No. 19A-429

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

RESPONDENT'S OPPOSITION TO 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:

INTRODUCTION

Asserting the demonstratively false specter of liability in the hundreds of millions of dollars per community and a proliferation of lawsuits, incorrectly asserting the underlying claims are unprecedented, a proposition this Court rejected in this case just two years ago, and unwilling to permit the percolation in the circuit courts that this Court's remand order directed and that is otherwise occurring, Bank of America and Wells Fargo[1] ("the Banks") seek to stay the mandate of the Eleventh Circuit in anticipation of a petition for certiorari. The process of obtaining the views of other circuits should not now be short-circuited just because the banks were disappointed with the answer given uniformly by courts reviewing substantially similar lawsuits. Instead, as this Court determined in 2017, the process of percolation should be allowed to run its course.

As they did in the Eleventh Circuit, the Banks concoct a causal chain of multiple minute steps, that using their methodology even the act of breathing would seem like an extended process under which exhaling would be five steps removed from separating one's lips to begin the process. They also groundlessly accuse the

[1] The application for a stay was filed by two bank groups jointly, whose separate cases were consolidated for review in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). The "Bank of America" group includes Bank of America, N.A., Bank of America Corp., Countrywide Bank, FSB, Countrywide Home Loans, Inc., and Countrywide Financial Corp. The "Wells Fargo" group includes Wells Fargo and Co. and Wells Fargo Bank, N.A.

Eleventh Circuit of ignoring this Court's 2017 decision, but reach that conclusion by relying upon a view of the case not embraced by the decision's majority.

The Banks cannot satisfy the heavy burden necessary to obtain a stay. They argue that certiorari is likely to be granted only because they dislike the Eleventh Circuit's resolution of a question this Court chose not to answer in 2017 before the lower courts tackled the issue. There is no circuit conflict. Instead, the Banks assert that district courts have disagreed about the proximate-cause issue presented, yet ignore the very different legal theories in those cases that fully explain the rulings. Contrary to the Banks' portrayal, there is remarkable unanimity among the lower courts about the proximate-cause standard applicable to causation theory that Miami shares with certain other municipalities that have brought suit.

Meanwhile, the Ninth Circuit will hear oral argument in early 2020 on the precise question and legal theory that the Eleventh Circuit faced, providing this Court with potential agreement or conflict in the circuits. The pendency of the issue there strongly advises against certiorari.

The assertion that this Court would likely reverse the Eleventh Circuit is equally fanciful, for the Banks' argument depends on a highly selective reading of this Court's 2017 decision and a blatant disregard for the statute-specific nature of the proximate-cause inquiry. The Eleventh Circuit, however, carefully parsed this Court's decision and faithfully applied it. Finally, the Banks fail to assert any irreparable damage, as the potential litigation costs they assert are not and cannot be the basis of irreparable damage. On the other hand, in these cases, the Banks have

asserted that they have not engaged in discriminatory practices comparable to those asserted here since at least 2016, proffering a Department of Justice determination in support of the assertion. If true, then no new lawsuits can meet the Fair Housing Act's two-year statute of limitation, and no proliferation of suits will occur.

COUNTERSTATEMENT OF THE CASE

A. Complaint Filed and Dismissed in the District Court.

On December 13, 2013, the City of Miami filed separate detailed Complaints against the two Banks who have jointly applied for a stay, alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 *et seq*, ("FHA"), by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and resulting in significant, direct, and continuing financial harm to the City. Record on Appeal (ROA),[2] Vol. 1, Docket/Tab# 1: Compl. 52-54 ¶¶ 163-64. 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.

As a result of these practices, the Complaint alleged that foreclosures resulted, which meant that property values of the homes and surrounding homes diminished, which translated into a loss of property tax revenues to the City. *Id*. at 45-48 ¶¶ 136-150. Moreover, the Complaint alleged that a Hedonic regression analysis can

[2] As the Applicant Banks did, the City will reference the substantially similar allegations and record in the case against Bank of America.

calculate the City's loss attributable to the Banks' predatory lending practices and separate out other potential causes, as studies have shown. *Id.* at 47, 48 ¶¶ 143-150.

