are to be judged under a very liberal standing requirement. . . . [T]he plaintiff need not allege that he or she was a victim of discrimination."); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (recognizing the need to generously construe the Fair Housing Act (citing *Trafficante*, 409 U.S. at 209, 201-12)).

In one of its earliest treatments of the Fair Housing Act, the Supreme Court held in *Trafficante* that people "who [are] not the direct objects of discrimination [have] an interest in ensuring fair housing, as they too suffer[]." 409 U.S. at 210. In *Trafficante*, a white tenant and a Black tenant sued their landlord for discriminating against non-white prospective tenants. While they had not been denied access to housing themselves, they alleged that as a result of the landlord's discrimination against prospective tenants, they lost the social benefits of living in an integrated community, missed the business and professional advantages that would have accrued from living in an integrated community, and consequently suffered economic damage in their social, business, and professional activities. *Id.* at 208. In holding that the tenants the landlord had rented to could sue under the Fair Housing Act, the Supreme Court explicitly recognized that "[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is . . . 'the whole community.'" *Id.* at 211 (quoting 114 Cong. Rec. 2706). The Court also emphasized that the only way to "give vitality" to the Fair Housing Act and comply with Congress's intent was through "a generous construction." *Id.* at 212.

*Trafficante* laid the groundwork for a subsequent holding with direct implications for the proximate-cause inquiry in this case. In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Court recognized that housing

discrimination can directly harm cities and that such injuries are cognizable under the Fair Housing Act. The Village of Bellwood alleged that racial steering hurt the local housing market, exacerbating segregation and reducing home values. *Id.* at 109-11. The Court agreed that the Village's claim fell within the scope of harms the Fair Housing Act was intended to reach: "[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." *Id.* at 110-11; *see also id.* at 111 ("[There] can be no question about the importance" to a community of "promoting stable, racially integrated housing." (citation omitted)). The Court concluded that Congress intended the Fair Housing Act to provide a remedy for the type of municipal injury the Village alleged—injury to communal "racial balance and stability" caused by the defendant's racial steering practices. *Id.*[1]

Consistent with *Trafficante* and *Gladstone*, the Supreme Court and this Court have further affirmed that any distinction between "third party" and "first party" harms is "of little significance in deciding whether a plaintiff has standing to sue" under the Fair Housing Act. *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

[1] The Seventh Circuit, in addressing a subsequent Fair Housing Act challenge by the Village of Bellwood against a real estate brokerage firm for racial steering, likewise held that Bellwood could sue to seek redress for resulting injuries to its tax base and its efforts to promote integrated housing. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525-27 (7th Cir. 1990).

375, 379 (1982); *see also Smith v. Pac. Props. & Dev. Corp*., 358 F.3d 1097, 1105 (9th Cir. 2004); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

Most recently, the Court held that the City of Miami constituted an *aggrieved person* with standing to sue a bank for predatory lending that caused the same types of municipal injuries that Oakland alleges here. The City of Miami claimed that predatory lending practices directed at Black and Latinx neighborhoods and residents led to a concentration of foreclosures in those neighborhoods that "hindered the City's efforts to create integrated, stable neighborhoods" and "reduced property values, diminishing the City's property-tax revenue and increasing demand for municipal services." *City of Miami I,* 137 S. Ct. at 1304. The Supreme Court held that these claims were "similar in kind to the claims the Village of Bellwood raised in *Gladstone*," where the village sought redress for injuries to its tax revenue and racial balance. *Id.* at 1304-05 (citing *Gladstone*, 441 U.S. at 95, 110-11). In so holding, the Court reiterated that the Fair Housing Act demands a broad construction. *Id.* at 1303-04.

The holdings in *Trafficante*, *Gladstone*, and *City of Miami I* concerned standing, not proximate cause. Yet these precedents are highly instructive for purposes of determining the appropriate proximate-cause analysis because they are based on the Supreme Court's consistently broad construction of the Fair Housing Act's statutory text. *See, e.g.*, *City of Miami I*, 137 S. Ct. at 1303-04. That

construction derives from the statutory text and legislative history, which proclaim Congress's clear legislative purpose to eradicate neighborhood segregation and its attendant strain on cities. Thus, the "broad construction" of statutory standing under the Fair Housing Act in *Trafficante*, *Gladstone*, *Havens*, and *City of Miami I* provides the guideposts for the proximate-cause analysis in this case, confirming that Oakland's claims for relief from injuries that resulted from Wells Fargo's discriminatory lending practices are not "out of step with the nature of the statutory cause of action and the remedial scheme that Congress created." *City of Miami II*, 923 F.3d at 1280 (internal quotation marks omitted).

