Nos. 19-675 and 19-688

IN THE

Supreme Court of the United States

BANK OF AMERICA CORPORATION, ET AL., *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

WELLS FARGO & CO., ET AL., *Petitioners*,
v.
CITY OF MIAMI, FLORIDA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

PHILIP L. WILLMAN
President
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside Plaza
Chicago, IL 60606
(312) 795-1101
pwillman@bjpc.com

MATTHEW T. NELSON
Counsel of Record
CHARLES R. QUIGG
WARNER NORCROSS + JUDD LLP
1500 Warner Building
150 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES....ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT....3

ARGUMENT....5

I. The Eleventh Circuit erred. 5

A. The Eleventh Circuit did not follow this Court's directions and departed from precedent....5

B. The Eleventh Circuit's "logical-bond" test undermines the purpose of the proximate-cause requirement....8

C. The Eleventh Circuit's embrace of statistical modeling to prove liability for individual injuries is wrong....11

II. This case is exceptionally important because the proximate-cause issue it raises applies to numerous federal statutes 19

CONCLUSION....21

TABLE OF AUTHORITIES

Page(s)

Cases

Aransas Project v. *Shaw*,
775 F.3d 641 (5th Cir. 2014).....20

Associated General Contractors of California, Inc. v. *California State Council of Carpenters*,
459 U.S. 519 (1983).....6, 20

Blue Shield of Virginia, Inc. v. *McCready*,
457 U.S. 465 (1982).....10

Bridge v. *Phoenix Bond & Indemnity Co.*,
553 U.S. 639 (2008).....15

Broussard v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998).....16

City of Cincinnati v. *Deutsche Bank National Trust Co.*, 863 F.3d 474 (6th Cir. 2017) 21

Connecticut Mutual Life Insurance Co. v. *N.Y. & New Haven Rail Road Co.*,
25 Conn. 265 (1856) 9

Consolidated Rail Corp. v. *Gottshall*,
512 U.S. 532 (1994).....11

CSX Transportation, Inc. v. *McBride*,
564 U.S. 685 (2011).....11

Dura Pharmaceuticals, Inc. v. *Broudo*,
544 U.S. 336 (2005).....20

Empire Merchants, LLC v. *Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018).....20

Fields v. *Twitter, Inc.*,
881 F.3d 739 (9th Cir. 2018).....20, 21

TABLE OF AUTHORITIES—Continued

Page(s)

Gates v. *Rohm & Haas Co.*,
655 F.3d 255 (3d Cir. 2011) 15

Hemi Group, LLC v. *City of New York*,
559 U.S. 1 (2010).....7

Holmes v. *Securities Investor Protection Corp.*,
503 U.S. 258 (1992).....5, 9, 20

In re Asacol Antitrust Litigation,
907 F.3d 42 (1st Cir. 2018) 15

In re Fibreboard Corp.,
893 F.2d 706 (5th Cir. 1990).....15

In re Zyprexa Product Liability Litigation,
671 F. Supp. 2d 397 (E.D.N.Y. 2009) 17

International Brotherhood of Teamsters, Local 734 Health & Welfare Trust Fund v. *Philip Morris Inc.*, 196 F.3d 818 (7th Cir. 1999) 8

Kemper v. *Deutsche Bank AG*,
911 F.3d 383 (7th Cir. 2018).....20

Laborers Local 17 Health & Benefit Fund v. *Philip Morris, Inc.*,
191 F.3d 229 (2d Cir. 1999) 8

Lexmark International, Inc. v. *Static Control Components, Inc.*, 572 U.S. 118 (2014) 19

Lyons v. *Philip Morris Inc.*,
225 F.3d 909 (8th Cir. 2000).....8

McLaughlin v. *American Tobacco Co.*,
522 F.3d 215 (2d Cir. 2008) 15

Michigan v. *Bay Mills Indian Community*,
572 U.S. 782 (2014).....7

TABLE OF AUTHORITIES—Continued

Page(s)

Nichols v. *Michigan City Plant Planning Department*, 755 F.3d 594 (7th Cir. 2014) 20

Oregon Laborers-Employers Health & Welfare Trust Fund v. *Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999).....8

Palsgraf v. *Long Island Rail Road Co.*, 162 N.E. 99 (1928) 9

Perry v. *American Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003).....8