The District Court on July 9, 2014 granted the Banks' motion to dismiss with prejudice with respect to the allegations based on the FHA. 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. *City of Miami v. Bank of Am. Corp.*, No. 13-24506-CIV, 2014 WL 3362348, at *4 (S.D. Fla. July 9, 2014). 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 *5.

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. *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1278 (11th Cir. 2015) ("*City of Miami I*"). Noting that "[n]o case of the Supreme Court or this Court has ever dealt directly with the existence or application of a proximate cause requirement in the FHA context," it rejected a "strict directness requirement" as inconsistent with "Supreme Court and Eleventh Circuit caselaw allowing entities who have suffered indirect injuries—that is, parties who have not themselves been directly discriminated against—to bring a claim under the FHA." *Id.* at 1279, 1281. 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 1282.

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." *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1304 (2017) ("*City of Miami II*"). It 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*. *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 City of Miami II*, 137 S.Ct. at 1304-05.

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

As guidance, the Court did state that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged,'"

but the degree of directness requires reference back to the FHA and "an assessment "'of what is administratively possible and convenient.'" *Id.* at 1306 (citation omitted). Beyond that, the Court declined to "draw the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall." *Id.* Instead, it instructed the "lower courts [to] define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

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

Rejecting the Banks' request that the case be remanded back to the District Court for first application of this Court's new guidance, the Eleventh Circuit asked all parties to file simultaneous briefing. Order, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Feb. 28, 2018). It did not grant the City's request for oral argument, which the Banks opposed. *See* Plaintiff/Appellant's Br., *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. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1264 (11th Cir. 2019) ("*City of Miami III*"). It held that

> Considering the broad and ambitious scope of the FHA, the statute's expansive text, the exceedingly detailed allegata 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.

Id.

The Court explained that "Miami has alleged a substantial injury to its tax base that is not just reasonably foreseeable, but also is necessarily and directly connected to the Banks' conduct in redlining and reverse-redlining throughout much of the City," and, thus, "plausibly bears 'some direct relation' to the claimed misconduct." *Id*. (citing *City of Miami II*, 137 S.Ct. at 1306). In fact, "only the City can allege and litigate this peculiar kind of aggregative injury to its tax base." *Id*. Nonetheless, the Eleventh Circuit held that the "pleadings fall short of sufficiently alleging 'some direct relation' between the Banks' conduct and a claimed increase in expenditures on municipal services," because the "complaints fail to explain how these kinds of injuries—increases in police, fire, sanitation, and similar municipal expenses—are anything more than merely foreseeable consequences of redlining and reverse-redlining." *Id*. In rendering contrary rulings on property tax losses and increased municipal expenditures, the Eleventh Circuit took a careful, pleading-specific approach to the proximate-cause issue on remand. *See id*. at 1271 ("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.").

REASONS TO DENY THE STAY

An application for a stay to a single justice will only be granted "in extraordinary circumstances." *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). In fact, "[d]enial of such in-chambers stay applications is the norm.'"

Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). The three criteria governing a stay pending a petition for certiorari are well-settled: First, "it must be established that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). Second, the Circuit Justice "must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below." *Id.* Third, "an applicant must demonstrate that irreparable harm will *likely result* from the denial of equitable relief." *Id.* (emphasis added).

In addition, a lower court's "conclusion that a stay is unwarranted is entitled to considerable deference." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers) (denying stay).

Applying this criteria, the application for a stay fails.

