NO. 19-675

IN THE

Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 2017, this Court, in this case, held that the City of Miami had standing under the Fair Housing Act (FHA) to sue for lost property taxes and excess municipal expenditures, and that the pleading standard for proximate cause specific to the FHA and how allegations fit those standards should receive the benefit of decisions from the lower courts. On remand, the Eleventh Circuit held that the City had met the requisite standard.

The question presented is:

Whether a municipality claiming violations of the FHA that result in loan foreclosures and lost property taxes has pleaded the necessary proximate cause for its injury where, as the Eleventh Circuit held, the resulting injury is a "clear, direct and immediate" consequence of those violations and thus the proximate cause of the City's financial injury.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent City of Miami, Florida respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

INTRODUCTION

Invoking the demonstratively false specter of liability in the hundreds of millions or even billions of dollars per community and an imaginary proliferation of lawsuits, Bank of America asks this Court to intervene in this case because (1) the Eleventh Circuit's decision did not conform to the minority opinion even though the appellate court scrupulously followed the guidance provided in the opinion for the Court; (2) the Bank worries that the Eleventh Circuit has somehow cast doubt on the proximate-cause standards applicable to other federal statutes, even though proximate-cause pleading standards are statute-specific; and (3) the Bank speculates that the result below will encourage copycat lawsuits by other municipalities, even though the Bank asserts that any actionable discriminatory conduct is long in the past and outside the limitations period. Moreover, the Bank deliberately ignores the upcoming February 10 oral argument in the Ninth Circuit on whether a substantially similar municipal lawsuit meets the proximate-cause standard at issue in the Petition, which has the potential to create a circuit split that does not currently exist.

The Petition treats this Court to distorted versions of this Court's 2017 decision in this case, the Eleventh Circuit's meticulous examination of this Court's guidance in that decision, and other cases brought by other local governmental units that are based on unique and different theories of liability that neither implicate the pleading in this case nor similar causal considerations. The fact that the Eleventh Circuit excluded a significant portion of Miami's damages demonstrates that the decision below will not have the dire consequences the Petition imagines will occur.

The Bank's Petition reflects a disappointed litigant seeking to re-write this Court's previous ruling and claims that a departure from its version of that decision requires error correction.. *See* Pet. 3 (labeling the decision below "wrong"). This is not a basis for certiorari. *See* S. Ct. Rule 10. Moreover, as other circuits have begun to confront similar proximate cause issues and an amended complaint in this case, conforming to the decisions of this Court and the Eleventh Circuit is due this very month in the District Court, the case makes a poor vehicle for review of the question presented. This Court's expressly stated direction to allow percolation so the lower courts may address the contours of proximate cause should be honored. The petition should be denied.

STATEMENT OF THE CASE

A. Complaint Filed and Dismissed in the District Court.

On December 13, 2013, the City of Miami filed a detailed Complaint against Bank of America, alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq*, ("FHA"), by discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and in significant, direct, and continuing financial harm to the City. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1301 (2017). The allegations asserted intentional discrimination and disparate-impact discrimination in which minority borrowers received more expensive and/or riskier mortgage loans than similarly situated non-minority borrowers and that minority borrowers were refused refinancing that was available to non-minority borrowers.

The Complaint alleged that foreclosures resulting from these practices caused the diminution of property values of the homes and surrounding homes, which also meant a loss of property tax revenues to the City. *Id.* at 1301-02. Moreover, the Complaint provided "statistical analyses that trace the City's financial losses to the Banks' discriminatory practices." *Id.* at 1302.

The District Court on July 9, 2014 granted the Banks' motion to dismiss with prejudice with respect to the allegations based on the FHA. Pet. App. 134a. It held that the City's claims fell outside the zone of interests of the FHA and therefore the City lacked

standing to pursue property tax losses and recoupment of municipal expenditures from discriminatory practices made actionable by the FHA. Pet. App. 133a. It further held that proximate cause was not met because independent economic developments broke the causal chain and because the statistical correlations asserted in the complaint were "insufficient to support a causation claim." *Id.* at 134a.

B. The Eleventh Circuit Reverses.

The Eleventh Circuit unanimously reversed the District Court with respect to both holdings. It held that the FHA's zone of interests encompasses the City's allegations in this case. Pet. App. 98a. Noting that "[n]o case of the Supreme Court or this Court has ever dealt directly with the existence or application of a proximate cause requirement in the FHA context," it rejected a "strict directness requirement" as inconsistent with "Supreme Court and Eleventh Circuit caselaw allowing entities who have suffered indirect injuries—that is, parties who have not themselves been directly discriminated against—to bring a claim under the FHA." *Id.* at 100a, 104a. Instead, it held "the proper standard, drawing on the law of tort, is based on foreseeability," which the court found the City's complaint met. *Id.* at 105a.

C. This Court Affirms in Part, Reverses in Part, and Remands.

This Court affirmed the Eleventh Circuit's holding that the City had standing. It held that the "City's financial injuries fall within the zone of

interests that the FHA protects." *City of Miami*, 137 S. Ct. at 1304. It held that the City's claims were not unprecedented but "similar in kind" to those it approved in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *Id. Gladstone* held that a "significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." 441 U.S. at 110-11 (emphasis added). *See also City of Miami*, 137 S. Ct. at 1304-05.