Ray Charles Foundation v. *Robinson*, 795 F.3d 1109 (9th Cir. 2015).....20

Service Employees International Union Health & Welfare Fund v. *Philip Morris Inc.*, 249 F.3d 1068 (D.C. Cir. 2001).....8

Slay's Restoration, LLC v. *Wright National Flood Insurance Co.*, 884 F.3d 489 (4th Cir. 2018).....7

Staelens v. *Dobert*, 318 F.3d 77 (1st Cir. 2003) 9

Staub v. *Proctor Hospital*, 562 U.S. 411 (2011).....19

Steamfitters Local Union No. 420 Welfare Fund v. *Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999) 8

Sterling v. *Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988).....16

Texas Carpenters Health Benefit Fund v. *Philip Morris Inc.*, 199 F.3d 788 (5th Cir. 2000) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Tyson Foods, Inc. v. *Bouaphakeo*,
136 S. Ct. 1036 (2016).....13, 14

U.S. Commodity Futures Trading Commission v. *Southern Trust Metals, Inc.*,
894 F.3d 1313 (11th Cir. 2018).....20

United States v. *Luce*,
873 F.3d 999 (7th Cir. 2017).....20

Vazquez v. *Hillery*,
474 U.S. 254 (1986).....7

Wal-Mart Stores, Inc. v. *Dukes*,
564 U.S. 338 (2011).....13, 14

Wyndham Vacation Ownership v. *Gallagher*,
No. 19-CV-00476, 2019 WL 5458815 (M.D. Fla. Sept. 10, 2019).....21

Rules

Supreme Court Rule 37.6.....1

Other Authorities

2 *McLaughlin on Class Actions* § 8.6 (16th ed.).....15

W. Keeton et al., *Prosser and Keeton on Law of Torts* § 41 (5th ed. 1984).....9

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

DRI–The Voice of the Defense Bar is an international organization of approximately 20,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI, through its Center for Law and Public Policy, participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system.

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief and have consented to its filing.

DRI's interest in these cases arises from its support of reasonable rules for defining the scope of liability for federal statutes that will at once permit them to serve their remedial ends and ensure proportionate levels of civil liability. The "logical-bond" limitation that the Eleventh Circuit adopted in these cases is virtually no limitation at all, and it creates perverse incentives for municipalities to bring lawsuits that consolidate speculative harms to numerous residents by means of statistics. Allowing plaintiffs to recover damages for injuries caused so remotely, if at all, by the alleged wrongful conduct results in nearly infinite and unpredictable liability. Judicial adoption of such a system is inconsistent with decades of widely accepted limitations on causation in the arena of tort law. And it is incompatible with the fair administration of the civil justice system.

SUMMARY OF ARGUMENT

When this Court first decided these cases, it held that a party claiming damages under the Fair Housing Act must show that the defendant's misconduct proximately caused his injuries. That "well established" and "traditional" requirement mandates that there is "some direct relation between the injury asserted and the injurious conduct alleged"; mere foreseeability is not enough. Pet. App. at 84a–86a.[2] Although three justices would have applied the test to these cases and concluded that Respondent the City of Miami could not meet it, *id.* at 98a–99a, this Court remanded the cases so the court of appeals could opine in the first instance on how the "some direct relation" standard applies under the FHA, *id.* at 86a–87a. The Eleventh Circuit has now done so, holding for the second time that the City has plausibly alleged that the Petitioner Banks'[3] allegedly discriminatory loan-underwriting practices proximately caused the City to lose a portion of its tax base.

On remand, the Eleventh Circuit committed various errors, and its decision again warrants review from this Court. Most significantly, as the Banks explain, the Eleventh Circuit's decision paid only lip service to this Court's holding. Under that court's logical-bond test, so long as a party can gin up a statistical model that theoretically could be applied

---

[2] Unless otherwise noted, citations herein are to the petition in *Wells Fargo*, No. 19-688.

[3] This brief refers to the petitioners in Nos. 19-675 and 19-688 as the Banks.

to the case to show a connection between misconduct and harm, the party may proceed with its claims.