### D. The Eleventh Circuit Correctly Held That the Fair Housing Act's Legislative History and the Consistently Broad Construction It Is Afforded Compel an Articulation of Proximate Cause that Includes Municipal Claims Like Oakland's

Applying the Supreme Court's guidance in *City of Miami I*, on remand the Eleventh Circuit in *City of Miami II* recognized that the Fair Housing Act is an "interconnected web of congressional judgments about how and when liability should be limited" and held that "[t]o develop a proximate cause standard without taking the full statutory scheme into account would be 'to intrude upon' this web and to ignore the will of Congress." *City of Miami II*, 923 F.3d at 1278 (quoting Sperino, *supra*, at 1236). In considering the claims brought by the City of Miami against several banks seeking redress for injuries the City suffered as a result of the predatory-lending induced foreclosure crisis, the Eleventh Circuit recognized that

the Fair Housing Act was intended to and did "look[] far beyond the single most immediate consequence of a violation." *City of Miami II*, 923 F.3d at 1280.

In *City of Miami II*, the Eleventh Circuit concluded that the historical context for the Fair Housing Act's passage—in the aftermath of the Kerner Commission Report, the assassination of Dr. King, and the resulting recognition of this country's long history of segregation—and the statute's legislative history—

> both comport with a proximate cause standard that can accommodate claims like the City's [Fair Housing Act claims against banks that engaged in predatory lending targeted at communities of color in Miami] . . . . It does not go too far to suggest, at least at a high order of abstraction, that in setting a standard for proximate cause the FHA looks far beyond the single most immediate consequence of a violation. Limiting the proximate cause calculus in that way would not be consonant with the powerful remedial purposes animating the bill. The Act took aim at "the segregated neighborhood" in general, not just at the prejudiced building owner. . . . [T]he FHA was written in broad terms and was aimed at broad problems. We can discern no reason to think as a general matter that the City's claims are out of step with the "nature of the statutory cause of action" and the remedial scheme that Congress created.

*City of Miami II*, 923 F.3d at 1280–81 (quoting 114 Cong. Rec. 3421).

A district court in this Circuit recently reached the same conclusion, holding that the City of Sacramento adequately alleged proximate causation in a virtually identical reverse redlining case under the Fair Housing Act, also against Wells Fargo. *City of Sacramento v. Wells Fargo & Co.*, No. 2:18-cv-00416-KJM-GGH, 2019 WL 3975590, at *4-*9 (E.D. Cal. Aug. 22, 2019).

## II. PRECEDENT PROHIBITS A CONCLUSION THAT INTERVENING "STEPS" NEGATE PROXIMATE CAUSE IN A FAIR HOUSING ACT CASE

The existence of an intervening "step" between the challenged conduct and the claimed injury does not preclude a plaintiff from plausibly alleging proximate cause. *City of Miami II*, 923 F.3d at 1273 (citing *Lexmark*, 572 U.S. 118). Instead, the proximate-cause analysis asks whether the defendant's conduct "necessarily injured [the plaintiff] as well as" the first-step victim. *Lexmark*, 527 U.S. at 139. "Where the injury alleged is so integral an aspect of the [violation] alleged," proximate cause is satisfied. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1982).

While the Supreme Court has not articulated a proximate-cause standard for the Fair Housing Act, the "step"-counting analysis that Wells Fargo urges here (*see* Opening Brief of Appellants at 22-29) is contrary to the outcomes in seminal decisions such as *Gladstone* and *Trafficante*.

In *Gladstone*, for example, one could use Wells Fargo's step-counting theory to identify several steps. First, the realtors steered prospective Black homebuyers to a particular, integrated neighborhood in Bellwood and steered prospective white homebuyers to different, predominantly white areas. Then, the prospective homebuyers chose to purchase homes in the areas where they were steered and did not purchase homes in other areas that would have resulted in more integration. Then, "perceptible increases in the minority population directly

attributable to racial steering precipitate[d] an exodus of white residents." *Gladstone*, 441 U.S. at 110. Then, increasing rates of segregation reduced the total number of buyers in the Bellwood housing market and deflected prices downward. Then, reduced property values in neighborhoods that became less white diminished the Village's tax base and decreased its ability to bear the costs of local government and provide services. Yet despite the number of "steps" between the defendants' racial steering and the Village's injuries, the Supreme Court readily concluded in *Gladstone* that those municipal harms were the types of injuries the Fair Housing act was meant to remedy. *Id.* at 111.