A second question, the pleading requirements of proximate cause for the FHA, went unanswered in this Court's opinion. The Court did reject what it perceived to be an exclusive focus on foreseeability as sufficient to satisfy proximate cause. It held that, "[i]n the context of the FHA, *foreseeability alone* does not ensure the close connection that proximate cause requires." *Id.* at 1306 (emphasis added). Still, it further held that "'[p]roximate-cause analysis is controlled by the nature of the statutory cause of action.'" *Id.* at 1305 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)).

As guidance, the Court stated that "proximate cause under the FHA requires '*some* direct relation between the injury asserted and the injurious conduct alleged,'" but the degree of directness requires reference back to the FHA and "an assessment '"of what is administratively possible and convenient."'" *Id.* at 1306 (emphasis added; citation omitted). Beyond that, the Court declined to "draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the

City's financial injuries fall." *Id.* Instead, it instructed the "lower courts [to] define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

D. The Eleventh Circuit Decision on Remand Finds the City's Complaint Meets Proximate Cause.

Rejecting the Banks' request that the case be remanded back to the District Court for first application of this Court's new guidance, the Eleventh Circuit asked all parties to file simultaneous briefing. Order, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Feb. 28, 2018). It did not grant the City's request for oral argument, which the Banks opposed. *See* Order, *City of Miami v. Bank of America*, Nos. 14-14543 & 14-14544 (11th Cir. Feb. 28, 2018). On May 3, 2019, it issued a unanimous decision, holding that the City's pleading met the FHA's proximate cause standard for some but not all of its economic injuries. It held that

> Considering the broad and ambitious scope of the FHA, the statute's expansive text, the exceedingly detailed allegation found in the complaints, and the application of the administrative feasibility factors laid out by the Supreme Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992),

> we are satisfied that the pleadings set out a plausible claim.

Pet. App. 4a.

The Court explained that "Miami has alleged a substantial injury to its tax base that is not just reasonably foreseeable, but also is necessarily and directly connected to the Banks' conduct in redlining and reverse-redlining throughout much of the City," and, thus, "plausibly bears 'some direct relation' to the claimed misconduct." *Id.* (citation omitted). In fact, "only the City can allege and litigate this peculiar kind of aggregative injury to its tax base." *Id.* Nonetheless, the Eleventh Circuit held that the "pleadings fall short of sufficiently alleging 'some direct relation' between the Banks' conduct and a claimed increase in expenditures on municipal services," because the "complaints fail to explain how these kinds of injuries—increases in police, fire, sanitation, and similar municipal expenses—are anything more than merely foreseeable consequences of redlining and reverse-redlining." *Id.* at 4a-5a. In rendering contrary rulings on property-tax losses and increased municipal expenditures, the Eleventh Circuit took a careful, pleading-specific approach to the proximate-cause issue on remand. *See Id.* at 18a ("In this opinion, we endeavor carefully to apply the Court's mandate to these complaints, to determine if they plausibly state a claim under the Fair Housing Act.").

Bank of America sought but was denied a petition for rehearing or rehearing en banc. Order, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Aug. 8, 2019). It was subsequently

denied a stay of the mandate pending its petition for certiorari. Order, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Oct. 9, 2019). Justice Thomas then similarly denied a stay pending its petition. *Bank of Am. Corp. v. City of Miami*, No. 19A429 (Oct. 30, 2019).

REASONS FOR DENYING THE PETITION

The Petition amounts to a bid for reconsideration of this Court's 2017 decision in this case. It re-raises arguments this Court expressly rejected on a municipality's standing to bring actions for lost property taxes resulting from violations of the FHA. *Compare* Pet. 2 ("Miami is one of more than a dozen local governments suing mortgage lenders under the FHA without claiming to have experienced any discrimination."); Pet. 31 (reprising arguments this Court rejected that "directly injured victims" and Attorney General lawsuits are better suited to "vindicate the law"), with *City of Miami*, 137 S. Ct. at 1304 ("we nonetheless conclude that the City's financial injuries fall within the zone of interests that the FHA protects."); *id.* at 1303-04 (acknowledging that the 1988 amendments to the FHA "retained without significant change the definition of 'person aggrieved' that this Court had broadly construed" to include "plaintiffs similarly situated to the City" seeking lost property taxes due to discriminatory housing practices).

As for the second issue, this Court explicitly "declin[ed]" to decide "the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall." *Id.* at 1306. Instead, it held that "lower courts

should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

Despite that expressed preference for percolation, the indeterminacy of the guidance this Court articulated, and the Eleventh Circuit's faithful and careful examination of that guidance, Bank of America mischaracterizes the decision below as "largely ignoring this Court's instructions." Pet. 1. To arrive at that unwarranted conclusion, the Bank cherry-picks generic phrases about directness principles from the opinion, concludes that the FHA standard must be the same as the standard applied to antitrust statutes and RICO because those generic phrases come from decisions about those statutes, and gives no weight at all to the most essential guidance in this Court's instructions: that the lower courts should consider the "nature of the statutory cause of action, and an assessment of what is administratively possible and convenient." *City of Miami*, 137 S. Ct. at 1306 (internal quotation marks and citations omitted). The Eleventh Circuit undertook exactly that inquiry.