The Eleventh Circuit's embrace of statistical modeling to establish proximate cause also departs from closely related class-action precedent. The City's claims, dependent as they are on discrimination allegedly perpetrated against thousands of Miami homeowners, are structurally identical to a class action. But as this Court has recognized in the class-action context, statistical models may not establish liability for all class members unless they could prove liability in an individual action. Here, the Eleventh Circuit correctly recognized that the City's statistical models would not support claims by individual homeowners because of the array of factors that affect individual foreclosures; indeed, according to the court, those homeowners could not plausibly allege proximate cause. Accordingly, those same homeowners could not use those statistics in a class action. The City's purported injuries derive from the homeowners' claims. The City should not be able to do the very thing that the more directly injured homeowners cannot; namely, use statistical modeling to impose liability in the aggregate where liability on an individual claim could not be proven.

The pernicious effect of the Eleventh Circuit's errors is compounded by the fact that other federal statutes incorporate the same proximate-cause requirement as the FHA. The court's remand decision implicitly invites lower courts to repeat its errors in other contexts. This Court should grant the petitions, reject the Eleventh Circuit's misinterpretation of proximate cause, and reaffirm

that the "some direct relation" standard means what it says: remote plaintiffs such as the City cannot recover for injuries directly suffered by a third party, especially where the third party's claims are barred for lack of proximate cause.

ARGUMENT

I. The Eleventh Circuit erred.

A. The Eleventh Circuit did not follow this Court's directions and departed from precedent.

As the Banks' petitions correctly explain, the Eleventh Circuit committed numerous errors on remand: It did not follow this Court's directions. It departed from this Court's precedent. And it reached a result that is inconsistent with the way several circuits have resolved claims by single plaintiffs that derive from and are dependent on a mass tort committed against third parties.

Most significantly, the Eleventh Circuit disregarded this Court's directions in its initial opinion in these cases. Effectively ignoring this Court's holding that "proximate cause under the FHA requires 'some direct relation' between the injury asserted and the injurious conduct alleged," Pet. App. at 86a (quoting *Holmes* v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)), the Eleventh Circuit reinterpreted the proximate-cause standard to require only a "logical bond," *id.* at 21a. As reinterpreted by the Eleventh Circuit, the "some direct relation" requirement has nothing to do with directness at all: the standard turns *not* on the directness of the relationship between misconduct and injury but instead on whether there is a

"meaningful and logical continuity" between them. *Id.* at 22a. In both words and deed, the Eleventh Circuit's "logical-bond" gloss renders toothless the "some direct relation" standard and is at least as broad as the foreseeability standard this Court rejected in its first opinion in these cases.

To rationalize its logical-bond reinterpretation, the court of appeals had to disregard other aspects of this Court's opinion as well. This Court recognized that, because "the housing market is interconnected with economic and social life," a violation of the FHA may be expected to—i.e., logically will—"'cause ripples of harm to flow' far beyond the defendant's misconduct." *Id.* at 85a (quoting *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)). Nonetheless, it unanimously rejected the proposition that "Congress intended to provide a remedy wherever those ripples travel." *Ibid.* The Eleventh Circuit reached the opposite conclusion on remand anyway, advising that the "FHA looks *far beyond* the single most immediate consequence of a violation." *Id.* at 40a (emphasis added). And its "logical-bond" test essentially allows anyone affected by a ripple caused by a FHA violation to bring suit.

The court of appeals also implicitly rejected this Court's holding that proximate cause under the FHA is governed by common-law directness principles because the FHA has common-law foundations and Congress is presumed to incorporate "traditional [common-law] requirement[s]" when it enacts federal causes of action. *Id.* at 84a. Because "they are the basis for imposing the [some direct relation] requirement," *id.* at 65a, one would expect this Court's decisions applying those common-law

directness principles to inform the Eleventh Circuit's application of them to this case on remand, *cf. Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) ("[*S*]*tare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" (quoting *Vazquez* v. *Hillery*, 474 U.S. 254, 265 (1986))). Not so, according to the court of appeals: "They do not help . . . flesh out the meaning of 'direct relation' . . . ." Pet. App. at 65a; see also *id.* at 69a ("[W]hile the statute's common-law antecedents do require a plaintiff plausibly to allege 'some direct relation,' we are unable to discern any further lessons from the common law that bear on our analysis.").

