No. 19-688

IN THE

# Supreme Court of the United States

WELLS FARGO & CO.
and WELLS FARGO BANK, N.A.,
*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 FOR AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONERS


STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, SW
Washington, DC 20024

KENNETH A. STOLLER
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
555 12th Street, NW, Suite 550
Washington, DC 20004

DANIEL P. KEARNEY
*Counsel of Record*
ANDREW JACO
THOMAS K. BREDAR
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

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## INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA was recently formed through a merger of two longstanding trade associations, the American Insurance Association and the Property Casualty Insurance Association of America. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and business in the U.S. and across the globe.

Business Roundtable is an association of chief executive officers of leading U.S. companies working to

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, or their counsel, made any monetary contribution to the preparation or submission of this brief.

promote a thriving U.S. economy and expanded opportunity for all Americans. Business Roundtable members lead companies that together have more than $7 trillion in annual revenues and employ more than 15 million employees. The Business Roundtable was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as amicus where important business interests are at stake.

Amici have a substantial interest in these cases, which threaten to reshape the impact of the Fair Housing Act on residential lending markets. Many of amici's members participate directly in these markets. As a result, amici have direct insights into the deleterious effects the Eleventh Circuit's decision would have on mortgage markets and the ability of lenders to provide the funding essential to foster growth and development in historically underserved communities. Amici respectfully submit that their views on the implications of the decision below shed light on the legal and policy questions presented here.

## SUMMARY OF ARGUMENT

Despite this Court's admonition, the Eleventh Circuit once again adopted a proximate cause standard that provides no meaningful limit on liability under the Fair Housing Act ("FHA" or "the Act"). In its initial decision, the Eleventh Circuit held that liability under the Act extended to any financial injuries that were a "foreseeable" result of the alleged violation, regardless of the number of "links in the causal chain" between the violation and the injury. *City of Miami* v. *Bank of Am. Corp.*, 800 F.3d 1262, 1282 (11th Cir. 2015). The Court rightly rejected that standard, because it would sweep

in harms far "'"too remote" from the defendant's unlawful conduct.'" *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1306 (2017) (quoting *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)). Rather, the Court directed the Eleventh Circuit to apply established proximate causation principles, which require a "'direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* (quoting *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974)).

But the result on remand from this Court was little different. Rather than apply "directness principles," the Eleventh Circuit looked for a "logical bond" between the alleged conduct and harm—a test hardly distinguishable from the foreseeability standard already rejected by this Court. The decision then proceeded to find a "logical bond" connecting a bank's issuance of mortgage loans to the subsequent defaults of homeowners on their loans to eventual foreclosures on the affected homes, leading to homes becoming abandoned, then to a general reduction in property values, and ultimately to a loss of City property tax revenue. That extended, highly attenuated chain of causation cannot be squared with this Court's requirement of a "'*direct* relation'" between injury and violation, or with the Court's admonition that proximate cause generally does not "'go beyond the *first* step.'" *Bank of Am.*, 137 S. Ct. at 1306 (emphasis added).

The potential impact of the Court of Appeals' error again warrants certiorari review—in the form of either summary reversal or plenary review. For one, the decision below portends the same consequences this Court sought to avoid the first time around—virtually boundless potential liability under the FHA and other statutory regimes that could allow individuals and municipalities to recover economic damages entirely re-

mote from the claimed violation. At least ten other municipalities or local jurisdictions have brought actions under the FHA alleging injuries similar to those alleged here. The breadth of the Eleventh Circuit's logical bond test again paves the way for those lawsuits, and for still others by non-municipal plaintiffs—the neighboring homeowner or the real estate agent, for example—alleging their own attenuated economic injuries under the FHA.

Moreover, if left uncorrected, the Eleventh Circuit's expansive proximate cause standard could easily migrate to other statutory regimes, inviting "massive and complex damages litigation." *Bank of Am.*, 137 S. Ct. at 1306 (quoting *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 545 (1983)). In rejecting the Eleventh Circuit's "foreseeability" standard, this Court made clear that FHA claims are subject to the same "directness principles" that inform proximate cause analysis under other statutory regimes analogous to common law actions in tort—including the Racketeer Influenced and Corrupt Organizations ("RICO") Act and the Clayton and Sherman Acts. The Eleventh Circuit's erroneous "logical bond" analysis could therefore appear to apply with similar force to those statutes. And although the Court of Appeals sought to confine its analysis to the FHA, nothing in the decision below is likely to discourage litigants from pressing to apply the "logical bond" test in other contexts.

