No. _____

In the Supreme Court of the United States

BANK OF AMERICA CORP., BANK OF AMERICA, N.A.,
COUNTRYWIDE FINANCIAL CORP., COUNTRYWIDE HOME LOANS,
COUNTRYWIDE BANK, FSB, WELLS FARGO & CO., WELLS FARGO BANK, N.A.,

Applicants,

v.

CITY OF MIAMI,

Respondent.

On Application for Stay

APPLICATION FOR A STAY OF MANDATE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

Largely ignoring an opinion and remand order from this Court, the Eleventh Circuit has allowed city and county governments to bring unprecedented claims under the Fair Housing Act (FHA), some claiming damages in the *hundreds of millions*. Despite the clear conflict with this Court's instructions, the Eleventh Circuit then refused to stay its mandate, allowing litigation to resume not just in this case but also likely in nine other cases within that circuit. This Court should stay the mandate pending the forthcoming petition for certiorari.

Miami (and other local governments) claim that a decrease in their property tax revenue can be traced back, through a lengthy causal chain, to the allegedly discriminatory terms of mortgage loans issued to city residents. The question is whether a plaintiff can satisfy the FHA's proximate cause requirement by alleging that lending discrimination leads to bad loans, which leads some of those loans to default, which leads some loan owners to foreclose, which sometimes leads to blight in city neighborhoods, which may lead to lower property values for the loan owners *and their neighbors*, which ultimately leads to lower tax revenue collections for the city.

This Court already considered Miami's allegations once, and unanimously rejected the Eleventh Circuit's holding that such an indirect causal chain satisfies the FHA's proximate-cause requirement. In *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), this Court unanimously held that a plaintiff must

allege not just a "foreseeable" chain of events—as the Eleventh Circuit had held—but a "direct" causal relationship. *Id.* at 1306. While the Court remanded for the lower courts to determine the "precise boundaries" of that directness inquiry in the FHA context, *id.*, this Court instructed the Eleventh Circuit to apply the *same* common-law "directness" principles that apply to other federal causes of action. *Id.* at 1306. Three Justices would have rejected Miami's claims outright because the Court's opinion "leaves little doubt" that Miami's "exceedingly attenuated" causal chain does not "satisfy the rigorous standard for proximate cause that the Court adopts." *Id.* at 1311 (Thomas, J., concurring in part and dissenting in part).

Disregarding this Court's reasoning, and directly rejecting the three-Justice concurrence, the same Eleventh Circuit panel has now held once again that Miami's multi-step causal chain satisfies the FHA's proximate-cause requirement. The court paid only lip service to the directness principles that this Court instructed it to apply: in the context of the FHA, the court held, those principles require only a "meaningful and logical continuity" between an alleged FHA violation and injury, dismissing the length of the causal chain as largely irrelevant. Ex. A at 23-24, 36. That may be a "relation," but it is not the "direct relation" this Court required. Indeed, the court's new standard appears to be *broader* than the foreseeability standard this Court rejected, as a connection could be "meaningful and logical" without being "foreseeable."

Making matters worse, even though the Eleventh Circuit waited more than *two years* to issue its remand decision, and even though the Eleventh Circuit

rejected the opinion of three Justices of this Court, the Eleventh Circuit refused to stay its mandate while Applicants seek certiorari. The result is to send this case and others like it back to district court—where discovery in similar cases has already proved exorbitantly costly—based on a proximate-cause standard that is far broader than the one this Court instructed it to apply.

This Court should stay issuance of the Eleventh Circuit's mandate pending the filing and disposition of Applicants' petition or petitions for a writ of certiorari. This case meets each consideration for a stay pending certiorari.

Most importantly, this Court is likely to grant certiorari and reverse the Eleventh Circuit's decision. The question presented is vitally important, as this case is one of many in which local governments seek to use the FHA to recover purportedly lost tax revenue by attempting to tie it, through a lengthy causal chain, to allegedly discriminatory loan terms. Each of these suits seeks a massive recovery—involving some of our nation's largest local governments (including Miami, Philadelphia, and Oakland, and Atlanta- and Chicago-area counties) and in some instances apparently seeking awards in the hundreds of millions. Under a proper application of the common-law directness principles this Court instructed the Eleventh Circuit to apply, these unprecedented suits plainly fail.