Bank of America fails to address that instruction at all. In fact, the only mention of that instruction in the Petition criticizes the Eleventh Circuit for considering it at all. Pet. 29. Instead, the Petition mischaracterizes the three-Justice concurrence in part, dissent in part, as declaring the holding in the case and faults the Eleventh Circuit for not applying that minority view. *Id.* at 14 ("[T]he Eleventh Circuit almost entirely ignored the direct conflict between its

application of the governing directness principles and the application of those same principles by three Justices of this Court—the only three Justices to have applied the correct proximate-cause standard to Miami's claims."). That criticism suggests that the majority on this Court got proximate cause wrong and ignores the actual instructions that this Court provided to the Eleventh Circuit on remand.

The Bank instead puts all of its stock in the minority position and makes plain that the Bank's real critique is that the Eleventh Circuit "directly reject[ed] the three-Justice concurrence." *Id.* at 3. However, the Bank's focus on the concurrence is misplaced because the majority did not issue a fractured or plurality decision, and thus the concurring opinion does not provide the basis of the decision. *See Marks v. United States*, 430 U.S. 188, 193 (1977). The three-Justice concurrence-in-part was not the proper basis for the Eleventh Circuit's decision on remand, and it provides no basis for certiorari.

I. This Court Expressly Asked for Percolation on this Issue in the Lower Courts and Certiorari Would Short-Circuit that Process.

In 2017, this Court held that Miami's "financial injuries fall within the zone of interests that the FHA protects," that its "claims are similar in kind to the claims the Village of Bellwood raised in *Gladstone*." *City of Miami*, 137 S. Ct. at 1304, and thus not unprecedented as the Bank claims, Pet. 1. Moreover, the cause of action properly included a claim for lost property taxes, *City of Miami*, 137 S.

Ct. at 1304-05, the only damages still claimed by the City.

On the issue of pleading causation, the Court expressly "decline[d]" "to draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall." *Id.* at 1306. Instead, it asked that the "lower courts … define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

That direction invoked a well-recognized process of percolation that allows the Court to benefit from the views of the lower courts, sampling potentially different approaches before determining that there is a need to coalesce around a singular approach. As Justice Frankfurter, writing for the Court, stated in *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950): "It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

Percolation allows for a multitude of judicial voices to examine a new question, which "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting).

Bank of America denies the value of awaiting decisions from other circuits, arguing that the Eleventh Circuit's decision conflicts with this Court's

decision and that it will lead to confusion in the lower courts. Pet. 32. Both claims are fanciful.

As previously stated, this Court expressly declined to determine the proximate-cause standard applicable to the FHA and whether the City's injury claims comport with that standard. *City of Miami*, 137 S. Ct. at 1306. While it provided some general guidance—guidance that the Eleventh Circuit considered at length, *see* Pet. App. 16a-67a—this Court emphasized that the directness principles it articulated should be FHA-specific, *City of Miami,* 137 U.S. at 1306, rather than simply carbon copies of the standard applicable to antitrust or RICO, which is the Bank's advocated approach. Pet. 11. There is no conflict between this Court's 2017 decision and the Eleventh Circuit's decision on remand.[1]

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[1] Where this Court generically indicated "we have repeatedly applied directness principles to statutes with 'common-law foundations,'" *City of Miami*, 137 S. Ct. at 1306 (citation omitted), Bank of America disingenuously inserts the word "same" to make it the "same 'directness principles.'" Pet. 11, 20. Instead, however, this Court directed that there be "*some* direct relation between the injury asserted and the injurious conduct alleged." *City of Miami*, 137 S. Ct. at 1306 (quoting *Holmes v. Sec. Inv'r Prot. Corp.,* 503 U.S. 258, 268 (1992) (emphasis added). Moreover, the applicable proximate-cause standard is always statute-specific, *Lexmark*, 572 U.S. at 133, and requires review of "some statutory history." *Holmes,* 503 U.S. at 267. Those requirements refute Bank of America's insistence that the FHA proximate-cause standard is the same as the one applied by this Court in RICO. Much of the Bank's unwarranted criticism of the Eleventh Circuit's decision improperly faults that court for focusing on the FHA, its legislative history, and its policy judgments. *See, e.g.*, Pet. 28, 31.

The Bank's assertion that the Eleventh Circuit's decision has and will sow confusion in district courts around the nation as a ground for review gives its Petition no traction. Certainly, every circuit decision that determines an issue of first impression will have persuasive value in district courts outside the circuit. Yet, this Court still ordinarily waits for a circuit conflict before deciding to resolve the issue. *See, e.g.*, *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). That the district courts "have fallen in disagreement over how to apply the FHA's proximate-cause requirement," Pet. 32, or that a first decision in a circuit court "undermined [an] emerging consensus" among federal district courts,"[2] Pet. 33, provides no grounds to depart from this Court's traditional insistence on a circuit conflict.

Bank of America's disappointment at receiving an adverse result provides no reason to short-circuit the process of percolation that this Court set in motion.