Finally, this Court's intervention is warranted because the Eleventh Circuit's decision to expand proximate cause to achieve the "broad remedial purposes" of the FHA may in fact have the opposite effect: it could lead to a decrease in the availability of credit to city homeowners and underserved communities, contrary to

the purposes of the FHA. Facing a potential wave of lawsuits and unpredictable legal risks, lenders may seek to manage their liability by reducing their exposure to cities and municipalities. These consequences could be especially pronounced in areas of economic distress—in other words, in many of the very localities that may be most in need of housing credit and that the FHA was designed to serve. *See Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

## ARGUMENT

### I. THE ELEVENTH CIRCUIT'S "LOGICAL BOND" TEST IS INCOMPATIBLE WITH THIS COURT'S DIRECTION

The Eleventh Circuit's decision threatens near-limitless liability under the FHA, opening the door to suits for attenuated economic injuries by cities, businesses, individuals, and others—none of whom experienced race-based housing discrimination prohibited by the Act. That is exactly what this Court sought to avoid in rejecting the "foreseeability" standard initially adopted by the Court of Appeals. "[A] violation of the FHA may … 'be expected to cause ripples of harm to flow far beyond the defendant's misconduct,'" (Pet. App. 33a (ellipsis in original)), but this Court made clear that "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel," *Bank of Am.*, 137 S. Ct. at 1306.

Despite this Court's insistence on "direct" causation, *(*Pet. App. 86a), the Eleventh Circuit's decision amounts to a repackaging of the "foreseeability" standard into an equally limitless "logical bond" test. The decision rendered this Court's "direct relation" mandate into an altogether new test allowing liability for

any injury where there is a "logical bond" with the alleged violation. Pet. App. 21a-22a. In reaching this conclusion, the court below made several critical errors that cannot be reconciled with this Court's direction.

First, the Eleventh Circuit erroneously focused on whether proximate cause is categorically limited to the "first step" in the causal chain. As the court necessarily conceded, the number of steps in the causal chain is not only relevant, but is often determinative; this Court has made that clear. *Bank of Am.*, 137 S. Ct. at 1306 ("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 N.Y.*, 559 U.S. 1, 10 (2010))). Although the Eleventh Circuit correctly recognized that the "first step" rule is subject to limited exceptions, it mistakenly concluded that this case warrants one of those exceptions.

The Eleventh Circuit principally relied on *Lexmark*, in which this Court held that a company whose potential customers are deceived into withholding business could sue a competitor for false advertising. Pet. App. 23a-29a. But *Lexmark*'s limited exception for Lanham Act claims cannot support the Court of Appeals' analysis. To even remotely fit the facts of this case to *Lexmark*'s rationale required a sleight of hand by the Eleventh Circuit: it simply skipped several steps in the causal chain between the alleged offering of discriminatory loan terms and a decrease in City tax revenue. As the Court of Appeals put it: "*Once we have reached increased foreclosures on a neighborhood or citywide basis*, it seems to us that the path to the City's substantially decreased tax base is clear, direct and immediate; we can discern no obvious intervening roadblocks." Pet. App. 33a (emphasis added). Moreover, even this truncated analysis omits several further

steps in the causal chain beyond foreclosure—*i.e.*, foreclosures leading to vacant and abandoned properties, leading to lower property values, leading to lower tax assessments, leading to lower tax revenue.

Second, the Eleventh Circuit failed to identify any principled limit to its "logical bond" test. The court seemed to believe that the City's "aggregate" alleged injury distinguished it from other potential FHA plaintiffs with injuries remote from the alleged violation, such as a neighboring homeowner or business. Thus, the court reasoned, causation is somehow *less* attenuated at the municipality level, and foreclosure-related injuries to a neighbor or local utility company are still further downstream from the City's harms. *See* Pet. App. 61a-62a. This defies common sense. When foreclosure renders a house vacant, the utility company loses a customer, and a neighbor's property may be adversely affected. Those injuries are not derivative of the City's harms, nor do they require the many additional steps required to link foreclosures to a drop in tax revenue.

