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 IN OPPOSITION

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QUESTION PRESENTED

Whether all federal statutory causes of action with common-law foundations have the exact same proximate-cause pleading requirements, regardless of statutory language, legislative purpose and intent, and prior construction?

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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

Wells Fargo presents a stark and novel question to this Court that would require the abandonment of longstanding jurisprudence and conflict with the Court's earlier decision in this case. The Bank asserts that every federal statute with common-law foundations adopts the exact same proximate-cause regime, and the Eleventh Circuit deviated from that rigid framework when it followed this Court's instructions on remand 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 expense." Pet. App. 86a-87a.

That instruction, specifying a standard applicable to the Fair Housing Act (FHA), demonstrates the error in Wells Fargo's premise. This Court has consistently held that the proximate-cause inquiry is statute-specific. Pet. App. 84a (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)), 86a. None of the eight justices participating in the 2017 decision questioned the requirement that the proximate cause regime was controlled by the statutory cause of action invoked. *See* Pet. 96a (Thomas, J., concurring in part and dissenting in part) ("I agree with the Court's

conclusions about proximate cause, as far as they go."). Justice Thomas's opinion also framed the issue in terms of "the FHA's proximate-cause requirement." Pet. App. 88a.

Wells Fargo makes its radical assertion that all federal statutes adopt the identical proximate-cause requirement in order to contrive a circuit split that is otherwise missing. No circuit court has yet addressed the FHA's proximate cause requirement, though oral argument in the Ninth Circuit on that question is scheduled for February 10, 2020. Still, there is no cognizable conflict between the circuits when different statutes are interpreted to have different requirements. *See, e.g., Negusie v. Holder*, 555 U.S. 511, 520 (2009) (holding a precedent that "addressed a different statute enacted for a different purpose, does not control [another's] interpretation").

This Court's decision to allow the "lower courts … [to] define, in the first instance, the contours of proximate cause under the FHA," Pet. App. 86a-87a, constitutes an express preference for percolation before considering the issue again. With another circuit about to take up the issue, there is no reason to revisit that preference or circumvent the process that will yield more judicial analysis on the proximate-cause issue.

The Bank's Petition reveals that it is a disappointed litigant, who asks for nothing more than error-correction on thet basis of its own skewed reading of this Court's decision. Those are not grounds upon which certiorari is granted. S. Ct. Rule 10. Moreover, as other circuits have begun to confront the same question and because an amended complaint in

this case is due January 31, 2020 in the District Court, the case makes a poor vehicle for review of the question presented. 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 Wells Fargo, alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq*, by engaging in 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. Pet. App. 76a. 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 diminished, which translated into a loss of property tax revenues to the City. *Id*. at 74a-75a. Moreover, the Complaint provided "statistical analyses that trace the City's financial losses to the Banks' discriminatory practices." *Id*. at 76a.

The District Court on July 9, 2014 granted the Bank's motion to dismiss with prejudice with respect to the allegations based on the FHA. *Id*. at 200a. It held that the City's claims fell outside the zone of

interests of the FHA and therefore lacked standing to pursue property tax losses and recoupment of municipal expenditures from discriminatory practices made actionable by the FHA. *Id*. at 194a. 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 196a.

B. The Eleventh Circuit Reverses.

The Eleventh Circuit unanimously reversed the District Court with respect to both holdings. It held that FHA's zone of interests encompasses the City's allegations in this case. *Id*. at 146a-147a. 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*. 149a, 153a. 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 154a-155a.

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." Pet. App. 82a. It

further held that the City's claims were not unprecedented but "similar in kind" claims to those it approved in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *Id.* at 82a-83a. *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. 91, 110-11 (1979) (emphasis added). *See also* Pet. App. at 83a.

A second question, the pleading requirements of proximate cause for the FHA, went unanswered in the 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 84a (emphasis added). Still, it further held that "'[p]roximate-cause analysis is controlled by the nature of the statutory cause of action.'" *Id.* (quoting *Lexmark*, 572 U.S. at 133).

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 86a (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*. at 86a-87a.

D. The Eleventh Circuit Decision on Remand Finds the City's Complaint Meets Proximate Cause for One Injury, but Not the Other.

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. Apr. 30, 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. 3a-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." Pet. App. 4a (citation omitted). In fact, "only the City can allege and litigate this peculiar kind of aggregative injury to its tax base." Pet App. 4a. 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. 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* Pet. App. 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.").