Similarly in *Trafficante*, Wells Fargo's theory might identify several intervening "steps" between the landlord's discriminatory rejection of prospective tenants based on race and the claimed injuries to the plaintiff tenants' social, business, and professional interests. Yet the Court held that the "broad and inclusive" language of the Fair Housing Act required a conclusion that the plaintiff tenants' injuries were within the scope of the Act's protective reach. 409 U.S. at 209-10.

Likewise, in *Pacific Shores Properties*, this Court held that the City's discriminatory refusal to permit the operation of group homes was the proximate cause of the plaintiff organizations' economic injuries—such as "lost income as a result of the business climate resulting from" the refusal and "costs associated with

counteracting the impression that the Group Homes were being shut down by the City"—even though there were contributing factors to these injuries beyond the City's permit refusal. 730 F.3d at 1167-72; *id.* at 1170 (rejecting argument that "the fact that some of the negative publicity about the Group Homes, which may have contributed to their business losses, was generated by . . . third-party sources" because the third-parties' actions were "a foreseeable result of" the City's conduct).

## III. MODERN-DAY PREDATORY LENDING INFLICTS HARMS JUST AS DEVASTATING AS THE HISTORICAL REDLINING PRACTICES THAT THE FAIR HOUSING ACT WAS INTENDED TO COMBAT

The harms of modern-day predatory lending, targeted at communities of color, are just as devastating as the historical redlining practices that the Fair Housing Act was intended to stop. The discriminatory housing practices of redlining and "reverse redlining" cause the very types of neighborhood and city-wide harms for which the Act's drafters intended to provide a remedy.

Redlining is "mortgage credit discrimination based on the characteristics of the neighborhood surrounding the would-be borrower's dwelling." *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1551 n.12 (5th Cir. 1996). The denial of mortgage credit based on race has a long history tied to the Federal Housing Administration and the Veterans Administration, which in the mid-twentieth century conditioned loan guarantees on restrictive covenants prohibiting resales to Black people, an

underwriting requirement that was "systematic and nationwide."[2] Redlining by federally and state-chartered banks was also widespread. As the Supreme Court recognized in *ICP*, historical redlining was a practice that, "sometimes with governmental support . . . encouraged and maintained the separation of the races." 135 S. Ct. at 2507. For decades, redlining entrenched segregated communities throughout the nation, including in California's Bay Area.[3]

The effects of historical redlining stubbornly persist in the form of lasting racial and economic segregation. Almost seventy-five years after the drawing of redlining maps, previously redlined communities remain racially segregated with lower homeownership rates and lower house values.[4] Other studies have linked historical redlining to present-day disparities in median home prices and enduring

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[2] Richard Rothstein, *What Have We—De Facto Racial Isolation or De Jure Segregation?*, 40 A.B.A. 3 (2014), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/racial_isolation_or_segregation/.

[3] Maps showing official redlining boundaries for San Francisco, San Jose, and several East Bay cities including Oakland are attached hereto. These maps, drawn by the Home Owners Loan Corporation, created by Congress in 1933 and now defunct, can be accessed through the web address https://www.kqed.org/lowdown/18486/redlining; The HOLC maps strongly influenced those later created by the Federal Housing Administration. Daniel Aaronson et al., *The Effects of the 1930s HOLC "Redlining" Maps*, (Federal Reserve Bank of Chicago, Working Paper No. 2017-12, 2019), *available at* https://www.chicagofed.org/publications/working-papers/2017/wp2017-12

[4] Aaronson et al., *supra* note 3, at 34-35. The results of the Federal Reserve Bank's analysis of present-day effects of redlining "highlight the key role that access to credit plays on the growth and long-running development of local communities." *Id.* at 35.

economic and racial segregation and inequality.[5]

