Nos. 19-675 & 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 THE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, BANK POLICY INSTITUTE, CONSUMER BANKERS ASSOCIATION, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MORTGAGE BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION AND NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE

The *American Bankers Association* ("ABA") is the principal national trade association of the financial services industry in the United States.[1] Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its million employees. ABA members are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small. The ABA frequently submits *amicus curiae* briefs in state and federal courts in matters that significantly affect its members and the business of banking.

Founded in 1916, the *American Financial Services Association* ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The *Bank Policy Institute* ("BPI") is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks,

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties were timely notified that *amici curiae* intended to file this brief and have consented to its filing.

regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

The *Consumer Bankers Association* ("CBA") is the only member-driven trade association focused exclusively on retail banking. Established in 1919, our members' products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans and collectively hold two-thirds of the country's total depository assets.

The *Independent Community Bankers of America* ("ICBA") is a national trade association. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans, and are the only physical banking presence in one in five U.S. counties. ICBA member community banks seek to improve cities and towns by using local dollars to help families purchase homes and are actively engaged in residential mortgage lending in the communities they serve.

The *Mortgage Bankers Association* ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies,

mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field.

The *Credit Union National Association, Inc.* ("CUNA") is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,500 federal and state credit unions, which collectively serve 115 million members nationwide. CUNA's mission in part is to advocate for responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services to credit union members.

The *National Association of Federally-Insured Credit Unions* ("NAFCU") is the only national trade association that focuses exclusively on federal issues affecting federally insured credit unions across the country. NAFCU's members include many of the largest and most sophisticated credit unions in the country, as well as small, local credit unions with relatively limited operations. In addition to representing the interests of its members before the three branches of the federal government, NAFCU provides its members with the information, education, and assistance they need to address the unique challenges that arise from operating cooperative financial institutions in today's economic environment.

Amici, on behalf of their members, have a significant interest in ensuring that the Fair Housing Act ("FHA") is enforced in a fair and reasonable way.

On remand from this Court, the court of appeals held that the proximate cause requirement for private litigation under the FHA imposes little if any effective limitation on novel FHA claims by plaintiffs who are not the direct victims of an alleged FHA violation and instead seek compensation for "ripples of harm" extending outwards from such violations. The massive wave of litigation under the FHA—brought by private lawyers on behalf of municipalities—will impose potentially enormous costs on lenders without significantly advancing the goals of the FHA.

SUMMARY OF ARGUMENT

This case warrants the Court's review for at least three reasons. *First*, the petitions for certiorari present an issue of exceptional importance. Numerous municipalities are asserting novel claims against banks under the FHA. Indeed, since this Court issued its initial opinion in this case, additional municipalities have asserted such claims. The municipalities seek staggering sums in damages, ranging into the hundreds of millions of dollars per bank per municipality. Discovery in these cases will be extraordinarily burdensome, involving hundreds of thousands of properties and a wide-ranging inquiry into the complex reasons for mortgage foreclosures and decreased property valuations. The court of appeals' decision also creates significant confusion and uncertainty over the types of novel claims that are viable under the FHA and other federal statutes.

Second, review is warranted because the court of appeals' decision on remand fails to adhere to the principles set out in this Court's previous decision. For example:

- This Court held that "proximate cause under the FHA requires some direct relation between the injury asserted and the injurious conduct alleged." *Bank of America v. City of Miami, Florida,* 137 S. Ct. 1296, 1306 (2017) (internal quotation and citation omitted). Yet the court of appeals held that a mere "logical bond" between the asserted injury and the injurious conduct alleged is sufficient to establish proximate cause. Pet. App. 21a–22a.[2]

- This Court held that "foreseeability alone is not sufficient." 137 S. Ct. at 1305. Yet the court of appeals' "logical bond" test, on its face, is even less demanding than its rejected foreseeability test.

- This Court noted that "the general tendency . . . in regard to damages at least, is not to go beyond the first step" in the chain of causation, 137 S. Ct. at 1306 (internal quotation and citation omitted). Yet the court of appeals asserted on remand that "step counting" is "of limited value." Pet. App. 33a.