Wells Fargo sought but was denied a petition for rehearing or rehearing en banc. City of Miami v. Wells Fargo & Co., No. 14-14544 (11th Cir. Aug. 8, 2019). It was subsequently denied a stay of the mandate pending its petition for certiorari. City of Miami v. Wells Fargo & Co., No. 14-14544. 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

Though it argues that the Eleventh Circuit eschewed this Court's instructions on remand, the Petition faults the decision below for following those instructions, rather than simply adopting the Bank's preferred one-size-fits-all approach to proximate cause that ignores the FHA itself, its purpose, and the cause of action it authorizes. Wells Fargo's preferred approach amounts to nothing less than a radical restructuring of the proximate cause requirements for federal statutes with common-law foundations.

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." Pet. App. 86a. 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 statute-specific approach and explicit preference for percolation, Wells Fargo insists that the Eleventh Circuit ignored this Court's instructions and reads into it a non-existent mandate to treat the FHA as if it were the RICO statute. 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." *Id.* at __a (internal quotation marks and citations omitted). The Eleventh Circuit undertook exactly that inquiry.

Still, Wells Fargo fails to address that instruction at all, even though it appears in this Court's opinion as the definition of how to look at the "first step," which is the criterion Wells Fargo relies most heavily upon.

Perhaps recognizing that this Court is not prone to grant certiorari for the purposes of error correction, assuming that the Eleventh Circuit's careful examination of this Court's opinion could be characterized as reaching an erroneous conclusion, Wells Fargo manufactures a circuit conflict that only exists if different statutes with different language and purposes must be construed the same way. To state Wells Fargo's entreaty is to refute it because the interpretative exercise relies precisely on the elements and differences that the Bank asks this Court to overlook.

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

While Wells Fargo asserts that the case is an ideal vehicle to decide the proximate-cause issue, it ignores this Court's expressed preference for percolation in this very case. In its 2017 decision, this Court held

that Miami's "financial injuries fall within the zone of interests that the FHA protects," and that its "claims are similar in kind to the claims the Village of Bellwood raised in *Gladstone*." Pet. App. 82a-83a. Moreover, the *Gladstone* cause of action properly included a claim for lost property taxes, *id.* at 83a, the only damages still claimed by the City here.

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 86a. 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.* at 86a-87a.

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).

Wells Fargo denies the value of awaiting decisions from other circuits, arguing that the Eleventh Circuit's decision "flouts this Court's guidance and threatens to cause confusion in the lower courts." Pet. 38. 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. *Id.* at 86a-87a. While it provided some general guidance, guidance that the Eleventh Circuit considered at length, *see* Pet. App. 16a-69a, this Court emphasized that the directness principles it articulated should be FHA-specific, *id.* at 84a, 86a, rather than simply be carbon copies of the standard applicable to antitrust or RICO, which is the Bank's preferred approach. Pet. 34. There is no conflict between this Court's 2017 decision and the Eleventh Circuit's decision on remand.

The Bank's assertion that the Eleventh Circuit's decision has and will sow confusion in 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 courts outside the circuit. Yet, this Court still ordinarily waits for a circuit conflict before deciding to resolve the issue. *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam). The alleged confusion provides no grounds to depart from this Court's traditional insistence on a circuit conflict.

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

Wells Fargo contrives a false circuit split to support its Petition. It argues that the Eleventh Circuit's FHA proximate-cause standard is irreconcilable with the one utilized by other circuits "in different statutory and factual contexts." Pet. 14. Of course, there is nothing unusual about that – and nothing certworthy, either. Different statutes and different factual contexts warrant different constructions and applications. *See Negusie*, 555 U.S. at 520.

The fact remains no federal circuit other than the Eleventh Circuit has yet reached the proximate-cause issue under the FHA presented here. However, as Wells Fargo well knows because it is a product of its motions under 28 U.S.C. § 1292(b), the Ninth Circuit will hear oral argument on the FHA proximate cause issue even before this Court takes up this Petition at conference. Because of the imminence of that review, 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. 1780, 1782 (2019) (per curiam).

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 a second circuit will soon consider the issue. Here, however, consideration of the proximate-cause standard applicable to local government actions brought under the FHA is imminent in a circuit other than the Eleventh. Moreover, it is 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 be the subject of a petition for certiorari, regardless of the result.