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[2] As this Brief will explain in more detail *infra* at 18-21, the Bank is wrong to assert an emerging consensus or that the cases that differ on this issue constitute "nearly identical FHA claims with nearly identical causal chains." Pet. 32. Instead, the cases that have found broader proximate-cause flaws are based on liability theories based on "equity stripping," a practice of "allow[ing] the borrower to pay only the monthly interest accruing on the loan or to make only minimum payments," so that the Bank, can maximize its fees and the borrower has ever-diminishing equity in the home. *Cty. of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 980 (N.D. Ill. 2018). In that case, the question was whether equity stripping is an injury that falls within the FHA's zone of interests. *Id.* at 990. By contrast, this Court has already determined that Miami's allegations fall within the FHA zone. *City of Miami*, 137 S. Ct. at 1304.

II. The Absence of a Circuit Conflict and the Imminence of Consideration in Another Circuit Further Advises Against Review in this Court.

The Bank does not assert an actual circuit conflict, nor could it. No federal circuit other than the Eleventh Circuit has yet reached the proximate cause issue under the FHA. This Court should follow its "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box*, 139 S. Ct. at 1782.

A. The Ninth Circuit Will Take Up the Issue Presented in the Petition before this Court Will Consider Certiorari in this Case.

This Court usually awaits a circuit conflict before taking up an issue presented in a petition, even when there is no prospect that another circuit will soon consider the issue. Here, the case against certiorari is even stronger: consideration of the proximate-cause standard applicable to local government actions brought under the FHA is imminent in a circuit other than the Eleventh. The Ninth Circuit is currently considering the issue in a case with similar allegations, the same theory of liability, and identical claims for lost property taxes and injunctive relief.

In *City of Oakland v. Wells Fargo Bank, N.A.,* No. 15-CV-04321-EMC, 2018 WL 3008538 (N.D. Cal. June 15, 2018), the district court determined the proximate-cause issue with similar reasoning and

results to what the Eleventh Circuit subsequently reached in this case. The *Oakland* Court then certified two questions for interlocutory review under 28 U.S.C. § 1292(b):

> (1) Do Oakland's claims for damages based on the injuries asserted in the FAC satisfy on a motion to dismiss proximate cause required by the FHA?
> (2) Is the proximate-cause requirement articulated in *City of Miami* limited to claims for damages under the FHA and not to claims for injunctive or declaratory relief?

City of Oakland v. Wells Fargo Bank, N.A., 2018 WL 7575537, at *2 (N.D. Cal. Sept. 5, 2018).

The Ninth Circuit accepted the appeal, and oral argument will take place February 10, 2020. *See City of Oakland v. Wells Fargo & Co.*, No. 19-15169; Oral Argument Calendar, Feb. 10-14, 2020, available at https://www.ca9.uscourts.gov/calendar/view.php?hearing=February%20-%20James%20R.%20Browning%20U.S.%20Courthouse,%20San%20Francisco&dates=10-14&year=2020.

Denying certiorari here gives this Court the benefit of an additional circuit-level decision that undoubtedly will also be the subject of a petition for certiorari, regardless of the result. The Bank's citation of decisions in district courts in other circuits suggests that other circuit-level decisions will soon follow.

B. Bank of America's Simulated Circuit Conflict Provides No Basis for Certiorari.

Bank of America purports to locate a circuit conflict between the Eleventh Circuit's decision on FHA proximate cause and decisions in other circuits involving the proximate-cause standard applicable to other federal statutes. Pet. 4, 33, 34 ("courts of appeals are divided as to the correct application of proximate cause to federal statutory claims"). It argues, contrary to *City of Miami* and this Court's other precedents, that courts should apply a "consistent proximate-cause principles across federal statutes with common-law foundations." *Id.* at 34. It further argues that directness means the same thing across federal statutes and that the circuits are consistent in applying it to other statutes. Pet. 34.

The argument, however, conflicts with this Court's consistent jurisprudence. First, proximate cause was not a unitary concept at common law. Instead, "[c]ommon-law 'proximate cause' formulations varied." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011). *See also Holmes*, 503 U.S. at 268 (common-law proximate cause took "many shapes").

While this Court has accorded the common-law based antitrust and RICO statutes a comparatively rigid directness requirement, the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, also boasts common-law foundations. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 166 (2007) (citing *Urie v. Thompson*, 337 U.S. 163, 182 (1949)) ("the elements of a FELA claim are determined by reference to the

common law"). Nonetheless, "[u]nder FELA, injury "is proximately caused" by the railroad's negligence if that negligence 'played any part ... in ... causing the injury.'" *McBride*, 564 U.S. at 700. This "played any part" standard is probably the most forgiving version of proximate cause and utterly rebuts Bank of America's argument that statutes with common-law foundations must have a consistent proximate-cause standard.

Second, consistent with the foregoing, this Court has emphasized the statute-specific nature of the applicable proximate-cause standard. While "'some'" directness principle applies to federal statutes with common-law foundations generally, *City of Miami*, 137 S. Ct. at 1306 (quoting *Holmes,* 503 U.S. at 268, and the "general tendency in these cases, in regard to damages at least, is not to go beyond the first step," *id*. (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010) (internal quotation marks omitted), "[w]hat falls within that first step depends in part on the nature of the statutory cause of action, and an assessment of what is administratively possible and convenient." *Id*. (quoting *Lexmark*, 572 U.S. at 133, and *Holmes*, 503 U.S. at 268).