It is thus no surprise that the Eleventh Circuit's remand decision also conflicts with how this Court and other circuits have applied the proximate-cause standard. As this Court observed *in this case*, this Court's precedents generally have held that only injuries directly caused by the alleged misconduct are proximately caused by it. *Id.* at 86a ("'The general tendency' in these cases, 'in regard to damages at least, is not to go beyond the first step.'" (quoting *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 10 (2010))).

Circuit courts have followed this Court's lead. At least nine circuits have rejected claims brought by parties in positions analogous to the City here, such as union trust funds seeking to recoup from tobacco companies amounts paid on account of plan participants using cigarettes. See, *e.g.*, *Slay's Restoration, LLC* v. *Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018) (rejecting RICO claim brought by contractor against property insurer after

insurer denied part of property owner's claim); *Perry* v. *Am. Tobacco Co.*, 324 F.3d 845, 849 (6th Cir. 2003) (rejecting RICO claims against tobacco companies brought by class of health plan participants based on increased premiums caused by smokers); *Serv. Emps. Int'l Union Health & Welfare Fund* v. *Philip Morris Inc.*, 249 F.3d 1068, 1073–74 (D.C. Cir. 2001) (rejecting claims brought by union trust funds against tobacco companies); *Lyons* v. *Philip Morris Inc.*, 225 F.3d 909, 914–15 (8th Cir. 2000) (same); *Tex. Carpenters Health Ben. Fund* v. *Philip Morris Inc.*, 199 F.3d 788, 789–90 (5th Cir. 2000) (same); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund* v. *Philip Morris Inc.*, 196 F.3d 818, 825–26 (7th Cir. 1999) (same); *Laborers Local 17 Health & Benefit Fund* v. *Philip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999) (same); *Or. Laborers-Employers Health & Welfare Tr. Fund* v. *Philip Morris Inc.*, 185 F.3d 957, 964 (9th Cir. 1999) (same); *Steamfitters Local Union No. 420 Welfare Fund* v. *Philip Morris, Inc.*, 171 F.3d 912, 930 (3d Cir. 1999) (same).

In short, the Eleventh Circuit's remand decision is erroneous. It is not consistent with this Court's initial decision in this case. It is not consistent with this Court's other proximate-cause precedents. And it is not consistent with how other circuit courts have resolved similar claims.

B. The Eleventh Circuit's "logical-bond" test undermines the purpose of the proximate-cause requirement.

The Eleventh Circuit's logical-bond test also does not serve the purpose of the proximate-cause requirement. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"

Holmes v. *Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992) (quoting W. Keeton et al., *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)). Without the limit that the requirement provides, "liability would extend endlessly, one harm leading inevitably to others." *Staelens* v. *Dobert*, 318 F.3d 77, 79 (1st Cir. 2003). "Life is too short to pursue every human act to its most remote consequences; 'for want of a nail, a kingdom was lost' is a commentary on fate, not the statement of a major cause of action against a blacksmith." *Holmes*, 503 U.S. at 287 (Scalia, J., concurring in the judgment). "Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property," *Conn. Mut. Life Ins. Co.* v. *N.Y. & New Haven R.R. Co.*, 25 Conn. 265, 274–75 (1856), that a direct-connection rule limiting the scope of actionable economic injury is necessary to ensure a proportionate degree of liability, see *Palsgraf* v. *Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (noting that the doctrine of proximate causation comes in part from a "rough sense of justice"). Accordingly, at common law, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." *Holmes*, 503 U.S. at 268–69.

The Eleventh Circuit's logical-bond test cannot accomplish this limiting purpose for purely economic harms like those presented here. As this Court recognized when it first considered these cases, just as an antitrust violation "may be expected to cause ripples of harm through the Nation's economy," *Blue Shield of Va., Inc.* v. *McCready*, 457 U.S. 465, 476

(1982), an FHA violation logically will cause ripples of harm through the local housing market and economy, Pet. App. at 85a. In both instances there is arguably a "meaningful and logical continuity," *id.* at 22a, between economic harm to those having a market relationship and the directly injured party, even if indirect and distinctly remote.