B. Wells Fargo's Claimed Circuit Conflict Does Not Exist and Provides No Basis for Certiorari.

Wells Fargo assays a conflict among the circuits between the Eleventh Circuit's decision on FHA proximate cause and decisions in other circuits involving other statutes and other factual contexts, asserting that proximate cause principles should not vary by statute. Pet. 14. The argument, however, conflicts with this Court's consistent jurisprudence.

1. Wells Fargo errs in claiming the common law and federal statutes have but one approach to proximate cause.

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 v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992) (common-law proximate cause took "many shapes."). The common law, then, does not provide a single answer to the standard employed in statutes with common-law origins.

Consider, for example, the Federal Employees Liability Act (FELA), 45 U.S.C. § 51 *et seq*. FELA 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 Wells Fargo's argument that statutes with common-law foundations must have a consistent proximate-cause standard.

The antitrust and RICO statutes also arise from common-law origins. *See Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 688 (1978) (Congress "expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 9 (2010) ("Proximate cause for RICO purposes, we made clear, should be evaluated in light of its common-law foundations"). Still, these two statutes have a much narrower proximate-cause standard because the statute's structure assures that "those directly injured, … could be counted on to bring suit for the law's vindication." *Holmes*, 503 U.S. at 273.

Consistent with the foregoing, this Court has often emphasized the statute-specific nature of the applicable proximate-cause standard. While *"some"* directness principles apply to federal statutes with common-law foundations generally, Pet. App. 86a (quoting *Holmes,* 503 U.S. at 268) (emphasis added), and that the "general tendency in these cases, in regard to damages at least, is not to go beyond the first step," *id*. (quoting *Hemi Group,* 559 U.S. at 10 (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 should also apply to RICO. This Court reasoned that "the 91st Congress, which enacted RICO, [did so] 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." *Id*. at 268. It did so because "it intended them to have the same meaning that courts had already given them." *Id*. Thus, the common causation standard used in the antitrust and RICO statutes derive from common language adopted to effectuate identical standards.

The FHA, however, has very different language than these statutes, accords standing to third-parties who may not have been the object of the

discriminatory practices, and should not be accorded the same construction as the 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, Pet. App. 80a-81a, 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).

2. Wells Fargo's "different statutory and factual contexts" cannot serve as the basis of a circuit conflict.

Wells Fargo concedes that its creative attempt to frame circuit conflicts relies on proximate-cause standards "in different statutory and factual contexts." Pet. 14. Yet, as shown above, the import of these very different treatments of statutes with common-law foundations demonstrates that Wells Fargo's unitary approach to proximate cause seeks nothing less than 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 basis upon which certiorari can properly rest.

For example, one of Wells Fargo's cases in supposed conflict with the decision below is *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002). Pet. 14-15. The case was brought by the

city and civil groups seeking to hold gun manufacturers liable for negligence, negligent entrustment, or public nuisance under state law for costs incurred by the city due to the criminal use of handguns. The court dismissed the public nuisance claims after finding no Pennsylvania case could extended nuisance liability over lawful products that are lawfully placed in the stream of commerce. *Id*. at 421. It further found proximate cause too attenuated because "gun manufacturers do not exercise significant control over the source of the interference with the public right." *Id*. at 422 (footnote omitted).

With respect to the negligence and negligent entrustment claims, causation was considered too remote because those "immediately and directly injured by gun violence—such as gunshot wound victims—are more appropriate plaintiffs than the City or the organizational plaintiffs whose injuries are more indirect." *Id*. at 425.

By contrast, in the FHA context, the Bank is the source of interference with the public right through its discriminatory practices, and the FHA was written to permit the City to bring an action as an aggrieved person. Pet. App. 82a. As the Eleventh Circuit observed, "a lawsuit commenced by an individual homeowner cannot challenge the Banks' policies on the same citywide scale that the alleged misconduct took place on," and "only the City can allege and litigate this peculiar kind of aggregative injury to its tax base" for violations of the FHA. Pet. App. 4a. Indeed, no individual homeowner would even realize that he or she was a victim of the discrimination perpetrated against them by the Bank in the absence of citywide data or other analysis that is unlikely to

be undertaken by an individual. The distinctions between Philadelphia's state law claims, ungoverned by statutory purpose, and the broad scope and reach of the FHA, demonstrates the folly of Wells Fargo's contention.