The equities also favor a stay. Litigating these cases is incredibly costly, especially in discovery. Allowing the mandate to issue would not only restart Miami's lawsuits against Bank of America and Wells Fargo, but also seven other nearly-identically-pleaded cases pending in the Eleventh Circuit against multiple

lenders. This Court should not force Applicants and the other lenders to spend money they cannot recover to defend cases that should not proceed. These cases have been stayed since 2016; the marginal delay from a stay is trivial in the context of this case, and will not prejudice Miami.

Applicants respectfully request that this Court stay issuance of the Eleventh Circuit's mandates pending the filing and disposition of Applicants' petition or petitions for certiorari. In addition, because the mandates are set to issue on October 21, Applicants respectfully request that the Court administratively stay issuance of the mandate pending disposition of this Application.

OPINIONS BELOW

The district court's opinion in Miami's suit against Bank of America[1] is available at *City of Miami v. Bank of America Corp.*, 2014 WL 3362348 (S.D. Fla. July 9, 2014). The Eleventh Circuit's first opinion in that case is reported at *City of Miami v. Bank of America Corp.*, 800 F.3d 1262 (11th Cir. 2015) (*City of Miami I*). The district court's opinion in Miami's suit against Wells Fargo[2] is available at *City of Miami v. Wells Fargo & Co.*, 2014 WL 11380948 (S.D. Fla. Sept. 16, 2014). The Eleventh Circuit's first opinion in that case is reported at *City of Miami v. Wells*

[1] This Application refers to the Bank of America and Countrywide companies collectively as "Bank of America," and uses the shorthand of referring to "Bank of America" as having made the relevant home loans. In fact, only three of the five Bank of America and Countrywide entities made home loans (Bank of America, N.A., Countrywide Bank, FSB, and Countrywide Home Loans, Inc.), the other two were corporate parents (Bank of America Corp. and Countrywide Financial Corp.), and during much of the relevant time the Countrywide companies and Bank of America companies were competitors.

[2] This Application refers to the two Wells Fargo companies as "Wells Fargo."

Fargo & Co., 801 F.3d 1258 (11th Cir. 2015). This Court's decision vacating both Eleventh Circuit decisions is reported at *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). The Eleventh Circuit's decision on remand in both cases is reported at *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260 (11th Cir. 2019) (*City of Miami II*), and is attached as Exhibit A.

JURISDICTION

The Eleventh Circuit issued its opinion on May 3, 2019. Applicants filed timely petitions for rehearing en banc. Each of those petitions was denied on August 26, 2019. On August 30, 2019, Applicants moved the Eleventh Circuit to stay its mandate in each case pending filing and disposition of a petition for certiorari. On October 9, 2019, the Court issued an order denying those motions, but staying issuance of the mandates for 10 days to allow Applicants to file this Application. A copy of that order is attached as Exhibit B. Thus, absent a stay by this Court, the mandates will issue on October 21, 2019. This Court has jurisdiction to stay issuance of the Eleventh Circuit's mandates pending the filing and disposition of a petition for certiorari. 28 U.S.C. § 2101(f).

STATEMENT OF THE CASE

I. The district court holds that Miami's claims fail to satisfy the FHA's proximate-cause requirement.

Miami sued Bank of America based on mortgage loans the bank made to minority borrowers.[3] Record on Appeal (ROA) Vol. 1, Tab 1, at 52-53 ¶¶ 163-64. Miami alleges that corporate policies resulted in statistical disparities between loan terms and loan performance across white, African-American, and Latino neighborhoods and borrowers. *E.g.*, *id.* at 32 ¶ 98, 35 ¶ 108, 42 ¶¶ 124-125. These disparities allegedly set in motion a lengthy causal chain that ultimately cost Miami money: less-favorable loan terms caused borrowers to default, which caused lenders to foreclose and vacancy at the property securing the loans, *id.* at 43 ¶ 128; foreclosures and vacancies led to a decline in value of the foreclosed property and the property of neighboring landowners, *id.* at 46 ¶ 141; and decreases in property value led to lower assessments and lower property-tax revenue collections for the city's coffers, *id.* at 43 ¶ 128, 45-48 ¶¶ 136-150.