If the only connection required to assert a claim for damages is a logical bond, however remote, then the next logical step in a case such as this is an action by other taxing authorities[4] in Miami-Dade County (who are functionally indistinguishable from the City) as well as a class action by the Miami homeowners who suffered a loss in property value (who are even closer to the alleged misconduct than the City), not to mention businesses that depend on home values and occupancy like a class of realtors and utility companies.[5] These parties could assert

---

[4] *Real Estate Tax Payments*, Miami-Dade County, https://www.miamidade.gov/global/service.page?Mduid_service=ser149979746350917 (last visited Dec. 11, 2019) ("County and municipal governments, as well as local taxing authorities (such as the School Board and South Florida Water Management District, Children's Trust), determine tax rates (also known as millage rates). The rate is multiplied against the assessed value of the property, minus exemptions, to determine the amount of taxes due.").

[5] This concern is not theoretical. Prince George's County, Maryland, is using a similar aggregation approach to recover lost franchise taxes and utility revenues in a parallel case. Am. Compl. ¶¶ 410–14, *Prince George's County* v. *Wells Fargo & Co.*, No. 18-CV-03576 (Nov. 15, 2019), ECF No. 62. If Prince George's County may recover lost franchise taxes, then the utility company whose lost sales led to the lost franchise taxes necessarily must be able to do so as well. Nonetheless, the

[Footnote continued on next page]

the same logical bond as the City. This essentially unlimited potential for liability is contrary to fundamental principles of the common law governing tort causation.

To be sure, from time to time this Court has departed from the ordinary rules of proximate causation. For instance, "in comparison to tort litigation at common law, 'a relaxed standard of causation applies under [the Federal Employers' Liability Act ("FELA")].'" *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 692 (2011) (quoting *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 542–43 (1994)). It reached this conclusion based on FELA's unique language. *Id.* at 691. Here, by contrast, this Court has already held that ordinary common-law directness principles govern proximate cause under the FHA. The Eleventh Circuit's relaxation of those principles therefore has no basis.

C. The Eleventh Circuit's embrace of statistical modeling to prove liability for individual injuries is wrong.

As the Banks observe, the Eleventh Circuit's conclusion that a party further removed from the alleged FHA violation (i.e., the City) may bring a claim for damages, while a party closer to the violation (i.e., a neighboring homeowner) may not, is illogical and inequitable. See Wells Fargo Pet. at 35–36; Bank of Am. Pet. at 17. The Eleventh Circuit's rationale for its conclusion—grounded in statistical models that purportedly can support only the City's

---

[Footnote continued from previous page]

Eleventh Circuit asserted that utility companies could not plausibly allege proximate causation. Pet. App. at 60a–64a.

proximate-cause allegations and not claims brought by individual neighbors—further illustrates why the City has not plausibly alleged that the Banks' alleged practices caused its losses here. Because it is founded on thousands of alleged FHA violations against individual homeowners, the City's case is similar to a class action. Yet in that context, this Court and others have held that statistical evidence cannot establish liability in the aggregate unless that evidence also could do so in an individual case.

Acknowledging Justice Thomas's admonition that "no one suggests that [neighboring] homeowners could sue under the FHA," Pet. App. at 98a (Thomas, J., concurring in part and dissenting in part), the Eleventh Circuit repeatedly emphasized on remand that the City's statistical evidence would be insufficient to support proximate-cause allegations in a case brought by a neighboring homeowner or the foreclosed-upon borrower himself, *id.* at 59a (explaining that the City's statistical models could not prove that the Banks' actions caused a foreclosure in any individual case "because of the diversity of individual circumstances"). This is so, the court of appeals explained, because "[a] neighboring homeowner . . . would be affected only by the homes closest to his own, and these might not accurately reflect the citywide average [presented by the City's models], in terms of causation or value." *Id.* at 61a–62a; see also *id.* at 49a ("Even if each individual act of redlining does not bear a one-to-one proportional relationship to Miami's loss of tax revenue since intervening circumstances affect which individual properties go into foreclosure . . . ." (citation omitted)).

According to the Eleventh Circuit, the City's case does not suffer from the same fatal flaw because its claims seek to aggregate foreclosures. "[I]ndividual variations among homeowners average out," the court advised, "when foreclosures are considered in the aggregate." *Id.* at 61a. In other words, "the aggregative nature of the City's claims . . . helps eliminate any discontinuity between the statutory violation and the injury." *Id.* at 48a.