I. THERE IS NO REASONABLE POSSIBILITY THAT CERTIORARI WILL BE GRANTED.

A. Prior Willingness to Entertain a Question Does Not Mean Certiorari Will Be Granted.

The Banks premise their assertion that certiorari will be granted largely on this Court's previous willingness to consider that question in connection with standing under the FHA in 2017, arguing that the new decision gives further traction to the inquiry. Application 11. However, while answering the standing issue question favorably to the City, the Court explicitly stated that it lacked the benefit, at the time it issued its opinion, of the views of the Eleventh Circuit and other courts of appeals

on "the contours of proximate cause under the FHA" and "how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *City of Miami II*, 137 S. Ct. at 1306. The Eleventh Circuit had recognized that the issue was not one previously addressed. *City of Miami I*, 800 F.3d at 1279.

Nor does a prior grant of certiorari, even in the same case, guarantee further review when a party who thought it had prevailed in this Court seeks review of the remanded case. *See, e.g., Campbell v. State Farm Mut. Auto. Ins. Co*., 98 P.3d 409, *cert. denied*, 543 U.S. 874 (2004); *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009) (dismissing as improvidently granted).

Percolation is a well-recognized device that allows the Court the benefit of the views of the lower courts, so it may determine whether the issue is worthy of review and, then, a sampling of different approaches. *See, e.g.*, *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J.) ("[B]ecause further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.") (concurring in denial of certiorari); *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). As the Court previously determined that percolation is warranted, there is no reason to short circuit the process while other circuits are about to review the same question.

Briefing before the Ninth Circuit is complete in *City of Oakland v. Wells Fargo & Co.*, No. 19-15169, which is slated to be argued early next year.

B. No Circuit Conflict Exists.

There is no circuit conflict, which renders the chances of certiorari remote. *See Blum v. Caldwell*, 446 U.S. 1311, 1316-17 (1980) (Marshall, J., in chambers) (finding it unlikely four justices would vote to grant certiorari in the absence of a circuit conflict). Briefing is complete in the Ninth Circuit in *City of Oakland* where the court will consider the same question on similar allegations after a district court held that proximate cause was met for some of the same reasons later adopted by the Eleventh Circuit and making the same distinction between property tax losses and added municipal expenditures as did the Eleventh Circuit. *See City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 7575537 *1 (N.D. Cal. Sept. 5, 2018). It is likely to be decided before this Court could decide the issue if certiorari is granted in this case, as the Ninth Circuit has asked counsel (the same counsel as for Wells Fargo and Miami here) for their availability for oral argument in February, March, or April 2020. *See* Response to Notice of Case Being Considered for Oral Argument, *City of Oakland v. Wells Fargo & Co.*, 19-15169, ECF No. 51 (9th Cir. Oct. 4, 2019).

Without a circuit conflict, the Banks assert that "at least nine courts" have addressed FHA proximate cause since *City of Miami II*, with what they claim are disparate results in "nearly identical FHA claims with nearly identical causal chains." Application 12. To make the claim, the Banks compare apples and oranges

because the district-court decisions in disagreement with the Eleventh Circuit all involve decidedly different legal theories.

In fact, in every case involving nearly identical claims with nearly identical causal chains, the courts are unanimous. In addition to the Eleventh Circuit, three district courts have rejected motions to dismiss based on similar claims. *City of Oakland*, 2018 WL 7575537 (holding that the statistical analyses alleged in the complaint provide sufficient certainty in tying the damages to the misconduct on a direct basis for the property tax claims); *City of Sacramento v. Wells Fargo & Co.*, No. 218CV00416, 2019 WL 3975590 (E.D. Cal. Aug. 22, 2019) (largely adopting the same analysis as the Eleventh Circuit); *City of Philadelphia v. Wells Fargo & Co.*, 2018 WL 424451 (Jan. 16, 2018) (providing scant analysis but denying the motion to dismiss and Wells Fargo's subsequent Rule 1292(b) motion to appeal the proximate cause determination on an interlocutory basis). Court Order, *City of Philadelphia v. Wells Fargo & Co.*, Case No. 2:17-cv-02203-AB, ECF No. 79 (E.D. Pa. Apr. 5, 2018).