- This Court stated that a damages claim under the FHA "is analogous to a number of tort actions recognized at common law," 137 S. Ct. at 1306 (internal quotation and citations omitted). Yet the court of appeals concluded

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[2] References to the Petitioner's Appendix in this brief refer to the Appendix to the Petition in Docket No. 19-675.

that "common-law antecedents do[] not get us too far." Pet. App. 63a.

- This Court held that nothing in the FHA suggests that Congress intended to provide a remedy wherever "ripples of harm" flow from a violation of the statute. 137 S. Ct. at 1306 quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983)). Yet the court of appeals stated that the FHA "looks far beyond the single most immediate consequence of a violation." Pet. App. 39a.

This Court should grant the petitions to correct the lower court's departures from the principles set forth in the Court's earlier opinion in this case.

Third, this Court's review is warranted because the court of appeals failed to recognize that both the federal government and directly-injured borrowers are fully equipped to remedy violations of the FHA by seeking damages as well as injunctive relief. The U.S. Department of Justice possesses, and vigorously exercises, broad authority to enforce the FHA, including authority to seek damages for aggrieved parties. The Department of Housing and Urban Development also plays a significant role in enforcing the FHA. In addition to these government enforcers, directly-injured mortgage holders have a cause of action for damages and injunctive relief. Mortgage holders can pursue class actions, and successful borrowers can recover their attorney's fees. Given these available enforcers, there is no valid reason to relax the usual proximate cause requirements applicable to municipalities.

ARGUMENT

I. This Case Presents an Issue of Exceptional Importance That Warrants This Court's Review.

As in 2016, when the Court first granted review in this case, the petitions for certiorari present an issue of exceptional importance. Then as now, private lawyers representing numerous municipal governments have asserted novel claims against banks under the FHA, seeking enormous amounts of damages ranging into the hundreds of millions of dollars per bank per municipality. Since this Court issued its decision 2017, even more municipalities have filed cases against the banks under the FHA.[3]

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[3] *See Prince George's Cnty. & Montgomery Cnty. v. Bank of Am. Corp.*, No. 1:18-cv-03575 (D. Md., filed Nov. 20, 2018); *Prince George's Cnty. & Montgomery Cnty. v. Wells Fargo & Co.*, No. 8:18-cv-03576 (D. Md., filed Nov. 20, 2018); *City of Sacramento v. Wells Fargo & Co.*, No. 2:18-cv-00416 (E.D. Cal., filed Feb. 23, 2018); *Cnty. of Cook v. Wells Fargo & Co.*, No. 1:14-cv-09548 (N.D. Ill., filed Nov. 28, 2015); *Cnty. of Cook v. HSBC N. Am. Holdings Inc.*, No. 1:14-cv-02031 (N.D. Ill., filed Sept. 30, 2015); *Cnty. of Cook v. Bank of Am. Corp.*, 2015 WL 1303313 (N.D. Ill., filed Mar. 19, 2015); *Cobb Cnty., DeKalb Cnty., & Fulton Cnty. v. Bank of Am. Corp.*, No. 1:15-cv-04081 (N.D. Ga., filed Nov. 20, 2015); *Cobb Cnty., DeKalb Cnty., & Fulton Cnty. v. HSBC N. Am. Holdings Inc.*, No. 1:12-cv-03640 (N.D. Ga., filed Oct. 18, 2012); *City of Oakland v. Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal., filed Sept. 21, 2015); *City of Miami Gardens v. Citigroup, Inc.*, No. 1:14-cv-22204 (S.D. Fla., filed June 13, 2014); *City of Miami Gardens v. JPMorgan Chase & Co.*, No. 1:14-cv-22206 (S.D. Fla., filed June 13, 2014); *City of Miami Gardens, v. Bank of America Corp.*, No. 1:14-cv-22202 (S.D. Fla., filed June 13, 2014); *City of Miami Gardens v. Wells Fargo & Co.*, No. 1:14-cv-22203 (S.D. Fla., filed June 13, 2014); *City of Miami v. Wells*

Absent this Court's review, the number of municipalities filing suit, and the number of financial institutions being sued, will likely continue to grow.