The district court dismissed the complaint, holding that Miami failed to allege injuries that were proximately caused by Bank of America's alleged conduct. *City of Miami*, 2014 WL 3362348, at *5. The district court held that the FHA, like other statutes with common-law roots, bars recovery of economic losses that are "too remote from the defendant's unlawful conduct." *Id.* (internal quotation marks

[3] For simplicity, this Application focuses on the factual allegations and procedural history of the Bank of America lawsuit. For purposes of this Application, the factual allegations in and procedural history of Miami's lawsuit against Wells Fargo are not materially different.

omitted). The court emphasized just how long a causal chain Miami would need to forge, and described the numerous intervening actors and acts that could "break the causal chain." *Id.*

II. The Eleventh Circuit holds that any foreseeable injury satisfies the FHA's proximate-cause requirement.

In *City of Miami I*, the Eleventh Circuit agreed with Miami that proximate cause under the FHA does not include a "directness requirement." *City of Miami I*, 800 F.3d at 1280. Instead, the court held that the proper standard is "based on foreseeability." *Id.* at 1282. The court held that because Miami alleged that Bank of America could have foreseen each of the "several links in th[e] causal chain," Miami had adequately alleged proximate causation. *Id.*

III. This Court vacates the Eleventh Circuit's decision, holding that the FHA's proximate-cause requirement incorporates common-law "directness principles" and that mere "foreseeability" does not suffice.

This Court rejected the Eleventh Circuit's foreseeability-only formulation of the FHA's proximate-cause element and held that the FHA incorporates the common-law "directness principles" that apply to other federal statutory causes of action. *Bank of America*, 137 S. Ct. at 1306. The Court held that "in the context of the FHA, foreseeability alone does not ensure the close connection that proximate cause requires." *Id.* Because the housing market "is interconnected with economic and social life," an FHA violation may "cause ripples of harm to flow far beyond the defendant's misconduct." *Id.* (internal quotation marks omitted). "Nothing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel. And entertaining suits to recover damages for any foreseeable result of an

FHA violation would risk massive and complex damages litigation." *Id.* (internal quotation marks omitted).

This Court thus held that, because the FHA is like other federal statutes with "common-law foundations," proximate cause under the FHA "requires some *direct* relation between the injury asserted and the injurious conduct alleged." *Id.* (emphasis added). The Court noted that in applying that requirement under statutes with common-law foundations, the "general tendency . . . in regard to damages at least, is not to go beyond the first step" in the causal chain. *Id.* (internal quotation marks omitted). The Court declined to apply the directness requirement to Miami's allegations, remanding for the "lower courts" to "draw the precise boundaries 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.*

Three Justices, while concurring in "the Court's conclusions about proximate cause," would have foregone remand and instead applied those legal principles to the facts of this case and held that Miami has failed to plead proximate cause. *Id.* at 1311-12 (Thomas, J., concurring in part and dissenting in part). As Justice Thomas explained, "the majority opinion leaves little doubt that neither Miami nor any similarly situated plaintiff can satisfy the rigorous standard for proximate cause that the Court adopts and leaves to the Court of Appeals to apply." *Id.* Allowing claims with such an "exceedingly attenuated" link between alleged

statutory violation and damages "would lead to disquieting consequences" by drastically expanding the plaintiffs who could bring FHA suits. *Id.*

IV. The same Eleventh Circuit panel holds, again, that Miami's claims satisfy the FHA's proximate-cause requirement because they involve a "meaningful and logical continuity" between the alleged injury and statutory violation.

After more than two years, and after further briefing but no oral argument, the same Eleventh Circuit panel again held that Miami's allegations satisfy the FHA's proximate-cause requirement. The court began its discussion of the governing "directness principles" by dissecting the phrase "some direct relation." Based on dictionary definitions of "some" and "relation"—but *not* "direct"—the court concluded that "some direct relation" encompasses *any* "meaningful and logical continuity" between the alleged statutory violation and injury. Ex. A at 22-24.

Next, the court of appeals rejected the principle that the FHA's proximate-cause requirement bars suits "beyond the first step" in the causal chain, *Bank of America*, 137 S. Ct. at 1306. While the court recognized, as it had in *City of Miami I*, 800 F.3d at 1282, that Miami alleged a multi-step causal chain, it dismissed "step-counting" as being "of limited value." Ex. A at 36. The court inferred that if this Court had thought the first-step inquiry determinative, it would not have remanded, but would have resolved the proximate-cause issue itself. Ex. A at 32.