Third, the Eleventh Circuit erroneously concluded that "hedonic regression" analysis could somehow overcome the problems of allowing liability for the City's remote alleged injuries. As an initial matter, it is not clear why the Court of Appeals thought the issue of "hedonic regression" relevant at all. The court appears to have reasoned backwards from its judgment that regression analysis is "administratively []feasible" to the conclusion that the alleged FHA violations therefore proximately caused the City's property tax injuries. Pet. App. 40a-41a. But this reasoning conflates factual cause with proximate cause. An injury may have many factual causes, some or all of which may conceivably (and even demonstrably) contribute to the injury. But

the law does not assign liability to all of them, and the question of which causes *should* properly incur liability is exactly what proximate cause principles are designed to address. *See, e.g.*, *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 701 (2011) ("[T]he phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes."). Indeed, the Court of Appeals appeared to conflate these issues in part because it conceived of FHA litigation as mostly about remedying aggregate, structural economic injuries like those alleged by the City. But actually the FHA is a relatively straightforward anti-discrimination statute. It is designed to provide remedies to persons who suffer race-based or other forms of discrimination in housing. And it provides no basis for the massive expansion of liability contemplated by the Eleventh Circuit's proximate cause test.

## II. THE ELEVENTH CIRCUIT'S DECISION ENCOURAGES OVERLY EXPANSIVE AND BURDENSOME LITIGATION UNDER THE FHA AND OTHER STATUTES

### A. The Decision Threatens To Unleash A Wave Of Meritless FHA Litigation

The consequences of the Eleventh Circuit's decision on remand are real, and are already being felt by defendants and courts alike. The Eleventh Circuit's decision provides a significant opening for financially stressed municipalities (or local governments simply looking for a windfall) to recover damages on broad theories of liability. And while the Eleventh Circuit is likely to serve as the initial testing ground for such claims, there is no reason to believe that litigation will be confined to one region. In fact, plaintiffs in cases pending *outside* the Eleventh Circuit have already

seized on the Eleventh Circuit's decision, arguing that it is a faithful interpretation of this Court's directive and seeking to use the decision to revive their lawsuits. If the Eleventh Circuit's analysis is left uncorrected, it will likely only encourage more ultimately meritless FHA litigation of this kind.

A wave of municipal FHA actions based on attenuated economic injuries has been underway for the past decade. Cities in the Eleventh Circuit and throughout the country have brought lawsuits alleging theories of liability similar to, and in some instances stretching beyond, those asserted by the City of Miami here. *See Montgomery Cty.* v. *Bank of Am. Corp.*, No. 1:18-cv-03575 (D. Md.); *Prince George's Cty.* v. *Wells Fargo & Co.*, No. 8:18-cv-03576 (D. Md.); *City of Sacramento* v. *Wells Fargo & Co.*, No. 2:18-cv-00416 (E.D. Cal.); *City of Phila.* v. *Wells Fargo & Co.*, No. 2:17-cv-02203 (E.D. Pa.); *County of Cook* v. *Wells Fargo & Co.*, No. 1:14-cv-09548 (N.D. Ill.); *County of Cook* v. *Bank of Am. Corp.*, No. 1:14-cv-02280 (N.D. Ill.); *County of Cook* v. *HSBC N. Am. Holdings, Inc.*, No. 1:14-cv-02031 (N.D. Ill.); *Cobb Cty.* v. *Bank of Am. Corp.*, No. 1:15-cv-04081 (N.D. Ga.); *Dekalb Cty.* v. *HSBC N. Am. Holdings Inc.*, No. 1:12-cv-03640 (N.D. Ga.); *City of Miami Gardens* v. *Bank of Am. Corp.*, No. 1:14-cv-22202 (S.D. Fla.); *City of Miami Gardens* v. *Wells Fargo & Co.*, No. 1:14-cv-22203 (S.D. Fla.); *City of Miami Gardens* v. *Citigroup Inc.*, No. 1:14-cv-22204 (S.D. Fla.); *City of Miami Gardens* v. *JPMorgan Chase & Co.*, No. 1:14-cv-22206 (S.D. Fla.); *City of Oakland* v. *Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal.). These cases, while already numerous, are likely just the tip of the iceberg if courts follow the Eleventh Circuit's lead.