The court of appeals' decision also creates confusion and uncertainty over the types of novel claims that may be viable under the FHA and other federal statutes. The court of appeals suggested that its decision would "keep the floodgates closed" to claims by neighboring homeowners and businesses, because it would be difficult for these plaintiffs to prove that their losses were caused by an FHA violation. Pet. App. 62a. But under the court of appeals' reasoning, an FHA claim may be viable whenever a party seeks to employ statistical methods to aggregate and estimate alleged losses. For example, utility companies could claim that FHA violations reduced their revenues, and municipalities could claim, in turn, that reduced utility revenues led to reductions in the municipalities' franchise tax revenues. Indeed, at least one municipality has already asserted such franchise tax claims. *See* Amended Complaint, *Prince George's Cnty. v. Wells Fargo & Co.*, No. 8:18-cv-03576 (D. Md. Nov. 15, 2019), ECF No. 1.

The court of appeals sought to minimize the alarming implications of its decision by distinguishing Miami's claims from those of neighboring landowners

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Fargo & Co., No. 13-cv-24508 (S.D. Fla., filed Dec. 13, 2013); *City of Miami v. Bank of America, Corp.*, No. 13-cv-24506 (S.D. Fla., filed Dec. 13, 2013); *City of Miami v. Citigroup Inc.*, No. 1:13-cv-24510 (S.D. Fla., filed Dec. 13, 2013); *City of Miami v. JPMorgan Chase & Co.*, No. 1:14-cv-22205 (S.D. Fla., filed June 13, 2014).

and utilities, which the court suggested could not satisfy proximate cause requirements. Pet. App. 59a–61a. The court of appeals' analysis is flawed because the alleged injury to municipalities is entirely derivative of alleged injuries to third parties, such as neighboring landowners and utilities. For example, Miami claims that its tax revenues were reduced because FHA violations caused foreclosures, which in turn caused reductions in property values and assessments, which in turn caused reductions in tax revenues. If a claim by a neighboring landowner cannot satisfy proximate cause, an even more remote derivative claim should also be barred.

In addition to these concerns, discovery in these cases will be extraordinarily burdensome and expensive. These cases may involve hundreds of thousands of mortgage loans, and similar or even larger numbers of neighboring properties.[4] They will also enmesh the courts in an inquiry into the multiple reasons for mortgage foreclosures and reduced property values, a complex set of issues that courts are not well-suited to resolve. The extraordinary burdens of discovery, combined with the enormous sums in damages being claimed by the cities, will create intense pressure to settle rather than litigate these cases to a conclusion. As a result, it is unclear whether the Court will have other opportunities to

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[4] In one case, a single lender disclosed information on more than 260,000 loans in just the first phase of the litigation. *See Cnty. of Cook v. Bank of Am, Corp.*, No. 14-cv-2280, Plaintiff's Report Regarding Outstanding Discovery Disputes at 2 (N.D. Ill., Mar. 12, 2016), ECF No. 104.

resolve the important legal issue presented by the petitions.

In short, there are strong reasons for this Court to review the court of appeals' decision, and no persuasive reason to allow the court of appeals' erroneous decision to fester in the lower courts.

II. The Court of Appeals Failed to Heed This Court's Decision.

When this case first came before the Court, three Justices concluded that "Miami's asserted injuries are too remote from the injurious conduct it has alleged." *Bank of America*, 137 S. Ct. 1296, 1311–12 (2017) (Thomas, J., concurring in part and dissenting in part). In the view of those Justices, the Court's opinion "leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts." *Id.* Although the members of this Court unanimously agreed on the applicable principles of proximate causation, the Court noted that it "lack[ed] the benefit of the [court of appeals'] judgment on how the contrary principles we have just stated apply to the FHA." *Id.* at 1306. The Court therefore vacated the court of appeals initial decision and remanded for further proceedings consistent with its opinion. *Id.*

The court of appeals' decision on remand fails to apply the "contrary principles" of proximate cause set forth in this Court's opinion. This failure to respect the Court's original decision provides an additional reason to grant the petitions for certiorari.