The court then turned to a policy-driven inquiry into how broadly to construe the FHA and whether or not tracing the multi-step causation chain in this FHA case would be "administratively infeasible." Ex. A at 43-67. Based largely on

Miami's conclusory promises that "Hedonic regression" can isolate the tax loss caused by a given foreclosure (though *not* by a given fair-lending violation), the court concluded that Miami's indirect tax losses will be "readily calculable." Ex. A at 46-49.

The court, at times, seemed to recognize that its directness inquiry was far broader than the inquiry this Court has applied to other statutes with "common-law foundations," *Bank of America*, 137 S. Ct. at 1306, like RICO and the antitrust laws. To justify such a uniquely expansive inquiry, the court pointed to the FHA's broad scope and Congress's purported purpose of redressing issues relating to "urban squalor," including a "[d]eclining tax base."[4] Ex. A at 36-43.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

[4] The Court rejected Miami's attempt to recover municipal service costs, concluding that such costs were "too remote to satisfy proximate cause" even under the court's broad standard. Ex. A at 75.

I. There is a reasonable probability that this Court will grant certiorari to determine the scope of the FHA's proximate-cause requirement.

This Court has already taken up the question of how to apply the FHA's proximate-cause requirement once in this case, and it is likely to do so again. Indeed, if anything there is *more* reason to grant certiorari now than there was when this Court took up this issue in this case three years ago.

First, now, as before, the Eleventh Circuit has interpreted the FHA as having a proximate-cause requirement that is unique among federal statutes, allowing claims for injury that is not only one, two, or three steps removed from the asserted statutory violation, but that is *any* number of steps removed so long as there is some "meaningful and logical continuity" between an alleged statutory violation and injury. Ex. A at 23-24; *see also* Ex. A at 36 (describing the number of steps in the causal chain as being "of limited value"). In agreeing to review the Eleventh Circuit's decision in *City of Miami I*, this Court recognized that certiorari was warranted to address a conflict between the Eleventh Circuit's application of common-law proximate-cause principles to the FHA and this Court's application of common-law proximate-cause principles to other federal causes of action. That same conflict is amplified now that (1) this Court has held, *in this case*, that the same common-law directness principles that apply to other federal causes of action also apply to the FHA, and (2) the Eleventh Circuit all but conceded that its proximate-cause test is far broader than anything this this Court has applied to other federal statutes. *See* Ex. A at 36-43.

Second, legal developments have heightened the case for certiorari. Since this Court's decision, at least nine courts have taken up the task of applying this Court's decision and have fallen into disagreement over how to apply the FHA's proximate-causation requirement to nearly identical FHA claims with nearly identical causal chains. Prior to the Eleventh Circuit's decision, three different judges held that tax-loss claims like Miami's do not satisfy proximate cause under this Court's decision in *Bank of America*.[5] A fourth judge expressed "serious concerns" about such claims.[6]

The Eleventh Circuit's decision undermined this emerging consensus and created uncertainty about how these functionally identical cases should proceed. Prior to the Eleventh Circuit's decision, only one court had allowed a tax-loss claim to proceed, but the Ninth Circuit granted interlocutory review in that case, presumably because it was a clear outlier.[7] Since the Eleventh Circuit's decision, however, three district courts outside the Eleventh Circuit denied motions to

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[5] *Cty. of Cook v. Bank of America Corp.*, No. 14-cv-2280, 2018 WL 1561725, at *5 (N.D. Ill. Mar. 30, 2018); *Cty. of Cook v. Wells Fargo & Co.*, No. 14-cv-9548, 2018 WL 1469003, at *8-*9 (N.D. Ill. Mar. 26, 2018); *Cty. of Cook v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950, 963-64 (N.D. Ill. 2018).

[6] *City of Phila. v. Wells Fargo & Co.*, No. 17-cv-2203, 2018 WL 424451, at *6 (E.D. Pa. Jan. 16, 2018).

[7] *See City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-cv-04321, 2018 WL 3008538 (N.D. Cal. June 15, 2018); *City of Oakland v. Wells Fargo & Co.*, No. 19-15169, ECF No. 1 (9th Cir. Jan. 24, 2019).

dismiss, effectively parroting the Eleventh Circuit's reasoning.[8] This confusion will proliferate absent this Court's intervention.