The Eleventh Circuit's embrace of statistical evidence to support the City's "aggregative" claims is inconsistent with the holdings of this Court and others in the more typical context in which claims are aggregated: class actions. No one questions that the City's statistical evidence could not prove that any of the foreclosures underlying the City's claims were caused by the Banks' alleged redlining practices, much less that a particular property fell in value or by how much. But as this Court has explained in the class-action context, if statistical evidence cannot establish liability in an individual case, then it may not be used to establish liability in a class action. See, *e.g.*, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1046–47 (2016) ("If the sample could have sustained a reasonable jury finding as to hours worked in each employee's individual action, that sample is a permissible means of establishing the employees' hours worked in a class action.").

In *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011), the plaintiffs brought claims on behalf of 1.5 million current and former Wal-Mart employees alleging that Wal-Mart engaged in a pattern or practice of sex discrimination in violation of Title VII and seeking, *inter alia*, backpay. 564 U.S. at 342–45.

They proposed, and the court of appeals upheld, the following procedure to prove Wal-Mart's liability for back pay:

> A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings.

Id. at 367.

This Court rejected this "novel project"—i.e., extrapolating Wal-Mart's aggregate liability across the class based on statistics—as "Trial by Formula." *Ibid.* Backpay, this Court recognized, is an inherently individualized remedy, and, even if the plaintiff class could establish a general pattern or practice of discrimination, Wal-Mart could still prevail as to individual class members by showing that it did not act for a discriminatory reason, among other defenses. *Id.* at 366–67.

In *Wal-Mart*, the plaintiffs' proposed use of statistics would have short-circuited this process, effectively providing a substantive windfall to the class claimants. See *Bouaphakeo*, 131 S. Ct. at 1048. Such a short-circuit also raises significant due-process concerns. *E.g.*, *McLaughlin* v. *Am. Tobacco*

Co., 522 F.3d 215, 232 (2d Cir. 2008) ("When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation."), *abrogated on other grounds by Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

Other courts have similarly recognized that aggregative statistical proof cannot resolve individual questions like causation. *E.g.*, 2 *McLaughlin on Class Actions* § 8.6 (16th ed.) ("Courts have repeatedly emphasized, in class actions, as in other cases, the determinative issues on causation are individual."). "[S]tatistical estimates deal only with general causation, for 'population-based probability estimates do not speak to a probability of causation in any one case; the estimate of relative risk is a property of the studied population, not of an individual's case.' " *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990); see also *In re Asacol Antitrust Litig.*, 907 F.3d 42, 56 (1st Cir. 2018) (allowing statistical proof of aggregate injury without proof that each class member was injured "would fly in the face of the core principle that class actions are the aggregation of individual claims, and do not create a class entity or re-apportion substantive claims"); *Gates* v. *Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011) ("Averages or community-wide estimations would not be probative of any individual's claim because any one class member may have an exposure level well above or below the average."); *McLaughlin*, 522 F.3d at 231 ("[A]n aggregate determination is likely to result in an astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little

or no relationship to the amount of economic harm actually caused by defendants.").

Thus, although aggregate proof might help establish general causation (i.e., that the defendant's actions are capable of causing the asserted harm), "each individual plaintiff [must] show that his or her specific injuries or damages were proximately caused by [the defendant]." *Sterling* v. *Velsicol Chem. Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988). Otherwise, by aggregating their claims and proofs, plaintiffs could present a "composite case [that is] much stronger than any plaintiff's individual action would be." *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); see also *id.* at 343 ("That th[e] shortcut [of statistical evidence of lost profits] was necessary in order for this suit to proceed as a class action should have been a caution signal to the district court that class-wide proof of damages was impermissible.").

The Eleventh Circuit correctly recognized these limitations in this case. As the court observed, the City's statistical models could not support a plausible allegation of proximate causation as to any individual foreclosure because the models "reflect the citywide average," Pet. App. at 61a–62a, and cannot "isolate the impact of redlining . . . on the individual level because of the diversity of individual circumstances," *id.* at 59a. This is the only reasonable conclusion. Otherwise, the City's models could establish that the Banks' alleged loan-underwriting practices proximately caused *every* foreclosure of Bank-issued loans in minority neighborhoods in Miami—a proposition that is at a minimum facially implausible.