For that reason, *Holmes* holds that the "key to the better interpretation [of any particular federal law's causation standard] lies in some statutory history." *Holmes*, 503 U.S. at 267. In *Holmes*, the statutory history indicated that the causation standard applicable to antitrust laws also applied to RICO. This Court reasoned that "the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the

Sherman Act, and later in the Clayton Act's § 4," presumably "used the same words [because] it intended them to have the same meaning that courts had already given them." *Id*. at 268.

The FHA has very different language and should not be accorded the same construction as RICO and the antitrust statutes. Whereas *Holmes* concluded that the legislative intent behind RICO did not support an "expansive reading" of RICO's reach and liability, 503 U.S. at 266, *City of Miami* held that Congress "ratified" the expansive reading the Court had previously given the FHA's reach and liability, 137 S. Ct. at 1305, and the Court has also instructed that courts must read the FHA's language as "broad and inclusive." *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 209 (1972).

The import of these very different treatments of statutes with common-law foundations demonstrates that Bank of America's unitary approach to proximate cause seeks a radical restructuring of this Court's relevant jurisprudence and calls into question multiple precedents, none of which has proven unworkable or divergent from legislative intent. The Bank's asserted conflict premised on interpretations of different statutes does not present a proper basis for certiorari.

C. The Divergence among District Courts Reflects Different Liability Theories.

Without a circuit conflict, Bank of America relies on different district courts entertaining different liability theories to assert confusion and divergence.

However, understanding the differences is critical to understanding the rulings of those courts.

In addition to the Eleventh Circuit, three district court rulings, two of which preceded the Eleventh Circuit, have rejected motions to dismiss based on similar claims about proximate cause with respect to lost property taxes while granting them to claims of increased municipal expenditures. *See City of Oakland*, 2018 WL 7575537 (holding that the statistical analyses alleged in the complaint provide sufficient certainty in tying the damages to the misconduct on a direct basis for the property tax claims); *City of Sacramento v. Wells Fargo & Co.*, No. 218CV00416, 2019 WL 3975590 (E.D. Cal. Aug. 22, 2019) (largely adopting the same analysis as the Eleventh Circuit); *City of Philadelphia v. Wells Fargo & Co.*, 2018 WL 424451 (Jan. 16, 2018) (providing scant analysis but denying the motion to dismiss and Wells Fargo's subsequent Rule 1292(b) motion to appeal the proximate cause determination on an interlocutory basis). *Id.*, ECF No. 79 (E.D. Pa. Apr. 5, 2018).

On the other hand, the Bank relies heavily on the different analysis applied by district courts in three cases from Cook County that predated the Eleventh Circuit's decision and were premised on the very different legal theory of equity stripping, which at least one court questioned as even being within the zone of interests of the FHA. *Cty. of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d at 990. In the Cook County cases, the plaintiff county alleged that, through equity stripping, Wells Fargo maximized late charges and ancillary fees through onerous terms to squeeze additional profit out of the

mortgages it serviced. By telling borrowers that they need only pay their monthly interest or a set minimum payment while the fees accumulate, the county alleged the Bank acquired what little equity in the home that the borrower had earned, resulting in default. *Id.* at 979. Cook County also offered no statistical analysis that might separate the equity-stripping cause of default from other potential factors.

Cook County's central claim in these cases was that the "equity-stripping practice meaningfully increased the County's costs of administering and processing foreclosures—through the use of the Cook County Sheriff's Office to post foreclosure and eviction notices, serve summonses, and evict borrowers, and the use of the Cook County Circuit Court to process foreclosure suits." *Id.* at 984. The Cook County decisions found that this claim satisfied proximate cause because "default and foreclosure are the inexorable consequences of Wells Fargo's denial of loan modification requests from already-distressed borrowers" and "thus led to additional expenditures by the County, with the same 1:1 correlation present in *Lexmark*." *Id.* at 986.

The Cook County cases found the claims of property tax losses due to equity stripping too attenuated to meet the applicable proximate cause standard because the complaint did not account for other potential causes of a default or the amount each year that the equity stripping lowered property taxes while the "borrower subject to equity stripping lived in and maintained the property." *Id.* at 988-89. *See also Cty. of Cook v. Bank of Am. Corp.*, No. 14 C 2280, 2018 WL 1561725, at *9 (N.D. Ill. Mar. 30,

2018) (limiting county to claims for foreclosure-processing related expenses on proximate cause grounds); *Cty. of Cook v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950, 954 (N.D. Ill. 2018) (same). Thus, the cases relied upon by the Bank rest upon a fundamentally distinct theory of liability from Miami's legal theory. The conflict the Bank proposes simply does not exist.

Bank of America also relies on two more recently filed cases that also rely on the equity-stripping theory. The Bank complains that district courts' rulings in those cases deemed the Eleventh Circuit's decision persuasive. Relying on a similar analysis to that of the decision below, these two rulings found only that foreclosure processing costs were proximately caused by the equity-stripping scheme, while they dismissed the other claims for damages based on increased municipal services costs, lowered property taxes, lost municipal income, and non-economic damages. *Prince George's Cty. v. Wells Fargo & Co.*, 397 F. Supp. 3d 752, 767 (D. Md. 2019); *Montgomery Cty. v. Bank of Am. Corp.*, No. PWG-18-3575, 2019 WL 4805678, at *17 (D. Md. Sept. 30, 2019).[3]

The results in these recent, Eleventh Circuit-influenced decisions, like the Eleventh Circuit's decision itself, found that proximate cause was not met on claims for increased municipal services.