Third, now, as before, the question presented is exceptionally important given the number of identically-pleaded cases and massive dollar amounts at stake. Miami's suit is one among many brought by outside plaintiffs' lawyers representing some of the largest tax-imposing local governments in the country, including Miami; Fulton County, Georgia (Atlanta); Cook County, Illinois (Chicago); Philadelphia; and Oakland. At the time of Applicants' previous petitions for certiorari, twelve local governments had brought suits similar to Miami's, and most of those governments had sued multiple lenders. *See* Pet. for Cert. 3 & n.1, *Bank of America Corp. v. City of Miami*, No. 15-1111 (filed Mar. 4, 2016). The number of suits has only grown. These suits often seek massive damages—in at least one case, the plaintiffs claimed "hundreds of millions of dollars" from a single lender. First Amended Complaint ¶ 421 (ECF No. 32), *Cobb Cty. v. Bank of America Corp.*, No. 15-cv-4081 (N.D. Ga. filed June 17, 2016). The sheer number of cases like Miami's that are currently pending, and the massive overall damages at stake, weigh at least as strongly in favor of certiorari as the last time this question came before this Court.

[8] *City of Sacramento v. Wells Fargo & Co.*, No. 18-cv-416, 2019 WL 3975590, at *6-*9 (E.D. Cal. Aug. 22, 2019); *Prince George's Cty. v. Wells Fargo & Co.*, No. 18-cv-3576, 2019 WL 3766526 (D. Md. Aug. 9, 2019); *Montgomery Cty. v. Bank of America Corp.*, No. 18-cv-3575, 2019 WL 4805678 (D. Md. Sept. 30, 2019).

Fourth, now, as before, the fact that the Eleventh Circuit is currently the only court of appeals to have addressed this precise issue is not a reason to deny certiorari. A conflict between a court of appeals decision and this Court's decisions on an "important question of federal law" is a basis for certiorari even absent a circuit conflict. S. Ct. R. 10(c). The Eleventh Circuit's application of a proximate-cause standard of unprecedented breadth plainly conflicts with not only this Court's decision in *Bank of America*, but also this Court's decisions applying the same common-law directness principles to other statutes. The proper application of these directness principles is, for the reasons just explained, exceptionally important.

In sum, given the massive damages asserted in the numerous lawsuits against numerous lenders seeking lost tax revenue under the FHA, the confusion over whether such damages are recoverable, and the conflict between the Eleventh Circuit's decision and this Court's precedent, there is a reasonable probability that this Court will once again choose to review the Eleventh Circuit's attempt to broaden the FHA's proximate-cause requirement beyond traditional common-law principles. There is, if anything, more reason to take up that question now than there was the last time this Court granted certiorari in this case.

II. There is a fair prospect that this Court will, once again, reverse the Eleventh Circuit's expansion of the FHA's proximate-cause standard.

This Court's holding in *Bank of America* was straightforward: The FHA's proximate-cause requirement incorporates the same "directness principles" that apply to other statutes with "common-law foundations" like RICO and the antitrust laws. Those principles require any plaintiff to show "some direct relation between

the injury asserted and the injurious conduct alleged." *Bank of America*, 137 S. Ct. at 1306. Moreover, the "general tendency" in cases applying these proximate-cause "directness principles" is "not to go beyond the first step" of causation from the alleged act to the resulting injury. *Id.* This Court has repeatedly rejected alleged causal chains far shorter than Miami's here, *e.g.*, *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268-69 (1992), making exceptions to the first-step principle only in limited circumstances necessary to avoid a nonsensical interpretation of a statute or where a second-step harm followed "automatically," *e.g.*, *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133-34, 140 (2014). A straightforward application of this Court's decision therefore requires dismissing Miami's complaint.

The Eleventh Circuit's remand decision simply fails to carry out this Court's direction. Instead of adhering to and applying established "directness principles," the panel substituted its own novel view about whether indirect theories like Miami's should be actionable. None of the Eleventh Circuit's justifications for applying a uniquely-expansive approach to the FHA withstands scrutiny.