In the East Bay, where Oakland is located, 83% of neighborhoods that were historically redlined today are low-income, as are 87% of historically redlined neighborhoods in San Francisco and San Jose.[6] Historical redlining in Oakland, and nationwide, and the resulting enduring racial and economic segregation have made borrowers of color in predominantly non-white neighborhoods vulnerable to present-day discriminatory lending practices including predatory lending, also called "reverse redlining," targeted at communities of color.[7] Reverse redlining arises out of the historical forces of segregation and discrimination that allowed redlining to flourish in the mid-twentieth century.[8] Just as redlining policies

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[5] *See, e.g.*, Bruce Mitchell & Juan Franco, *HOLC "Redlining" Maps: The Persistent Structure of Segregation and Economic Inequality*, National Community Reinvestment Coalition (2018), at https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf; J. Brian Charles, *Federal Housing Discrimination Still Hurts Home Values in Black Neighborhoods*, Governing the States and Localities (Apr. 30, 2018), *available at* https://www.governing.com/topics/transportation-infrastructure/gov-redlining-race-real-estate-values-lc.html.

[6] *See Redlining and Gentrification: The Legacy of Redlining – Resources*, Urban Displacement Project, at https://www.urbandisplacement.org/redlining. *See also* Esri, *A Legacy of Redlining*, *available at* https://www.arcgis.com/apps/MapJournal/index.html?appid=1832f7860d634b83877475144748908e (mapping redlining boundaries in the Bay Area with present-day indicators of community vulnerability).

[7]Charles L. Nier, III & Maureen R. St. Cyr., *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 Temp. L. Rev. 941, 947 (2011).

[8] Nicole Summers, *Setting the Standard for Proximate Cause in the Wake of Bank of America Corp. v. City of Miami*, 97 North Carolina L. Rev. 529, 538 n.29

intentionally excluded neighborhoods based on their racial demographics, there is a well-documented history of reverse redlining being targeting at predominantly minority communities in the late 1990s and early 2000s, as banks peddled high-cost loans with adjustable interest rates and other predatory terms to economically vulnerable, racially segregated communities.[9]

Reverse redlining is linked to compensation structures that create incentives for brokers and loan officers to sell subprime loans. Borrowers of color are disproportionately offered loans with higher interest rates and riskier terms, leading to increased defaults and foreclosures.[10] Such compensation policies, which incentivize subprime lending to the most economically vulnerable, credit-stripped communities, "systematically disfavor[]" Black and Latinx borrowers whose communities have been historically denied credit and are less likely to be served by

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(2019); *see also Hargraves v. Capital Cty Mortg. Corp.*, 140 F. Supp. 2d 7, 20-21 (D.D.C. 2000) (describing "redlining" and "reverse redlining" as connected evils); Nier & St. Cyr, *supra* note 7, at 946 (explaining that "from historical redlining to reverse redlining, homeownership opportunities have been and continue to be affected by race"); *and see generally* Kathleen Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. *1225, 1259-70 (2002);* Alan M. White*, Borrowing While Black: Applying Fair Lending Laws to Risk-Based Mortgage Pricing, 60 S.C.L. Rev.* 3, 677, 690-91 (2009); Lina E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & Pol'y 121, 122, 124 (2009).

[9] *See, e.g.*, Summers, *supra* note 8, at 537-38.

[10] Justin P. Steil & Dan Traficonte, *A Flood—Not a Ripple—of Harm: Proximate Cause Under the Fair Housing Act*, 40 Cardozo L. Rev. 1236, 1276 (2019) (internal citations omitted).

mainstream banks.[11]

The foreclosure crisis of the late 2000s hit Black and Latinx individuals and neighborhoods the hardest. Among borrowers with mortgages that were originated between 2005 and 2008, nearly 8% of Black and Latinx borrowers lost their homes to foreclosures, compared to 4.5% of Whites, disparities that hold after controlling for differences in income patterns.[12] Although foreclosures have occurred in racially integrated neighborhoods as well as predominantly Black and Latinx neighborhoods, they have had the effect of "reduc[ing] the proportion of whites in these [previously integrated] neighborhoods," in part because white residents are more likely to have greater resources to leave neighborhoods suffering from widespread foreclosures.[13]

Studies of Wells Fargo's specific lending practices in Black and Latinx neighborhoods show that the bank has systematically made higher cost loans with less favorable terms to Black and Latinx borrowers. One study showed that among Wells Fargo borrowers, similarly situated Black borrowers were charged "significantly higher rates and received less favorable loan terms than similarly

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[11] *Id.* at 1277 (internal citations omitted).