The decision below has already provided impetus to several cases pending within the Eleventh Circuit. Fol-

lowing the decision, a previously stayed lawsuit in the Northern District of Georgia was reopened to allow plaintiffs to file an amended complaint. *See Cobb Cty.* v. *Bank of Am. Corp.*, No. 1:15-cv-04081 (N.D. Ga.). Plaintiffs suing HSBC in the same district also filed an amended complaint following the Court of Appeals' ruling. *Dekalb Cty.* v. *HSBC N. Am. Holdings, Inc.*, No. 1:12-cv-03640 (N.D. Ga.). And in three separate cases in the Northern District of Illinois, a plaintiff filed motions to reconsider prior dismissals of its claims, relying entirely on the argument that the Eleventh Circuit faithfully applied this Court's directive. *See County of Cook* v. *Bank of Am. Corp.*, No. 1:14-cv-02280 (N.D. Ill.); *County of Cook* v. *HSBC N. Am. Holdings Inc.*, No. 1:14-cv-02031 (N.D. Ill.); *County of Cook* v. *Wells Fargo & Co.*, No. 1:14-cv-09548 (N.D. Ill.).

The injuries alleged in many of these actions are even more attenuated than the remote economic injuries alleged by the City here. County and municipal plaintiffs around the country have asserted vague, non-economic harms related to "neighborhood blight," "urban decay," "deterioration" of communities, and the "segregative effect" of foreclosures as a basis for FHA liability. *See, e.g.*, *Montgomery Cty.* v. *Bank of Am. Corp.*, No. 1:18-cv-03575, 2019 WL 4805678, at *17 (D. Md. Sept. 30, 2019); *Prince George's Cty.* v. *Wells Fargo & Co.*, 397 F. Supp. 3d 752, 756 (D. Md. 2019). Similarly, plaintiffs have alleged harm from the "undermining" of city initiatives "to promote fair nondiscriminatory housing opportunities to its citizens, as well as the benefits of living in an integrated community." Amend. Compl. 7, *City of Oakland* v. *Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal. Aug. 15, 2017), ECF No. 104. Much like the City in the instant case, plaintiffs' claims in other cases rely on attenuated causal chains and fail

to account for the many intervening causes of the economic and societal ills they allege.

A notable instance of this expansive FHA litigation involves two recent lawsuits in Maryland, where counties have filed actions claiming that home vacancies allegedly resulting from discriminatory loans caused the counties to lose "revenue from franchise taxes, such as cable providers, … because no one is using those services." Amend. Compl. 143, *Prince George's Cty.* v. *Wells Fargo & Co.*, No. 8:18-cv-03576 (D. Md. Nov. 15, 2019), ECF No. 62; Amend. Compl. 124, *Montgomery Cty.* v. *Bank of Am. Corp.*, No. 1:18-cv-03575 (D. Md. Nov. 25, 2019), ECF No. 74. The plaintiffs' alleged harm from unlawful discrimination—a *decrease in cable television subscriptions* and the resulting loss of *cable franchise tax revenue*—is even more remote from the alleged FHA violation than the City's claimed injury is here (though only slightly farther along the flawed continuum set forth by the Eleventh Circuit). If such litigation were permitted to proceed, it is hard to imagine any economic or fiscal ill that could not be pinned on an alleged FHA violation.

Finally, the burdens of defending against these overly expansive FHA claims are significant. Defendants are faced with substantial pressure to settle even meritless claims due to the massive potential damages at stake. Although some district courts have understood that the causal link for such claims is "a bridge too far," *see, e.g.*, *Montgomery Cty.*, 2019 WL 4805678, at *17, the Eleventh Circuit's decision will likely make it easier for actions to survive a motion to dismiss. And even the *in terrorem* effect of litigation can impose real costs on defendants. *See, e.g.*, *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557-558 (2007) (warning of the risk to defendants of "*in terrorem*" settlements in the

face of massive discovery and damages litigation). Further, the very nature of the aggregate injury claims validated by the Eleventh Circuit invites burdensome and far-reaching discovery into defendants. Given the longevity of most mortgages, many claims involve loans made over a decade ago, and plaintiffs have thus sought tens of thousands of loan files in order to aggregate data across neighborhoods, cities, and even counties, over an extended period of time. *See, e.g.*, Declaration of Mehul Jariwala, *County of Cook* v. *Bank of Am.*, No. 14-cv-02280 (N.D. Ill.), ECF No. 350-3; Declaration of Joseph Yandell, *County of Cook* v. *Bank of Am.*, No. 14-cv-02280 (N.D. Ill.), ECF No. 350-1. This type of discovery comes at significant expense. And while some courts have rejected plaintiffs' data-driven fishing expeditions, other courts have allowed plaintiffs to embark on extensive discovery to obtain data to be fed into complex regression analyses purportedly designed to support their attenuated injury claims. *See, e.g.*, Mem. Op. & Order 7, *County of Cook* v. *Bank of Am. Corp.*, No 14-cv-02280 (N.D. Ill. Oct. 22, 2019), ECF No. 360.