The problems start with the Eleventh Circuit's discussion of the phrase "some direct relation." Ex. A at 22-23. The panel interpreted that phrase to mean *any* type of "logical bond," or "meaningful and logical continuity." Ex. A at 23. The panel based that expansive view *not* on the common law, but on dictionary definitions of words this Court used in its opinion. And it did so selectively—

extensively defining "some"[9] and "relation" (and "cause"), but *completely ignoring the word "direct*." Indeed, "logical bond" comes straight from the definition of "relation," completely unlimited by the modifier "direct."

Given that "direct" means "effected without any … intervening step,"[10] to have "some direct relation" between a violation and damages requires not just *any* "logical bond," but an *immediate* one. Indeed, replacing directness with a mere "logical bond" effectively resurrects the foreseeability standard that this Court already rejected, and thus fails to "ensure the close connection that proximate cause requires." *Bank of America*, 137 S. Ct. at 1306. If anything, the Eleventh Circuit's standard is *broader* than foreseeability because a bond could be "logical" even if not "foreseeable."

The Eleventh Circuit's "logical bond" standard also disregards this Court's repeated holding that proximate cause generally does not "go beyond the first step" in the causal chain. *E.g.*, *Bank of America*, 137 S. Ct. at 1306. In case after case, this Court has held that the relevant "directness principles" are not satisfied if there are *any* intervening steps in the causal chain, especially where, as here, the plaintiff "complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Holmes*, 503 U.S. at 268-69; *see also*, *e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 534 (1983).

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[9] The court of appeals misdefined "some" in any event. In this Court's phrase "some direct relation," "some" means "one … of something," *i.e.*, a class or group. *Webster's Third New International Dictionary* 2171. It does not "soften[]" the adjective "direct," Ex. A at 23. The Court did not write "some*what* direct."

[10] *Webster's* 640.

The Eleventh Circuit recognized in *City of Miami I* that Miami's allegations depend on precisely such a multi-step causal chain. *City of Miami I*, 800 F.3d at 1282.

The Eleventh Circuit's only response was to note that the first-step principle is not a "hard and fast rule," Ex. A at 24, but just because some very limited exceptions exist does not mean that Miami falls into one—much less that the court should entirely disregard the length and complexity of the causal chain. There is *no* case making an exception as broad as the one the Eleventh Circuit made here. The court relied primarily on *Lexmark*, but contrary to the Eleventh Circuit's decision, Ex. A at 25, there was nothing "complex" about the chain of causation in that case. *Lexmark* involved the Lanham Act, which bars customers from suing for false advertising even though they are the only ones directly injured; to make the statute function, this Court held that a competitor whose potential customers are deceived into withholding business is a proper plaintiff. 572 U.S. at 133-134. The FHA can plainly function without any exception to the first-step principle. *See* pp. 20-21, *infra*. And neither *Lexmark* nor any other case has upheld a causal chain anywhere near as extended as the one on which Miami relies here.

Perhaps recognizing how far it had gone beyond the established common-law principles this Court instructed it to apply, the panel emphasized that the FHA is a broad statute. *See* Ex. A at 37-43, 68-73. But even broad statutes focus on remedying direct harm. Antitrust laws, for example, were intended to be "given broad, remedial effect," *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 568-69 & n.6 (1982), and RICO is similarly to be "read broadly" and "liberally

construed," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). But even so, this Court has squarely held that plaintiffs cannot use either of these statutes to recover downstream economic harm from injuries inflicted on others. *Holmes*, 503 U.S. at 274; *Associated Gen. Contractors*, 459 U.S. at 535. This Court's decision cited precisely these RICO and antitrust precedents as the basis for the common-law "directness principles" that govern the FHA. *Bank of America*, 137 S. Ct. at 1306. This Court held that the FHA is to be treated like other statutes, but the Eleventh Circuit treated it as uniquely broad and disconnected from the common law.

The Eleventh Circuit's resort to the FHA's purported purposes fares no better. The court relied on a single Senate floor statement from 1968 opining that discrimination in our nation's cities could be linked to a "[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor." Ex. A at 42. But these general justifications for enacting the statute are not license to permit recovery in civil litigation for such *indirect* harms. Rather, Senator Mondale's statement recognizes that, as this Court put it, a "violation of the FHA may … be expected to cause ripples of harm to flow far beyond the defendant's misconduct." *Bank of America*, 137 S. Ct. at 1306 (internal quotation marks omitted). Congress's desire to limit those ripples does not mean "that Congress intended to provide a [*private*] remedy wherever those ripples travel," *id.*, on top of the federal government's ability to enforce the statute. This Court already decided that the FHA is not that broad.