[12] Debbie Gruenstein Bocian et al., *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, Center for Responsible Lending Report (June 18, 2010), https://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

[13] Steil & Traficonte, *supra* note 10, at 1278.

situated white borrowers in white neighborhoods."[14] This has resulted in a significantly higher likelihood of foreclosure among Black and Latinx Wells Fargo borrowers who received unfavorable terms as compared to white borrowers who were not subject to high-cost loans.[15]

The heavy racial imbalances of these reverse redlining practices have had a foreseeable and direct negative economic impact on neighborhoods that are predominantly non-white and the cities in which those neighborhoods are located, including Oakland. Widespread foreclosures resulting from reverse redlining have "significantly increased both Black-white and Latino-white levels of residential segregation."[16] In addition to increasing residential segregation, reverse redlining has imposed a "devastating human cost" on Black and Latinx families, from foreclosures to the loss of home equity and plummeting homeownership rates.[17] The concentration of foreclosures in particular neighborhoods has led to dramatic declines in property values surrounding these clusters of foreclosures—in Oakland, it has been estimated that foreclosures resulting from the predatory lending bubble

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[14] Steil & Traficonte, *supra* note 10, at 187 (citing Rugh et al., *Race, Space, and Cumulative Disadvantage: A Case Study of Subprime Lending Collapse*, 62 Soc. Probs. 186 (2015).

[15] Steil & Traficonte, *supra* note 10, at 187.

[16] *Id.*

[17] Robert G. Schwemm et al., *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harvard Civil Rights-Civil Liberties Law Review 375, 376, 381-82 (2010).

of the mid-2000s decreased property values by $4 billion.[18] Widespread foreclosures have also led to an increase in municipal spending to maintain a decent quality of life in these neighborhoods. The collective effect of this discrimination has been the stripping of millions of dollars of equity from non-white neighborhoods as well as municipal coffers of the cities where subprime lending was targeted, including Oakland.

The Court can approach the determination of proximate cause in this predatory lending challenge by considering the duty of a bank like Wells Fargo to the communities it purportedly serves through the important act of offering credit for home mortgages. Proximate cause can be explained as a question of duty: "whether the defendant is under any duty to the plaintiff, or whether the duty includes protection" against the consequences of the defendant's actions. William Lloyd Prosser et al., *The Law of Torts* § 42, at 273 (5th ed. 198). Wells Fargo owed duties not only to protect its customers from predatory lending but also to the Oakland neighborhoods it served to ensure that its lending practices did not reinforce racial segregation and further economic distress in historically redlined,

[18] ACCE & California Community Reinvestment Coalition, *The Wall Street Wrecking Ball: What Foreclosures Are Costing Oakland Neighborhoods* 3 (Sept. 2011), *available at* http://ebho.org/wp-content/uploads/2011/09/The_Wall_Street_Wrecking_Ball_web_size.pdf.

predominantly Black and Latinx neighborhoods.[19] The Fair Housing Act does not contemplate absolving Wells Fargo from that responsibility simply because the plaintiff is the municipality whose communities were devasted by the shirking of that duty, instead of individual borrowers.

## IV. MUNICIPALITIES ARE UNIQUELY SITUATED TO BRING FAIR HOUSING ACT CHALLENGES TO PRACTICES LIKE PREDATORY LENDING THAT CREATE AND PERPETUATE RESIDENTIAL SEGREGATION

Oakland is not the only city to suffer the direct consequences of a foreclosure crisis concentrated in its predominantly non-white communities; nor is it the only one that has sought to hold banks accountable. Across the country, cities with large Black and Latinx populations that have borne the devastating impacts of predatory lending and the ensuing foreclosure crisis have used the Fair Housing Act in a quest for justice for municipal funds and the dignity of their communities.

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[19] The Bank's leadership has explicitly recognized these duties. For example, its CEO said in a statement that "restoring trust in Wells Fargo and building a better bank for our customers and our communities is our top priority. Wells Fargo is deeply committed to economic growth, sustainable homeownership and neighborhood stability in low- and moderate-income communities and will continue to invest above and beyond what is required by [the Community Reinvestment Act]." *See also* Evan Weinberger, *Feds Flunk Wells Fargo on Community Lending Exam*, Law360 (N.Y.C.) (Mar. 28, 2017 2:42 PM), https://www.law360.com/articles/907064/feds-flunk-wells-fargo-on-communitylending-exam. *See also* Press Release, Housing Opportunities Made Equal of Virginia, Inc., HOME and Wells Fargo Create $4 Million Partnership to Increase African-American Housing Opportunities (July 17, 2017) (on file with author). (statement by vice president that Wells Fargo should work to improve homeownership rates in Black communities).