Rather than uniquely permitting the City to bring a claim, however, the limitations the Eleventh Circuit recognized mean that the City's statistical models cannot support the City's proximate-cause allegations here. Although brought individually, the City's claims are structurally indistinguishable from a class action: they depend not on discriminatory acts perpetrated against the City itself but instead on thousands of such acts allegedly perpetrated against its residents. See *In re Zyprexa Prod. Liab. Litig.*, 671 F. Supp. 2d 397, 402 (E.D.N.Y. 2009) ("Mississippi's individual claim is structured on the foundation of many thousands of conceptually separate claims associated with individual patients . . . . Such a 'structural' class action is congruent with other forms of aggregate litigation insofar as the State seeks to use generalized evidence to prove its claims."). In other words, the City's alleged losses arise, if at all, only because of injuries sustained initially by individual homeowners.[6]

As a result, the City's claims raise all of the same concerns as a class action relating to the use of

---

[6] Indeed, the City proposes to calculate its losses as a percentage of losses sustained by individual homeowners. *E.g.*, First Am. Compl. ¶ 121, *City of Miami* v. *Bank of Am. Corp.*, No. 13-CV-24506 (July 21, 2014), ECF No. 72-1. ("Foreclosures attributable to BoA in minority neighborhoods in Miami can be analyzed through Hedonic regression to calculate the resulting loss in the property values of nearby homes. This loss can be distinguished from any loss attributable to non-BoA foreclosures or other causes. The loss in property value in minority neighborhoods in Miami attributable to BoA's unlawful acts and consequent foreclosures can be used to calculate the City's corresponding loss in property tax revenues.").

aggregate proof. Just as in a class action, allowing statistical evidence to substitute for an individualized determination of whether and to what extent the Banks' alleged practices proximately caused each particular foreclosure at issue—not to mention the loss in value of neighboring properties—would convert these cases into trials by formula. It would overlook the acknowledged differences among individual foreclosures and significantly impinge upon the Banks' due-process rights.[7]

The Eleventh Circuit's conclusion that *adding* layers of abstraction cuts through the causal fog that applies to individual foreclosures is therefore erroneous and nonsensical. Because the City's statistical models could not establish proximate cause in any individual case for damages brought by a homeowner upon whom a Bank foreclosed, the models also could not do so if homeowners' claims were aggregated into a class action. The same necessarily is true for the City's claims for damages, which derive from the same aggregated violations

---

[7] It is understandable that the City would seek to bypass examination of each foreclosure because doing so would be extremely costly, assuming it were possible at all. Consider, for example, a similar case brought by Cook County, Illinois, where a single lender group produced information on nearly 270,000 loans. Pls.' Report re Outstanding Disc. Disputes at 2, *County of Cook* v. *Bank of Am. Corp.*, No. 14-CV-02280 (March 12, 2016), ECF No. 104 ("In response to the County's First Request for Production, Defendants have produced 10,670 documents (totaling 140,206 pages), and 92 data points on 268,063 loans in Cook County."). Even if the City's aggregation approach were legitimate, discovery would continue to be unduly expensive and burdensome because the City's model requires citywide information on the details of loans and foreclosures.

but are even further removed from the hypothetical class of homeowners. If the statistical models cannot show that the Banks' alleged discrimination proximately caused any individual foreclosure and associated loss in property value, they cannot show that the discrimination proximately caused all foreclosures and, by extension, the City's alleged tax-base loss.

II. This case is exceptionally important because the proximate-cause issue it raises applies to numerous federal statutes.

As the Banks' petitions make clear, the monetary stakes raised by these cases could not be higher given that they are two of several similar cases brought by municipalities around the country. Wells Fargo Pet. at 36–37; Bank of Am. Pet. at 15–16. These cases, however, will have effects far beyond the FHA context. As this Court recognized in its initial opinion in these cases, a claim for damages under the FHA requires the plaintiff to establish proximate causation because Congress is presumed to incorporate traditional common-law rules when it creates federal causes of action. Pet. App. at 84a ("We assume Congress 'is familiar with the common-law [proximate-cause] rule and does not mean to displace it *sub silentio*' in federal causes of action." (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)).