The Eleventh Circuit also wrongly read this Court's decision to remand, rather than apply the correct proximate-cause standard to Miami's claims in the first instance, as a hint that Miami's claims should survive. *See* Ex. A at 32. This Court's willingness to let the court of appeals correct its mistakes was not a signal that there was no mistake to correct. There are multiple examples *just this year* of cases in which this Court vacated a lower court's decision and remanded to apply the correct standard and, when the lower court reached the same decision anyway, this Court again granted plenary review and reversed. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019); *Moore v. Texas*, 139 S. Ct. 666, 672 (2019).

Much of the Eleventh Circuit's decision rests not on application of "directness principles" at all, but on a speculative discussion of why proving plaintiffs' *indirect* causation theory "is not administratively infeasible." Ex. A at 43-67. But nothing in this Court's decision in this case, or any other, suggests that proximate cause can be established simply by a court's case-specific conclusion that it would not be "infeasible" to trace causation. As the court of appeals recognized, Ex. A at 43, the Supreme Court in *Holmes* explained that three particular difficulties in tracing causation explain *why* the "directness of relationship" is a "central element[]" of proximate cause. *Holmes*, 503 U.S. at 269. But while those policies *justify* the directness inquiry, they do not drive the analysis in each case.

Even considering the policies *Holmes* identified, the Eleventh Circuit's analysis is deeply flawed. For instance, as this Court explained in *Holmes*, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a

plaintiff's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269. That reasoning directly applies here, as innumerable "independent" factors can intervene between an allegedly discriminatory loan term, a default, a foreclosure, a vacancy, a change in property values, tax assessments, and the ultimate change in tax revenue.

The court of appeals claimed that because Miami alleged that "Hedonic regression" can calculate lost tax revenue from a given *foreclosure*, it will be possible to prove Miami's indirect losses. Even this is doubtful, given the well-recognized limitations and manipulability of regression analysis generally.[11] But even the court of appeals' blind reliance on the allegation does not get Miami far enough, for such a regression analysis cannot address what happened at the earlier steps: whether the default that led to the foreclosure and vacancy was caused by disadvantageous loan terms rather than changes in the borrower's life after the loan closed, such as job loss, illness, or divorce. As the Eleventh Circuit's discussion makes clear, Ex. A at 48, Miami has not alleged that regression could do that work.

The court of appeals similarly erred in concluding that indirect suits like Miami's are necessary to "vindicate the law." Ex. A at 58, 61; *see Holmes*, 503 U.S. at 269. Not only can directly injured victims bring suit under the FHA, *see* 42 U.S.C. §§ 3610, 3612, 3613, aided by an attorney's-fee-shifting provision, *id.*

[11] For instance, an article Miami previously cited to this Court explains that regression "facilitates biased, result-oriented thinking by expert witnesses" and "can give the wrong answer, or contradictory answers, to questions lawyers and judges care about." D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533, 534, 538 (2008).

§ 3613(c)(2), but HUD can bring an administrative action on behalf of a directly injured victim, *id.* § 3610(a)(1)(A)(i), and the Attorney General can bring suit against those engaged in a "pattern or practice" of statutory violations, *id.* § 3614(a). The court of appeals made a value judgment that Congress could have done more to encourage FHA enforcement, and so took it upon itself to put a thumb on the interpretive scale in order to right that perceived wrong. Ex. A at 61. This is not an appropriate exercise of statutory interpretation.

Ultimately, though, the policy-driven question whether claims like these *should* be actionable is beside the point. The panel simply refused this Court's instruction that it apply established common-law directness principles to the FHA to determine whether these claims *are* actionable. Those principles plainly require reversal of the Eleventh Circuit's decision, and dismissal of Miami's complaint.

III. Staying the mandate will not prejudice Miami and will avoid significant litigation expenses that Applicants could not recover if this Court reverses the Eleventh Circuit.