These injuries are distinctly municipal, not individualized, in nature. Courts have affirmed these cities' ability to seek redress for these injuries under the Fair Housing Act. *City of Miami I*, 137 S. Ct. 1296 (holding city had standing to bring Fair Housing Act challenge for harms resulting from predatory lending); *City of Miami II*, 923 F.3d at 1271-94 (holding that city adequately alleged that municipal injuries were proximately caused by predatory lending practices); *County of Cook v. HBC N. Am. Holdings Inc.*, 136 F. Supp. 3d 952 (N.D. Ill. 2015); *City of Los Angeles v. Wells Fargo*, 22 F. Supp. 3d 1047 (C.D. Cal. 2014); *City of Sacramento*, 2019 WL 3975590.

Until *City of Miami I*, courts addressing these municipal Fair Housing Act challenges typically did not conduct a proximate-cause analysis, because the Supreme Court had not yet clarified that proximate cause is an element of damages cases under the Fair Housing Act. However, the broad consensus of courts across the country that municipalities are proper plaintiffs to seek redress for the community-wide harms of predatory lending supports the District Court's holding here that Oakland satisfies the Fair Housing Act's proximate-cause analysis.

The predatory lending practices at issue in these cases are a form of systemic housing discrimination that harms communities as well as individuals. These structural forms of housing discrimination create and perpetuate residential housing segregation along racial lines and impose real costs on an entire city, such

as impairment of educational opportunities, increased levels of crime and neighborhood decay, interference with access to jobs, discouraging investment, and exacerbating the concentration of poverty in segregated urban core areas. The concentration of poverty that accompanies segregation further burdens local governments' fiscal capacities, as impoverished communities often require other services—such as elevated welfare caseloads, higher numbers of indigent patients at public hospitals, and the need to provide additional educational services for failing schools—that tax strained city budgets and divert resources from other public services.[20]

Cities that have been impacted by discriminatory predatory lending and the ensuing foreclosures are likely to be more racially segregated than they would have been absent such practices. The effects of discrimination impose financial costs on cities that are inextricably connected with segregation and discrimination itself and are therefore injuries that the Fair Housing Act must reach.

Oakland's interests in this case, like the interests of the Village of Bellwood in combating segregation and promoting integration several decades ago, lie at the heart of the Fair Housing Act's legislative purpose. Oakland's pursuit of Fair

[20] Alan Berube & Bruce Katz, *Katrina's Window: Confronting Concentrated Poverty Across America*, Brookings Institution (2005), *available at* https://www.brookings.edu/wp-content/uploads/2016/06/20051012_Concentratedpoverty.pdf.

Housing Act claims against banks for targeting predatory lending in predominantly Black and Latinx neighborhoods is consistent with a primary intention of the Fair Housing Act's drafters, to hold accountable actors whose discriminatory practices wreak city-wide harms. Those drafters recognized that racial segregation leads to the very types of economic disparities that existed between urban and suburban neighborhoods in 1968 and that today enable harmful practices like predatory lending in predominantly Black and Latinx communities.

As the Eleventh Circuit recognized in *City of Miami II*, compared to individual borrowers, municipalities are better positioned to bring Fair Housing Act challenges to remedy the societal costs of predatory lending practices because a city's suit—

> aims to recover for a larger injury sustained on a citywide basis and to remedy a different, broader violation than a homeowner's suit would. . . . The City's suit challenges the entire policies. A discrimination claim by an individual homeowner would challenge only a bank's discriminatory action against that homeowner. . . . [which] wouldn't serve to condemn the pattern or policy. . . . [T]he regression analysis that can isolate the impact of redlining on the neighborhood scale could not solve this problem on the individual level because of the diversity of individual circumstances.