A comparison of this Court's opinion and the court of appeals' opinion on remand reveals that the court

of appeals repeatedly diverged from the path marked out by this Court:

- This Court held that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" 137 S. Ct. at 1306 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). On remand, however, the court of appeals looked to dictionary definitions of the terms "some" and "relation," but not the critical term "direct." On that basis, the court of appeals transformed the requirement of "some direct relation" into a much weaker requirement of a mere "logical bond" between the alleged statutory violation and the claimed injury. Pet. App. 21a–22a.

- In its original decision, this Court held that "foreseeability alone is not sufficient to establish proximate cause under the FHA." 137 S. Ct. at 1306. Yet on remand the court of appeals adopted a "logical bond" test that appears to be even less demanding than the "foreseeability alone" test that this Court rejected. Pet. App. 21a.

- This Court stated that "'[t]he general tendency' in these cases, 'in regard to damages at least, is not to go beyond the first step'" in the chain of causation. 137 S. Ct. at 1306 (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010)). Yet the court of appeals asserted that "step counting" is "of limited value." Pet. App. 33a.

- This Court explained that a damages claim under the FHA "'is analogous to a number of tort actions recognized at common law,'" and noted that the Court has "repeatedly applied directness principles to statutes with 'common-law foundations.'" 137 S. Ct. at 1306 (citations omitted). Yet on remand the court of appeals largely dismissed the common-law foundations of proximate cause, asserting that "common-law antecedents" do "not get us too far." Pet. App. 63a.

- This Court held that, while "[a] violation of the FHA may . . . 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct . . . [n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel." 137 S. Ct. at 1306. Yet the court of appeals concluded that Congress *did* intend to provide a remedy for ripples that travel well beyond the alleged misconduct. *See* Pet. App. 40a ("[T]he FHA looks far beyond the single most immediate consequence of a violation.").

Justice Thomas's concurring and dissenting opinion describes the attenuated chain of causation that connects the alleged violations of the FHA to Miami's claimed injury: *First*, lenders allegedly engaged in discriminatory lending practices. *Second*, these practices allegedly resulted in defaults on home loans. *Third*, these defaults resulted in foreclosures. *Fourth*, these foreclosures led to vacant properties. *Fifth*, these vacant properties led to lower property valuations (including lower valuations for other

nearby homes). *Sixth*, these lower valuations resulted in lower property tax revenues paid to Miami. Although the court of appeals quibbled over the exact number of steps in the chain of causation, there is no dispute that Miami's claimed injury goes well beyond the first step. *See* 137 S. Ct. at 1305 (quoting *City of Miami v. Bank of America Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015) ("[T]here are 'several links in the causal chain' between the charged discriminatory lending practices and the claimed losses.").

The causal chain in this case is more attenuated than any this Court has approved. Instead, it goes well beyond this Court prior decisions concerning proximate cause, as well as its prior decision in this case. The Court should grant review to correct the court of appeals' departure from the standards laid down by this Court's decisions.

III. Other Plaintiffs Are Well-Positioned to Enforce the FHA.

The court of appeals suggested that a relaxed approach to proximate causation under the FHA is justified because, "although the homeowners are arguably closer in the chain [of causation], they are too numerous and diffuse to be counted on for deterrence." Pet. App. 58a. In reaching this conclusion, the court of appeals understated the enforcement powers of directly-injured borrowers and completely ignored the important role of the federal government in enforcing the FHA. Because these parties are well-positioned to vindicate violations of the FHA, there is no valid reason to waive the usual requirements of proximate cause in order to further a

"general interest in deterring injurious conduct." *Holmes*, 503 U.S. at 269–70.