The equitable factors also favor staying the mandate. Applicants will suffer irreparable harm absent a stay, as they will incur significant litigation expenses from remanded proceedings that would be completely unnecessary if this Court reverses the Eleventh Circuit. Absent a stay of mandate, the case will be remanded to the district court, and litigation will recommence. This will require, at the very least, the resumption of motions practice concerning Miami's third amended complaints, which it filed after the Eleventh Circuit's decision in *City of Miami I*. Moreover, it is entirely possible that discovery could begin before this Court decides whether to grant certiorari. If Applicants' experience in discovery in similar suits

brought by other local governments is any indication, the discovery costs associated with this case would be significant.

Moreover, Bank of America is also a defendant in two other, nearly identical FHA cases in the Eleventh Circuit—one brought by Miami Gardens and one by the three largest counties in suburban Atlanta. Those cases are currently stayed, and the plaintiffs are likely to demand that they resume if the Eleventh Circuit's mandate issues, multiplying Bank of America's litigation expenses. In addition, the same plaintiffs—Miami, Miami Gardens, and the three Atlanta-area counties—have five other suits in the Eleventh Circuit pending against other lenders, one of which includes all three Atlanta-area counties as plaintiffs. Each of these cases would also likely resume if the Eleventh Circuit's mandate issues, leading to more potentially wasted litigation expenses.

Whatever litigation costs Bank of America, Wells Fargo and other lenders incur in defending these cases would be completely wasted if this Court were to grant certiorari and reverse the Eleventh Circuit's decision. These costs would also be entirely irreparable, as Bank of America, Wells Fargo, and other lenders could not recoup their wasted costs from the local-government plaintiffs or from anyone else.

Delaying any remand while this Court considers whether to grant certiorari would not prejudice Miami. This case is fundamentally about money damages. Though Miami has claimed, at various times, that it plans to seek some unspecified injunctive relief, it also acknowledged below that the challenged practices have

likely ceased, taking injunctive relief off of the table. *See* Opposition to Motion to Stay Issuance of the Mandate at 3 n.1, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. filed Sept. 9, 2019).

The delay that would result from a stay is particularly irrelevant in the context of these cases. Miami filed these cases nearly six years ago. This Court issued its decision in *Bank of America* more than two years ago. The Eleventh Circuit then waited more than two years to issue its remand decision (a delay that makes the Eleventh Circuit's refusal to stay the mandates for a few additional months particularly remarkable). Moreover, given that discovery has not even begun, it will be years before the parties could complete discovery and go to trial. Given that context, the comparatively minimal delay caused by Applicants' proposed stay would not meaningfully alter this case's timeline, or the nature of the City's recovery—if any.

CONCLUSION

For all of these reasons, Applicants respectfully request that this Court order that the mandates for the United States Court of Appeals for the Eleventh Circuit be stayed pending the filing and disposition of a petition for a writ of certiorari. Because the Eleventh Circuit's mandates are set to issue on October 21, 2019, Applicants also respectfully request that this Court order that the issuance of the mandates be stayed while the Court considers this Application.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants state:

1. Bank of America Corporation is a publicly-held corporation whose shares are traded on the New York Stock Exchange, under ticker symbol "BAC". It has no parent company, and no publicly-held corporation owns more than 10% of Bank of America Corporation's shares.

2. Bank of America, N.A. is a wholly-owned subsidiary of BANA Holding Corporation. BANA Holding Corporation is a wholly-owned subsidiary of BAC North America Holding Company. BAC North America Holding Company is a wholly-owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a wholly-owned subsidiary of Bank of America Corporation, the entity described in paragraph 1.

3. Countrywide Financial Corporation is a wholly-owned subsidiary of Bank of America Corporation, the entity described in paragraph 1.

4. Countrywide Home Loans, Inc. is a wholly-owned subsidiary of Countrywide Financial Corporation, the entity described in paragraph 3.

5. Countrywide Bank, FSB no longer exists; effective April 27, 2009, this entity, which converted its bank charter and became Countrywide Bank, N.A., merged into Bank of America, N.A., the entity described in paragraph 2.

6. Wells Fargo & Co. is a publicly held corporation whose shares are traded on the New York Stock Exchange, under ticker symbol "WFC". It has no

parent company, and no publicly-held corporation owns more than 10% of Wells Fargo & Co.'s shares.

7. Wells Fargo & Co., the entity described in paragraph 6, is the ultimate parent corporation of Wells Fargo Bank, N.A.