923 F.3d at 1289.

## CONCLUSION

*Amici* have observed that predatory lending and the ensuing foreclosures have perpetuated the segregation of vulnerable groups and made it more difficult

for cities to create inclusive communities. Long-term vacancies and blighted properties affect the safety of residents and make neighborhoods less welcoming to visitors and new businesses. Oakland's efforts here to protect its residents from the ongoing racialized harms of reverse redlining are consistent with the vision of the Congress that enacted the Fair Housing Act to create an act with "teeth and meaning" that could be used to remedy the societal harms of segregation and the concentration of poverty in racially impacted communities. When viewed in the context of the purpose and reach of the Fair Housing Act, the factual allegations in the City of Oakland's complaint detail a sufficiently close relationship between Wells Fargo's lending practices and Oakland's injuries. *Amici* therefore urge this Court to affirm the District Court's holding that Oakland has adequately pled that its injuries were proximately caused by Wells Fargo's challenged lending practices.

Dated: September 10, 2019

Respectfully submitted,

*s/ Jamie Crook*
American Civil Liberties Union
Foundation of Northern California

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I certify that this amicus brief complies with the type-volume limitation of Rule 29(a)(5) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1(a) because it contains 6,973 words, excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 with Times New Roman 14-point font.

Dated: September 10, 2019 *s/ Jamie Crook*

## CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 10, 2019 *s/ Jamie Crook*

# APPENDIX

Image 1 – Oakland, Berkeley, Alameda, San Leandro, Piedmont, Emeryville, Albany

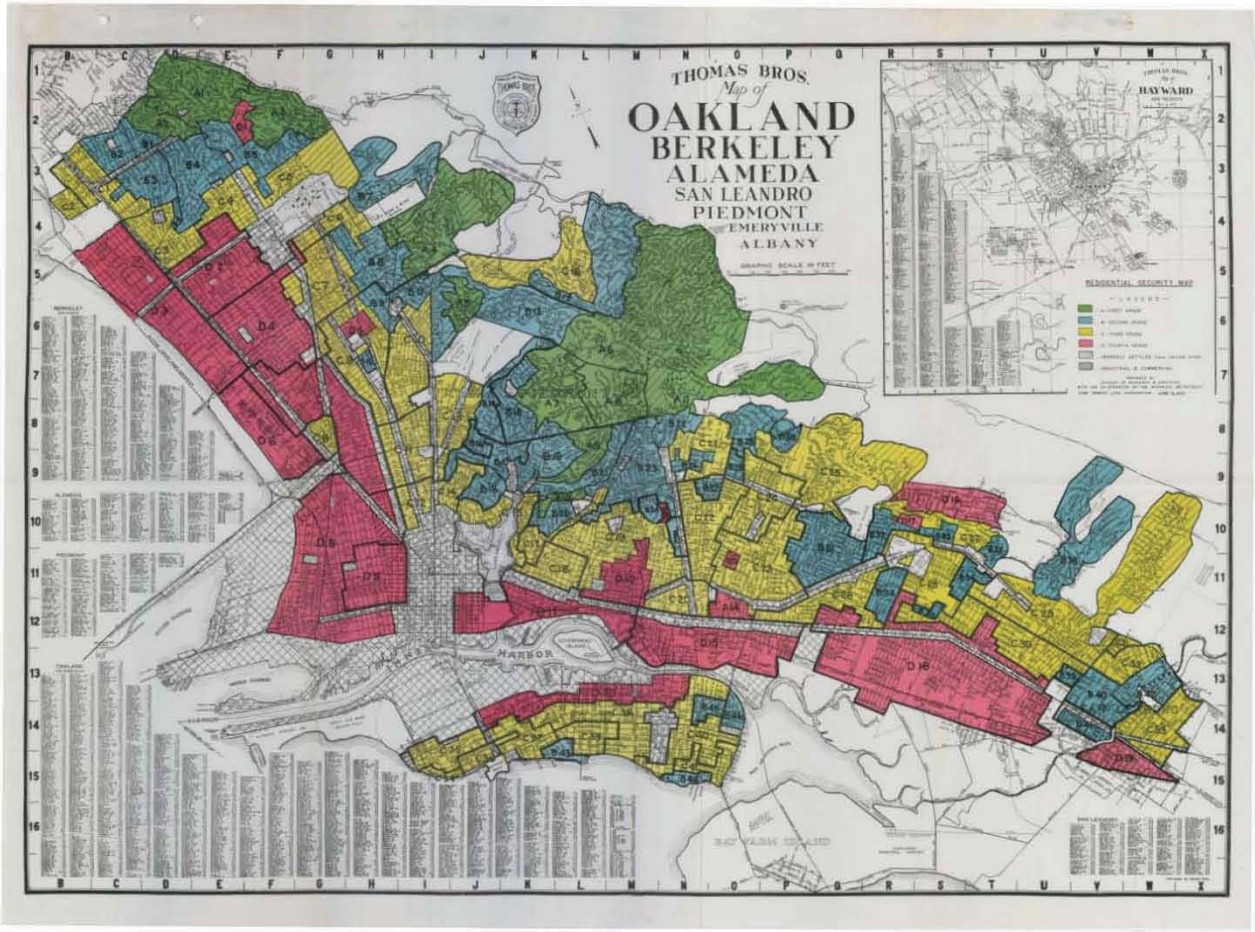

Image 2 – San Francisco

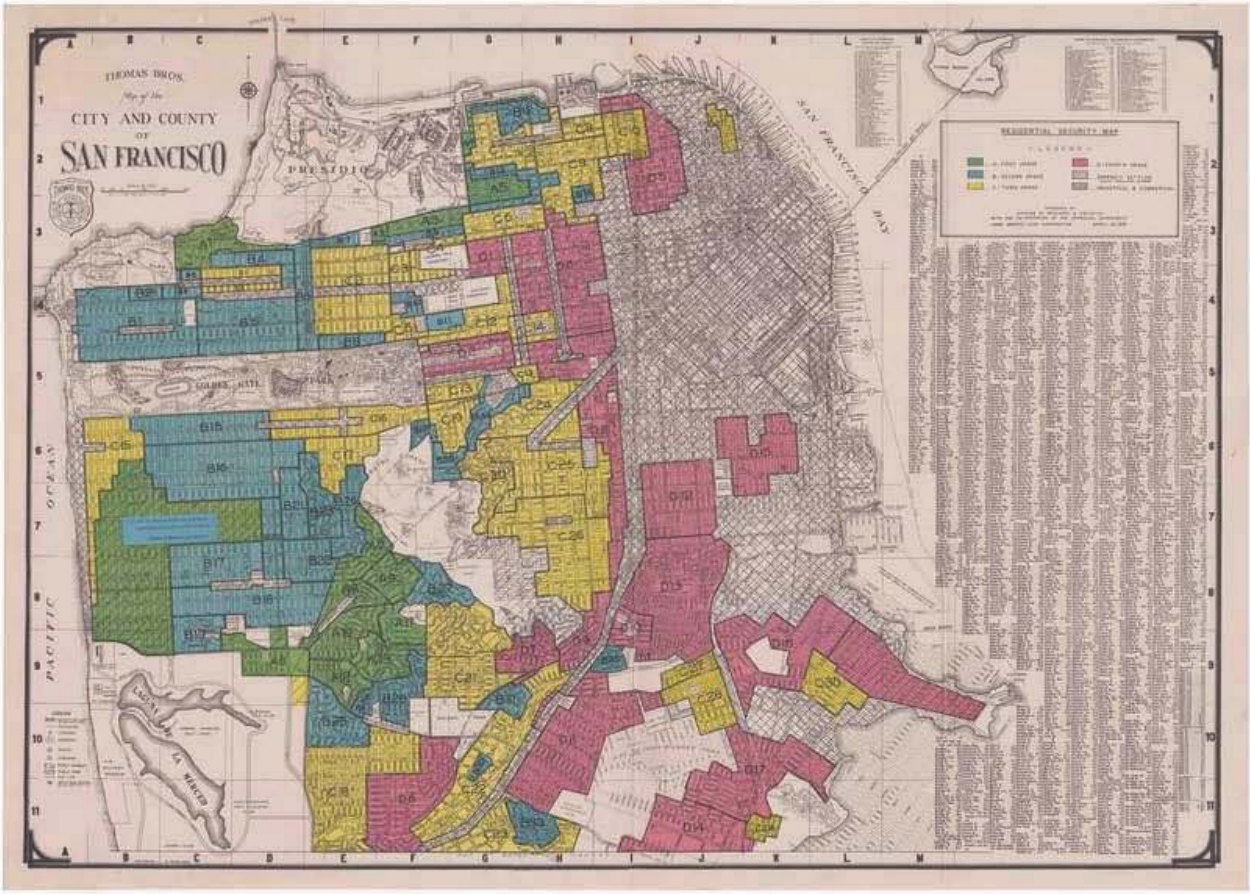

Image 3 – San Jose