Wells Fargo also attempts to find conflict with decisions that health-and-welfare benefit trusts attempted to recoup costs it paid for smokers' medical expenses. Yet, its examples were RICO and/or antitrust actions, which, as explained earlier, is a different action with very different causation language. Thus, while *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, and *Perry v. Am. Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003), found proximate cause lacking, they did so because the economic injuries alleged were purely derivative of the physical injuries suffered by plan participants. Plainly, the FHA permits a broader array of plaintiffs to be aggrieved parties and accords standing to Miami, Pet. App. 82a, whereas, in similar circumstances, Miami would not have standing to pursue antitrust or RICO claims.

In further refutation of the claimed circuit conflict, the Eleventh Circuit is in accord with the RICO decisions from other circuits barring health and welfare claims against tobacco companies on the basis of proximate cause. *See United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000). Thus, no conflict exists.

Wells Fargo's final set of supposedly conflicting circuit decisions are also RICO cases. *See* Pet. 17. They provide no greater insight into the FHA and its causation requirements.

3. The very different use of statistical analysis in RICO cases and FHA cases also provide no basis to assert a conflict.

The Bank also asserts a circuit conflict over the use of statistical modeling with respect to causation in a scant two-paragraph argument. It relies primarily on *Oregon Laborers*, which incorporated a decision of the Third Circuit. *Oregon Laborers* held the plaintiff benefits fund had to "demonstrate how many smokers would have stopped smoking if provided with smoking-cessation information, how many would have begun smoking less dangerous products ... but we do not believe that aggregation and statistical modeling are sufficient to get the Funds over the hurdle of the *AGC* factor focusing on whether the 'damages claim is ... highly speculative.'" 185 F.3d at 965 (quoting *Steamfitters*, 171 F.3d at 929 (3d Cir. 1999).

When *Oregon Laborers* was raised in Oakland's FHA case, the District Court held that the "language appears to be dicta" because "[n]othing in the rest of the Ninth Circuit's decision refers to any statistical analysis or any argumentation thereon." *City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at *9 (N.D. Cal. June 15, 2018), *motion to certify appeal granted*, No. 15-CV-04321-EMC, 2018 WL 7575537 (N.D. Cal. Sept. 5, 2018).

It is undeniable, as the Ninth Circuit recognized subsequent to *Oregon Laborers*, that "[e]xpert testimony can be used to explain the causal connection between defendants' actions and plaintiffs' injuries, even in the context of other market forces," *Maya v. Centex Corp.*, 658 F.3d 1060, 1073 (9th Cir. 2011). Therefore, a regression analysis can play a useful and influential role in assuring that a cogent causal connection exists. Courts regularly accept regression analyses. *See In re: Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 69 (1st Cir. 2013); *Garcia v. Johanns*, 444 F.3d 625, 635 (D.C. Cir. 2006). The analysis can control for a variety of potential influences, while estimating the size and statistical significance of the individual influences. *See* D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533 (2008). *See also* Daniel L. Rubinfeld, "Reference Guide on Multiple Regression," in Federal Judicial Center, Reference Manual on Scientific Evidence 179-227 (2d ed. 2000).

Given that a regression analysis, even one that "includes less than 'all measurable variables' may serve to prove a plaintiff's case," *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (emphasis added), the City's pleading describing the analysis that would be used in significant detail and the factors it would utilize should be enough to give rise to a "reasonable inference that [the Bank] is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is on this basis that, after examining the Complaint's detailed description of the regression analysis and studies that used the same methodology for the same purposes that the Eleventh Circuit concluded it gave "a clear idea of the final analysis—based on empirical data drawn from thousands of housing transactions

[of how] the City will calculate the impact of the Banks' foreclosures on property values in redlined (and reverse-redlined) areas of Miami, controlling for other variables and isolating the impact of the redlining." Pet. App. 46a. To the Eleventh Circuit, the

> plausibility of hedonic regression analysis has a direct bearing on how "difficult it [is] to ascertain the amount of [the City's] damage attributable to the violation, as distinct from other, independent, factors," *Holmes*, 503 U.S. at 269, 112 S.Ct. 1311, and thus helps determine "what is administratively possible and convenient," in terms of damages calculation, *Bank of Am.*, 137 S.Ct. at 1306.

Pet. App. 47a (brackets in orig.).