For that reason, this Court has "construed federal causes of action in a variety of contexts to incorporate a requirement of proximate causation." *Lexmark*, 572 U.S. at 132 (Lanham Act); see also *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 419–21 (2011) (Uniformed Services Employment and

Reemployment Rights Act); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 346 (2005) (securities fraud); *Holmes*, 503 U.S. at 268–70 (RICO); *Assoc. Gen. Contractors*, 459 U.S. at 529–35 (Clayton Act). Lower courts have done so for even more federal statutes. See, *e.g.*, *U.S. Commodity Futures Trading Comm'n* v. *S. Tr. Metals, Inc.*, 894 F.3d 1313, 1329 (11th Cir. 2018) (Commodity Exchange Act); *Fields* v. *Twitter, Inc.*, 881 F.3d 739, 746 (9th Cir. 2018) (Anti-Terrorism Act); *United States* v. *Luce*, 873 F.3d 999, 1014 (7th Cir. 2017) (False Claims Act); *Ray Charles Found.* v. *Robinson*, 795 F.3d 1109, 1124 (9th Cir. 2015) (Copyright Act); *Aransas Project* v. *Shaw*, 775 F.3d 641, 656 (5th Cir. 2014) (Endangered Species Act); *Nichols* v. *Mich. City Plant Planning Dep't*, 755 F.3d 594, 603–04 (7th Cir. 2014) (Title VII).

Although the Eleventh Circuit's remand decision viewed the FHA's proximate-cause requirement as an island, see, *e.g.*, Pet. App. at 65a ("[These analogues] do not help flesh out the meaning of 'direct relation' . . . ."), that conclusion is wrong. Just as this Court's precedents construing the Clayton Act, RICO, and the Lanham Act informed the proximate-cause requirement that applies to the FHA, *id.* at 84a–86a, the resolution of the proximate-cause question presented by this case will help inform the application of that requirement in cases brought under other statutes. Indeed, various courts of appeals have already cited this Court's initial decision in this case when discussing the proximate-cause requirement for other causes of action. *E.g.*, *S. Tr. Metals*, 894 F.3d at 1329 (Commodity Exchange Act); *Kemper* v. *Deutsche Bank AG*, 911 F.3d 383, 391 (7th Cir. 2018) (Anti-Terrorism Act); *Empire Merchants, LLC* v. *Reliable Churchill LLLP*, 902 F.3d 132, 141 (2d Cir. 2018) (RICO); *Fields*, 881 F.3d

at 749 (Anti-Terrorism Act); *City of Cincinnati* v. *Deutsche Bank Nat'l Tr. Co.*, 863 F.3d 474, 480 (6th Cir. 2017) (Ohio public nuisance law).

This inevitable crossover between case law applying the proximate-cause requirement to the FHA and case law applying the requirement to other statutes substantially increases the importance of this Court's review in these cases. If this Court allows the Eleventh Circuit's erroneous remand decision to stand, it will implicitly invite lower courts to repeat the Eleventh Circuit's error in other contexts. Indeed, at least one district court has already cited the Eleventh Circuit's remand decision to support a more expansive view of proximate cause under the Lanham Act. *Wyndham Vacation Ownership* v. *Gallagher*, No. 19-CV-00476, 2019 WL 5458815, at *6 (M.D. Fla. Sept. 10, 2019) ("Supreme Court precedent shows that an intervening step will not vitiate proximate cause in all instances. What is more important . . . is the certainty with which . . . the injury is fairly attributable to the statutory violation." (quoting remand decision) (alterations in original)). This Court should grant the petitions now to correct the Eleventh Circuit's error and clarify how the proximate-cause requirement applies under the FHA and, by extension, other statutes incorporating the same traditional common-law requirement.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be granted.

Respectfully submitted,

PHILIP L. WILLMAN
President
DRI–THE VOICE OF THE DEFENSE BAR
222 South Riverside Plaza
Chicago, IL 60606
(312) 795-1101
pwillman@bjpc.com

MATTHEW T. NELSON
Counsel of Record
CHARLES R. QUIGG
WARNER NORCROSS + JUDD LLP
1500 Warner Building
150 Ottawa Avenue NW
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Amicus Curiae

DECEMBER 26, 2019