[3] In both instances, the plaintiff was granted leave to file an "Amended Complaint setting forth in more detail how the losses caused by Defendants' purported violations may be ascertainable through a regression analysis or other specific method." *Prince George's Cty.*, 397 F. Supp. 3d at 767; *Montgomery Cty.*, 2019 WL 4805678, *17.

These rulings, like those in the *Oakland* and *Sacramento* cases, demonstrate that the standards courts are using in the wake of this Court's decision require a showing substantially beyond foreseeability, in contrast to the Bank's characterization of the holdings. *See* Pet. 3. Those results do not lend urgency to the Question Presented in the Petition sufficient to eschew the usual requirement of a circuit split.

III. The Petition Does Not Present a Recurring Issue of Exceptional Importance.

Lacking a circuit conflict, Bank of America asserts that the Question Presented is a recurring issue of exceptional importance that demands this Court's immediate attention. The argument, however, is doubly flawed. First, the Bank contends that local government lawsuits seek massive damages, giving the example of the complaint filed against it in Cook County that indicated that damages could "exceed $1 billion." Pet. 15-16. While not this case, the district court in that lawsuit limited cognizable damages to the county's foreclosure-processing expenses, an amount that may properly be called *de minimis* and unlikely to approach even one percent of that billion dollars. *County of Cook*, 2018 WL 1561725, at *9 (N.D. Ill. Mar. 30, 2018).[4]

[4] The Eleventh Circuit limited Miami's damages to lost property taxes, Pet. App. 68a-69a, a ruling that Bank of America relegates only to a footnote, Pet. 14 n.3. That the ruling also demonstrates that the Bank is wrong to assert that the proximate cause standard adopted is broader than the previous foreseeability standard that would have allowed those

Second, the Bank suggests that the Eleventh Circuit's proximate cause standard will open the floodgates to copycat lawsuits by other local government units, even though this Court's 2017 decision recognizing municipal standing did not result in an avalanche of new actions. Indeed, there is reason to believe that the statute of limitations will prevent the filing of any additional lawsuits about loans originated during the same time period.

A. The Damage Claims Are Likely to be Quite Modest.

The Bank and its *amici* raise meritless arguments that allowing Miami and other local governments to proceed in cases like this one will cost banks hundreds of millions or even billions per lawsuit, bringing about dire financial consequences for banks, the national economy, and even the global economy. Their hyperbolic rhetoric has no grounding in fact.

Instead, as was discussed in oral argument when this case was previously before this Court, the only cases resolved as of that time, those of Baltimore and Memphis, were settled for less than $10 million. Oral Argument transcript, *Bank of Am. Corp. v. City of Miami*, No. 15-1111, Nov. 8, 2016, at 35:10-15. The

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claims to go forward. *See id*. at 3 (asserting the new standard is broader than foreseeability). In addition, the District Court excluded claims against the Bank's Countrywide subsidiaries. *City of Miami v. Bank of Am. Corp*., No. 1:13-cv-24506, ECF. No. 98 (Mar. 17, 2016). Because of those rulings, the Bank substantially overstates the number of loans at issue (the majority of which were issued by Countrywide) and the damages that can flow from them by referencing the original complaint. *See* Pet. 9.

Memphis settlement consisted largely of committing $4.5 million for down payments and renovation grants, as well as homebuyer education, as gestures of business goodwill and $3 million for local initiatives. Bob Ivry, The Seven Sins of Wall Street 256-57 (2014). Both cities' settlements were part of the Department of Justice's own settlement over the same discriminatory practices. John L. Ropiequet, *Does* Inclusive Communities *Point the Way to A More Limited Future for Fair Lending Claims?*, 69 Consumer Fin. L.Q. Rep. 83, 93 (2015). Both settlements became just part of the cost of doing business and were formulated as grants, rather than liability payments.

A similar result occurred in Philadelphia's lawsuit against Well Fargo. While Memphis has a population of about 650,000[5] and Baltimore has one of about 600,000,[6] Philadelphia's population is more than the two other cities combined: more than 1.5 million.[7] It recently resolved its lawsuit similar to Miami's for $10 million in grants "for sustainable housing-related programs to promote and preserve

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[5] U.S. Census Bur., *Quick Facts: Memphis, Tennessee*, available at https://www.census.gov/quickfacts/memphiscitytennessee.

[6] U.S. Census Bur., *Quick Facts: Baltimore, Maryland*, available at https://www.census.gov/quickfacts/fact/table/baltimorecitymaryland/PST045218.

[7] U.S. Census Bur., *Quick Facts, Philadelphia, Pennsylvania*, available at https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania/PST045218.

home ownership for low- and moderate-income residents." City of Philadelphia Law Department Press Release, *City of Philadelphia and Wells Fargo Resolve Litigation: Reach Collaborative Agreement for $10 million in Affordable Housing and Housing Preservation Grants,* available at https://www.phila.gov/2019-12-16-city-of-philadelphia-and-wells-fargo-resolve-litigation/ (last visited Jan. 24, 2020). Miami is smaller than any of these cities whose cases were resolved. Its population is 470,914.[8] There is every reason to believe Miami's litigation will result in damages that are proportionately smaller than those that have already resolved, rather than the speculative numbers that Bank of America imagines.