4. No deep conflict exists on what words to emphasize in the phrase "some direct relation."

Wells Fargo's final supposed conflict, argued in a bare three paragraphs, is how to interpret the phrase, "proximate cause … requires 'some direct relation between the injury asserted and the injurious conduct alleged." Pet. 20 (quoting Pet. App. 86a). The Bank asserts that the Eleventh Circuit wrongly emphasized the word "some" to give the phrase some play in the joints, while other circuits have emphasized the word "direct." *Id.* Yet, the differences in interpretation can be ascribed to the different statutory schemes involved, rather than some doctrinal schism warranting this Court's intervention. It does not

provide the type of circuit conflict that warrants certiorari.

III. The Eleventh Circuit Meticulously and Diligently Followed this Court's Guidelines.

Wells Fargo accuses the Eleventh Circuit of rejecting this Court's directions. Pet. 21. It did no such thing. This 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.* at 86a. 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.* at 86a-87a.

To be sure, it provided a number of generic guiding principles: there must be "*some* direct relation between the injury asserted and the injurious conduct alleged;" the "general tendency in these cases, in regard to damages at least, is not to go beyond the first step;" and "[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.* at 86a (emphasis added; internal quotation marks and citations omitted).

Wells Fargo would subtract from those statements the word "some" in "some direct relation." It would also read out "general tendency" to make the "first step" language a hard and fast rule, which also requires, as the Petition does, Wells Fargo to ignore this Court's instruction that "[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." *See* Pet. 22-24. Yet, nothing in the opinion should be treated as mere surplusage, particularly the instructions this Court gave about how to view the first step.

Thus, it is the Eleventh Circuit, not Wells Fargo, that "endeavored carefully to apply the Court's mandate to these complaints, to determine if they plausibly state a claim under the Fair Housing Act." Pet. App. 18a. In Wells Fargo's constrained view of what this Court instructed, the Eleventh Circuit was wrong to develop a "proximate-cause standard peculiar to the FHA." Pet. 24. Yet, that is exactly the task this Court set. Pet. App. 86a-87a (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.").

Wells Fargo offers no alternative construction of the FHA, its legislative history, or congressional intent. Instead, it slams the Eleventh Circuit's legitimate inquiry into the "nature of the statutory cause of action," Pet. App. 86a, a task this Court undertook in *Lexmark* from which the phrase came. *See* 572 U.S. at 133. Notably, the plaintiff in *Lexmark* satisfied proximate cause, even though it was not a direct competitor with the defendant, and the injury was "not direct" and not a literal "first step" link "but includes the intervening link of injury to [others]." *Id.* at 139 (internal quotation marks and citations omitted). The *Lexmark* opinion recognizes that the facts "therefore might not support standing under a strict application of the general tendency not to stretch proximate causation beyond the first step." *Id.*

Yet, the Court nonetheless held that liability aligned with statutory purposes and that there was no "discontinuity," which is the only reason to consider the "general tendency." *Id*. at 140.

Wells Fargo attempts to excuse this Court's willingness to entertain a second step in *Lexmark* from this Court's recognition of the "relatively unique circumstances" involved, and the Bank's own recognition that "Congress intended to expand the first step to include competitors because otherwise no party could bring suit. Pet. 31 (citing *Lexmark*, 572 U.S. at 140, 133). Yet, if this Court properly took congressional intent in the Lanham Act into account, the expanded standing accorded under the act, and who might be able to vindicate the act's central purpose, then the Eleventh Circuit's analysis, rather than the Bank's statute-blind approach, is valid and remains consonant with this Court' s precedents.

Predictably, Wells Fargo glosses over the senselessness of its categorical first-step approach, even though the Eleventh Circuit addressed it. The court noted that the Bank's version of one-step removal would exclude from court 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.

Pet. App. 30a.

After examining caselaw that demonstrates that the first step concept is not the inflexible obstacle the Bank suggests and finding that no remand would have occurred if there were not more to the first-step inquiry, the court concluded that "the "general tendency" to stop at the first step is just that, a general tendency, not an inexorable rule." Pet. App. 30a-31a.

Significantly, the court found that the banks "overstate the length of the causal chain by reading the complaints unfavorably to the City," and ignoring more immediate allegations. Pet. App. 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.

Pet. App. 34a.