### B. The Eleventh Circuit's Proximate Cause Standard Threatens To Invite Massive Damages Litigation Under RICO And Other Statutes

The Eleventh Circuit's decision also threatens to invite massive damages litigation under other federal statutes. In its earlier decision, this Court expressly held that "[a] damages claim under the [FHA] 'is analogous to a number of tort actions recognized at common law,'" *Bank of Am.*, 137 S. Ct. at 1306 (quoting *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974)), and noted that the Court had "repeatedly applied directness principles to statutes with 'common-law foundations,'" *id.* (quoting *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451, 457

(2006)). The Court in particular relied on cases involving RICO to explicate the proximate cause standard. *See id.* (citing *Hemi Grp., LLC* v. *City of N.Y.*, 559 U.S. 1 (2010), *Holmes* v. *Securities Inv'r Prot. Corp.*, 503 U.S. 258 (1992), and *Anza*, 547 U.S. 451). Each of these cases made clear that, when evaluating claims arising under statutes with common-law foundations, courts must apply "directness principles," *id.*, which generally limit damages to "the first step," *id.* (quoting *Hemi Grp.*, 559 U.S. at 10).

It was this directive that the Eleventh Circuit purported to follow, (Pet. App. 64a-69a), and the lower court's "logical bond" test thus could easily migrate to other statutory regimes that are analogous to common-law actions in tort. If injuries such as those alleged by the City are deemed to have a "logical bond" to an FHA violation, similar claims could—and likely will—be asserted by plaintiffs relying on the sweeping remedial provisions of RICO. Moreover, the migration of the lower court's proximate cause analysis is unlikely to stop at RICO. This Court also has drawn on the Clayton and Sherman Acts to inform proximate cause analysis under the FHA. As this Court has observed, an antitrust violation (like an FHA violation) may "'be expected to cause ripples of harm to flow, far beyond the defendant's misconduct," yet extending a remedy to "wherever those ripples travel … would risk massive and complex damages litigation.'" *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 534, 545 (1983) (quotation marks omitted); *see also Bank of Am.*, 137 S. Ct. at 1306 (quoting *Carpenters*). Indeed, the decision below does just that: it extends proximate cause under the FHA to distant ripples while purporting to adhere to the same directness principles that generally apply "to statutes with 'common-

law foundations.'" *Bank of Am.*, 137 S. Ct. at 1306 (quoting *Anza*). If the Court of Appeals' analysis is understood to be consistent with this Court's directive, the decision below will almost certainly have ramifications beyond the FHA.

The Eleventh Circuit seemed to recognize this troubling implication, but not enough to be deterred from its dangerously expansive holding. Thus, the court cited the FHA's "broad remedial purpose" and "far-reaching terms" to justify its expansive proximate cause standard. Pet. App. 34a. It claimed to distinguish RICO and antitrust claims based on the supposed absence, in the FHA context, of any other plaintiff who could bring the sweeping aggregate claims brought by the City here. And it fell back on this Court's statement that the analysis "depends in part on the 'nature of the statutory cause of action,'" Pet. App. 18a (quoting *Lexmark*, 572 U.S. at 133), even while omitting a critical piece of context—that the nature of the statutory cause of action informs "*what falls within the first step of the causal chain*." Pet. App. 22a (emphasis added). The Court of Appeals simply brushed past these nuances and concluded that the broad remedial purpose of the FHA supported extending liability to injuries well beyond the first step in the causal chain.

## CONCLUSION

This Court should grant the petition for writ of certiorari and either summarily reverse the Court of Appeals' judgment or set the case for plenary review.

Respectfully submitted.

STEVEN P. LEHOTSKY
JANET GALERIA
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, SW
Washington, DC 20024

KENNETH A. STOLLER
AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION
555 12th Street, NW, Suite 550
Washington, DC 20004

DANIEL P. KEARNEY
*Counsel of Record*
ANDREW JACO
THOMAS K. BREDAR
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
daniel.kearney@wilmerhale.com

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