Nor will liability have the dire consequences the Bank and its *amici* forecast. Analysts, who take litigation exposure into account, rate Bank of America stock a "buy" and forecast continued growth and profitability. *See* https://money.cnn.com/quote/forecast/forecast.html?symb=bac (last visited Jan. 24, 2020). Its most recent annual report painted an equally rosy picture, boasting of record earnings in 2018 of $28.1 billion, or $2.61 per share, as well as capital, liquidity, and capacity to serve clients at record levels. Bank of America, 2018 Annual Report: What Would You Like to Do?, at 1, available at http://media.corporate-ir.net/media_files/IROL/71/71595/BOAML_AR2018.pdf. In reporting on pending litigation, these FHA lawsuits

[8] U.S. Census Bur., Quick Facts, Miami city, Florida, available at https://www.census.gov/quickfacts/fact/table/miamicityflorida/POP060210.

were so insignificant that the report makes no mention of it.

During a call on January 15, 2020, not one of the independent banking analysts questioning Bank of America CEO Brian Moynihan and CFO Paul Donofrio raised any questions about these cases. *See* Bank of America Corporation (BAC) CEO Brian Moynihan on Q4 2019 Results-Earnings Call Transcript (Jan. 15, 2020), available at https://seekingalpha.com/article/4317146-bank-of-america-corporation-bac-ceo-brian-moynihan-on-q4-2019-results-earnings-call). Moreover, neither Mr. Moynihan, Mr. Donofrio, nor any of the participating analysts referenced the FHA cases during the previous conference calls which occurred on October 16, 2019 (https://seekingalpha.com/article/4296896-bank-of-americas-bac-ceo-brian-moynihan-on-q3-2019-results-earnings-call-transcript); July 17, 2019 (https://seekingalpha.com/article/4275569-bank-of-america-corporation-bac-ceo-brian-moynihan-on-q2-2019-results-earnings-call); April 16, 2019 (https://seekingalpha.com/article/4254779-bank-of-america-corporation-bac-ceo-brian-moynihan-on-q1-2019-results-earnings-call); January 16, 2019 (https://seekingalpha.com/article/4233829-bank-of-america-corporation-bac-ceo-brian-moynihan-on-q4-2018-results-earnings-call). If the Eleventh Circuit's ruling actually engendered the concerns about dire consequences the Bank and its *amici* assert in this Court, the issue would not have gone unmentioned.

Similarly, a review of Bank of America's 2018 10-K, coupled with the three 10-Q Reports filed to date corresponding to the 2019 calendar year, are devoid of any reference whatsoever to these cases. There is

no discussion of potential devastating financial consequences flowing from these cases and the resulting impact on the Bank, let alone any discussion regarding how these cases may impact the banking system or the broader economy. *See* 2018 10-K, available at http://investor.bankofamerica.com/static-files/6b395490-64a9-4fc3-a911-e6a050521f00; 2019 10-Q for the Third Quarter, available at http://investor.bankofamerica.com/static-files/5f38c392-cad3-42ce-a5fa-b1d949707519; 2019 10-Q for the Second Quarter, available at http://investor.bankofamerica.com/static-files/71620a93-361c-499a-8a92-1d9d2bd94e37; and 2019 10-Q for the First Quarter, available at http://investor.bankofamerica.com/static-files/34467440-b8ad-4296-b40f-f87ca8fe2b06.

B. New FHA Litigation Is Unlikely to be Filed.

Both the Bank and its amici presuppose that the Eleventh Circuit's proximate-cause ruling will unleash the floodgates of new, copycat cases. The Bank notes that twelve local governments had brought lawsuits prior to the filing of a writ of certiorari in *City of Miami*. Pet. 15. The first lawsuits were filed in 2008 and 2009 and were resolved through settlement or dismissal.[9] A number of the

[9] The first lawsuits were filed by Baltimore, Birmingham, and Memphis. Ropiequet, 69 Consumer Fin. L.Q. Rep. at 89. The Baltimore and Memphis cases were settled as part of the Department of Justice's settlement of its FHA action. *Id*. at 92. The Birmingham lawsuit was dismissed on standing grounds. *City of Birmingham v. Citigroup Inc*., No. CV-09-BE-467-S, 2009 WL 8652915, at *1 (N.D. Ala. Aug. 19, 2009).

later lawsuits have also reached final disposition.[10] Those facts plainly indicate that the Bank's portrayal of rampant local government FHA litigation against lenders is overblown.