While the Bank cherry-picks phrases from the decision to support its claim of error, it cannot justifiably criticize the court from not weighing this Court's guidance, examining the FHA closely, and relating it to the allegations in the complaint that will actually go forward. It may disagree with the court's conclusions, but that provides no grounds on which certiorari can rest. The Bank's claim that the Eleventh Circuit's approach creates open-ended liability, has no limitations, and is little more than the foreseeability test this Court rejected, Pet. 36. is rebutted by the Eleventh Circuit's dismissal of the City's claim for lost municipal expenditures, which had survived under the foreseeability-alone test. Pet. App. 44a.

In the end, Wells Fargo's version of proximate cause simply does not comport with this Court's version. Plainly, the Eleventh Circuit carefully followed this Court's precedents and walked through all of the factors it should. Wells Fargo's argument, then, is that it is right and the decision below is wrong, and it asks this Court to take the rare and plainly unwarranted step of error correction.

IV. The Petition Does Not Present an Important Issue that Extends Beyond the FHA.

Lacking an actual circuit conflict, Wells Fargo suggests that asserts that the Question Presented is important because "of the number of similar cases and massive dollar amounts at stake." Pet. 36. 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 by Cobb County that claimed damages in the "hundreds of millions of dollars." *Id*. at 37. However, the case cited involves a distinctly different theory of liability than Miami's case. It claims damages from an equity-stripping scheme. *Cobb Cty. v. Bank of Am. Corp.*, 183 F. Supp. 3d 1332, 1333 (N.D. Ga. 2016). In a similar set of allegations brought by the same lawyers, the district court limited cognizable damages to the county's foreclosure-processing expenses, an amount that may properly be called *de minimis* and unlikely to approach one percent of that billion. *County of Cook*, 2018 WL 1561725, at *9 (N.D. Ill. Mar. 30, 2018).[1] In any event, because the proximate-cause inquiry focuses on the cause of the injury or damages, cases premised on equity stripping require a different analysis and application of the requisite standard. Lumping Miami's case, in which there is no similar prayer for relief, with the equity-stripping cases comprises an exercise in misdirection.

Second, the Bank suggests that the Eleventh Circuit's proximate cause standard will open the floodgates to copycat lawsuits by other local

[1] The Eleventh Circuit in this case 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.

government units, even though this Court's 2017 decision recognizing municipal standing did not result in an avalanche of new actions. Indeed, as long as Wells Fargo has ceased the practice of issuing discriminatory loans, as it claims to have done, the statute of limitations will prevent the filing of any additional lawsuits.

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

The Bank and its *amici* raise meritless claims 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, Oral Argument transcript, *Bank of Am. Corp. v. City of Miami*, No. 15-1111, Nov. 8, 2016, at 35:10-15, the only cases resolved as of that time, those of Baltimore and Memphis, were settled for less than $10 million. For example, the 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 also became just part of the cost of doing business and were formulated as grants, rather than liability payments, which is not damages in the traditional sense.

As similar result resolved Philadelphia's lawsuits against Well Fargo. While Memphis has a population of 650,618[2] and Baltimore has one of 602,495,[3] Philadelphia's population is more than the two other cities combined: 1,584,138.[4] It recently resolved its lawsuit similar to Miami's for $10 million in grants "for sustainable housing-related programs to promote and preserve 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).

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

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

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

Miami is smaller than any of these cities whose cases were resolved. Its population is 470,914.[5] 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 massive amount Wells Fargo and its amici imagine.

Nor will liability have the dire consequences the Bank and its *amici* forecast. Analysts, who take litigation exposure into account, rate Wells Fargo stock a "hold," the same rating it has had since January 2019, and forecast continued growth and profitability despite the Bank's recent scandals. *See* https://money.cnn.com/quote/forecast/forecast.html?symb=wfc (last visited Jan. 25, 2020). Its most recent annual report painted an even rosier picture, boasting of record earnings in 2018 of $22.4 billion, or $4.28 per diluted common share, the "highest earnings per share in the company's history," even though the Bank agreed to consent orders that year with the Federal Reserve, the Office of the Comptroller of the Currency, and the Consumer Financial Protection Bureau that same year. Wells Fargo & Co. 2018 Annual Report 2018, at 7, 4, available at https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2018-annual-report.pdf.