Federal Government Enforcement. The federal government's enforcement powers have increased significantly since this Court decided *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). In that case, the Court expressed concern that that the Department of Justice could "sue only to correct a 'pattern or practice' of housing discrimination," and that the Justice Department was limited to a staff of "less than two dozen lawyers" to carry out this task. 409 U.S. at 210–11. In addition, the Court noted that the Department of Housing and Urban Development had "no enforcement powers" under the FHA. *Id.*

In the decades since *Trafficante*, these circumstances have changed. In the Fair Housing Amendments Act of 1988, Congress provided a significant new enforcement role for HUD. Pub. L. No. 100-430, § 8, 102 Stat. 1619 (Sept. 13, 1988), 42 U.S.C. § 3610–3612. Indeed, Congress even created an enforcement role for HUD-certified state and local agencies. *Id.* § 3610(f). The City of Miami, Florida, is not certified under this provision.

The Department's authority to enforce the FHA has also increased significantly. The Fair Housing Amendments Act authorized the Department of Justice to seek monetary damages and distribute them to "aggrieved persons" under the FHA. 42 U.S.C. § 3614(d)(1). The Justice Department uses

these powers to enforce the FHA vigorously.[5] While the Justice Department regularly recovers and distributes funds to "aggrieved persons" under the FHA, it has never suggested that municipalities could claim those funds to recover losses to their tax revenues.[6]

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[5] *See* Department of Justice, Recent Accomplishments of the Housing and Civil Enforcement Section (updated Dec. 3, 2019), https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section.

[6] Press Release, Department of Justice, Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), http://tinyurl.com/DOJCtywideSettle; Press Release, Department of Justice, Justice Department Reaches Settlement with Wells Fargo Resulting in More Than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), http://tinyurl.com/DOJWFSettle; Press Release, Department of Justice, Justice Department Reaches Settlement with Sage Bank to Resolve Allegations of Mortgage Lending Discrimination (Nov. 30, 2015), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-sage-bank-resolve-allegations-mortgage-lending; Press Release, Department of Justice, Justice Department Reaches Settlement with Charter Bank to Resolve Allegations of Lending Discrimination (Sept. 28, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-charter-bank-resolve-allegations-lending-discrimination; Press Release, Department of Justice, Justice Department Reaches Settlement with Minnesota Bank to Resolve Allegations of Lending Discrimination (May 8, 2018), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-minnesota-bank-resolve-allegations-lending; Press Release, Department of Justice, Justice Department Settles Suit Against Indiana Bank to Resolve Lending Discrimination Claims (June 13, 2019), https://www.justice.gov/opa/pr/justice-

Borrower Enforcement. Directly-affected mortgage holders have a cause of action for damages and injunctive relief under the FHA. *See* 42 U.S.C. § 3613. Prevailing plaintiffs can recover their attorney's fees. *Id.* § 3613(c). In addition, borrowers who are directly injured by FHA violations may bring class actions if the requirements of Rule 23 are satisfied. *See, e.g.*, *Maziarz v. Housing Auth.*, 281 F.R.D. 71, 85 (D. Conn. 2012) (certifying a class alleging discrimination under the FHA).

The circumstances of this case differ from those presented in *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). In that case, the Court allowed a plaintiff to sue for an alleged injury that followed "more or less automatically" from a violation of the statute, even though that plaintiff was one step removed from the most immediate injured party. *Id.* at 140. The "relatively unique circumstances" presented in *Lexmark*, *id.*, are not present in this case. The City's claimed injuries do not follow "automatically" from a violation of the FHA. To the contrary, "other, independent events . . . might well have caused the injuries Miami alleges in these cases." *See Bank of America*, 137 S. Ct. at 1311 (Thomas, J., concurring in part and dissenting in part).

In sum, Congress authorized directly-injured individuals to seek redress for FHA violations, and in addition provided for federal, state and local

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department-settles-suit-against-indiana-bank-resolve-lending-discrimination-claims.

enforcement. In the light of these enforcement provisions, there is no justification for discarding normal proximate cause requirements under the FHA.

CONCLUSION

For the reasons set forth in this brief, as well as those set forth in the petitions for a writ of certiorari, the petitions should be granted.

Respectfully submitted,

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