Another marker indicating the falsely sweeping nature of the arguments about new litigation is what occurred subsequent to this Court's holding according municipalities standing in *City of Miami*. The decision's clear indication that local governments could bring lawsuits for lost property taxes and increased municipal spending under the FHA had greater potential to encourage new lawsuits than could ever be ascribed to the Eleventh Circuit's proximate cause ruling, permitting only the claim for lost property taxes to go forward. At oral argument in *City of Miami*, counsel for the banks argued that "[t]here are 19,300 cities in America. If you adopt their theory, you would be allowing all of them to bring complaints just like this." Oral Argument transcript, *Bank of Am. Corp. v. City of Miami*, No. 15-1111, Nov. 8, 2016, at 55:18-20. This Court was not moved by the Banks' misguided

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[10] The Los Angeles lawsuits were dismissed at summary judgment. *City of Los Angeles v. Bank of Am. Corp*., 691 F. App'x 464, 465 (9th Cir. 2017); *City of Los Angeles v. Wells Fargo & Co*., 691 F. App'x 453 (9th Cir. 2017). One of the Miami Gardens cases was dismissed at summary judgment, though on grounds raised *sua sponte* by the appellate court. *City of Miami Gardens v. Wells Fargo & Co*., 931 F.3d 1274 (11th Cir. 2019), *petition for rehearing en banc pending*. The Philadelphia case was recently resolved. City of Philadelphia Law Department Press Release, *supra*, available at https://www.phila.gov/2019-12-16-city-of-philadelphia-and-wells-fargo-resolve-litigation/ (last visited Jan. 24, 2020).

attempt to invent a doomsday scenario which never has, and never will, come to fruition. In fact, as Bank of America tells this Court in its Petition, only four lawsuits were subsequently filed. Pet. 15.[11] That fact demonstrates it is little more than empty rhetoric when the Bank's *amici* assert that allowing the decision below to stand would engender similar lawsuits that "could very well spread to nearly every county and municipality with the resources to sue." Am. Br. Cato Institute 12. *See also* Am. Br. The Chamber of Commerce, *et al.* 9 ("These cases, while already numerous, are likely just the tip of the iceberg if courts follow the Eleventh Circuit's lead)."

The likelihood of additional lawsuits at this time is extremely low. Bank of America asserts that the misconduct alleged is a product of the past, when subprime mortgages were in vogue and unfortunately triggered the financial crisis. *See* National Commission on the Causes of the Financial and Economic Crisis in the United States, The Financial Crisis Inquiry Report xvi (Jan. 2011), available at http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf ("it was the collapse of the housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string

[11] There were actually only three. Oakland's lawsuit, which the Bank numbers among the four new cases, was filed prior to this Court's 2017 decision. Complaint, *City of Oakland v. Wells Fargo & Co.*, No. 15-cv-04321, 2015 WL 5582203 (Sept. 21, 2015). Philadelphia's lawsuit, now resolved, was filed immediately after the Court's decision based on a tolling agreement it had with Defendant Wells Fargo & Co. prior to the decision. *City of Philadelphia v. Wells Fargo & Co.*, No. 17-cv-2203, ECF No. 25-1, n.5.

of events, which led to a full-blown [financial] crisis in the fall of 2008.").

The Bank settled FHA claims for discriminatory mortgage lending brought by the Department of Justice for its Countrywide subsidiaries in 2011 for a record $335 million. U.S. Dep't of Justice Office of Public Affairs, *Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation*, available at https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination. As part of the consent order, Bank of America "represented to the United States that BAC and its subsidiaries do not originate and price loans employing policies and procedures that the United States alleges resulted in the discriminatory practices at issue in its Complaint." Consent Order, *United States v. Countrywide Financial Corp.*, No. 2:11-CV-1054, at 4 (Dec. 28, 2011), available at https://www.justice.gov/sites/default/files/crt/legacy/2012/01/27/countrywidesettle.pdf. If the representation is true, the two-year statute of limitations on new actions has passed.

IV. The Decision Below is Correct.

One of the key portions of the Eleventh Circuit's decision on remand that Bank of America ignores is its assessment that the Bank's emphasis on a literal first step would also exclude a lawsuit by a homeowner "who was forced into foreclosure on account of a predatory bank loan that violated the Fair Housing Act." Pet. 30a. The court stated that such a plaintiff

> …would never be able to plausibly allege that the foreclosure was proximately caused by the bank's predation. By the Banks' lights, there are two critical steps in the chain of causation between the act of redlining and foreclosure: the middle and distinct step being a homeowner's default [and the] independent step of failing to make payments on the predatory loan.

Id.

After examining caselaw that demonstrates that the first step concept is not inflexible, the court concluded that "the 'general tendency' to stop at the first step is just that, a general tendency, not an inexorable rule." *Id*.

Even so, the court found the banks "overstate the length of the causal chain by reading the complaints unfavorably to the City," and ignoring more immediate allegations. *Id*. at 31a. The Eleventh Circuit concluded:

> The Banks' step-counting is self-evidently conducted so as to identify as many steps as possible. We might just as easily place the same injury at the second or third step: First, a bank extends predatory loans in violation of the FHA. Second, homeowners default. Third, the bank forecloses and the property values plummet, necessarily reducing the City's tax base and injuring its fisc. The chain will be

> shorter still if struggling homeowners sought to refinance and then faced swift foreclosures when fair terms were not extended. This count, which draws inferences in favor of the City, is decidedly more appropriate for the motion to dismiss stage.

Id. at 33a.

While the Bank cherry-picks phrases from the decision to support its claim of error, it cannot justifiably criticize the court for not weighing this Court's guidance, examining the FHA closely, and relating it to the allegations in the complaint that were permitted to proceed. The Bank may disagree with the Eleventh Circuit's conclusions, but that provides no grounds upon which certiorari can rest.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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