In addition, senior management, including the CEO and CFO, have never expressed any concern whatsoever regarding the impact of these cases in any

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

of the recent quarterly earnings conference calls. Most notably, on January 14, 2020, Wells Fargo's new CEO Charlie Scharf conducted his first conference call in his new position at the Bank. While Mr. Scharf discussed multiple issues currently plaguing the Bank that affected its operations and financial position, at no time did he utter a single word about any of the FHA cases, and that omission is not an accident. *See* https://seekingalpha.com/article/4316892-wells-fargo-company-wfc-ceo-charlie-scharf-on-q4-2019-results-earnings-call-transcript. Nor, for that matter, did Mr. Scharf's predecessors or the Bank's CFO reference these cases during the quarterly earnings call on October 15, 2019 (see https://seekingalpha.com/article/4296629-wells-fargo-company-wfc-on-q3-2019-results-earnings-call-transcript, the call on July 16, 2019 (see https://seekingalpha.com/article/4275260-wells-fargo-company-wfc-ceo-allen-parker-on-q2-2019-results-earnings-call-transcript), the call on April 12, 2019 (see https://seekingalpha.com/article/4254260-wells-fargo-company-wfc-ceo-allen-parker-on-q1-2019-results-earnings-call-transcript), or the call on January 15, 2019 (see https://seekingalpha.com/article/4233605-wells-fargo-co-wfc-ceo-tim-sloan-on-q4-2018-results-earnings-call-transcript).

Furthermore, the banking analysts who participated in Wells Fargo's earnings calls once again remained silent regarding these cases during the question and answer sessions with the CEO and CFO. The transcripts of these calls reveal that the analysts failed to ask so much as one question regarding the FHA municipal litigation, reflecting their clear understanding that these cases will have no impact on

Wells Fargo's financial condition, the banking system, or the national/global economy.

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 "some of the largest taxing jurisdictions in the country" have brought these actions, though it only lists five jurisdictions, although the lone case of one of them (Philadelphia), has resolved. Pet. 36-37. The first lawsuits were filed in 2008 and 2009 and were resolved through settlement or dismissal.[6] A number of the later lawsuits have also reached final disposition.[7] Those facts plainly indicate

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[6] The first lawsuits were filed by Baltimore, Birmingham, and Memphis. 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, 89 (2015). 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).

[7] 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 also dismissed at summary judgment on the basis of an issue raised *sua sponte* by the court of appeals despite the lack of discovery on that issue. *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).

that the Bank's portrayal of rampant local government FHA litigation against lenders is overblown.

Another marker indicating the falsely sweeping nature of the claims about new litigation is what occurred subsequent to this Court's determination of municipal 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 attempt to invent a doomsday scenario which never has, and never will, come to fruition.

In fact, only three lawsuits were subsequently filed.[8] 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

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[8] 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 Law Department Press Release, supra, available at https://www.phila.gov.2918-12-16-city-of-philadelphia-and-wells-fargo-resolve-litigation/ (last visited Jan. 24, 2020).

every county and municipality with the resources to sue." Am. Br. Cato Institute 12. *See also* Am. Br. Chamber of Commerce 9; 's claim that "[t]hese cases, while already numerous, are likely just the tip of the iceberg if courts follow the Eleventh Circuit's lead" is merely empty rhetoric. Br. for Amici Curiae The Chamber of Commerce of the United States, *et al*. 9.

The likelihood of additional lawsuits at this time is extremely low. Wells Fargo has told courts that it has ended the programs that were the basis of the cities' complaints and proffered a Department of Justice memorandum supporting their assertion at least as of 2016. Joint Mot. for Termination of the Consent Order, *United States v. Wells Fargo Bank, N.A.*, No. 1:12-cv-01150, ECF No. 24 at 1 (D.D.C. Sept. 14, 2016) (stating the government's agreement that the bank "satisfied each term of the [DOJ] Consent Order"). Given that the FHA has a statute of limitations of two years, 42 U.S.C. § 3613((a)(1)(A), the Bank cannot realistically claim that new lawsuits can still be filed.

V. The Decision Below is Correct.

One of the key portions of the Eleventh Circuit's decision on remand that Wells Fargo 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.

Pet. App. 31a.

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*. 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. 34a.

The Bank cannot justifiably criticize the Eleventh Circuit for not weighing this Court's guidance, examining the FHA closely, and relating it to the allegations in the complaint that will actually go forward. It may disagree with the court's conclusions, but that provides no grounds on which certiorari can rest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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