On the other hand, the Banks rely heavily on the different analysis applied by district courts in three cases from Cook County that predated the Eleventh Circuit's decision and were premised on the very different legal theory of equity stripping, rather than property values, which at least one court questioned as even being within the zone of interests of the FHA. *Cty. of Cook v. Wells Fargo & Co.*, 314 F. Supp. 3d 975, 990 (N.D. Ill. 2018).[3] In the Cook County cases, the plaintiff county alleged that,

[3] Miami's claims are indisputably within the zone, as *City of Miami II* established.

through equity stripping, Wells Fargo maximized late charges and ancillary fees through onerous terms to squeeze additional profit out of the mortgages it serviced. By telling borrowers that they need only pay their monthly interest or a set minimum payment while the fees accumulate, the county alleged the Bank acquired what little equity in the home that the borrower had earned, resulting in default. *Id.* at 979. Cook County also offered no statistical analysis that might separate the equity-stripping cause of default from other factors.

Cook County's central claim in these equity-stripping cases was the "equity-stripping practice meaningfully increased the County's costs of administering and processing foreclosures—through the use of the Cook County Sheriff's Office to post foreclosure and eviction notices, serve summonses, and evict borrowers, and the use of the Cook County Circuit Court to process foreclosure suits." *Id.* at 984. The Cook County decisions found that this claim satisfied proximate cause because "default and foreclosure are the inexorable consequences of Wells Fargo's denial of loan modification requests from already-distressed borrowers" and "thus led to additional expenditures by the County, with the same 1:1 correlation present in Lexmark[*Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)]." *Id.* at 986.

On the other hand, the Cook County cases found the claims of property tax losses due to equity stripping too attenuated to meet the applicable proximate cause standard because the complaint did not account for other potential causes of a default or the amount each year that the equity stripping lowered property taxes while the "borrower subject to equity stripping lived in and maintained the property." *Id.* at

988-89. *See also Cty. of Cook v. Bank of Am. Corp.*, No. 14 C 2280, 2018 WL 1561725, at *9 (N.D. Ill. Mar. 30, 2018) (limiting county to claims for foreclosure-processing related expenses on proximate cause grounds); *Cty. of Cook v. HSBC N. Am. Holdings Inc.*, 314 F. Supp. 3d 950, 954 (N.D. Ill. 2018) (same). Thus, the conflict the Banks purport to assay simply does not exist as the cases relied upon by the Banks rest upon a fundamentally distinct theory of liability from Miami's legal theory.

C. No Issue of Great National Importance Is Presented.

The Banks assert that the question they intend to present "is exceptionally important given the number of identically-pleaded cases and massive dollar amounts at stake." Application 13. Yet, since this Court's decision in *City of Miami II*, upholding the standing of municipalities seeking damages for property tax loss and increased municipal expenditures due to FHA violations, no flood of new lawsuits were filed – and the Banks do not bear their burden to demonstrate otherwise. Indeed, during oral argument when this case was previously before this Court, 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.

Instead, they have told courts that they have 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 Banks cannot realistically claim that new lawsuits can still be filed.

The Banks also raise the shibboleth that the cases involve "massive dollar amounts." Application 13. The claim simply has no basis. For support, the Banks only cite their own earlier petition for certiorari, Application 13, and a single outlier complaint filed in 2016 by Cobb County claiming "hundreds of millions of dollars" in damages, Application 13, in a case that has spent most of its existence stayed and which, according to a joint status report filed with the court, anticipates the filing of a new complaint. Joint Status Report, *Cobb Cty. v. Bank of America Corp.*, No. 15-cv-4081, ECF 48 (N.D. Ga. filed Oct. 4, 2019).

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, those of Baltimore and Memphis, were resolved 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). The Banks' claims that cities seek massive damages simply does not withstand scrutiny.

II. REVERSAL OF THE ELEVENTH CIRCUIT'S HOLDING IS HIGHLY DOUBTFUL.

The Banks argue that the Eleventh Circuit "directly reject[ed] the three-Justice concurrence" and should be reversed. Application 2. Of course, the opinion cited, concurring in part and dissenting in part, is not controlling. A clear majority of this Court held that it was up to the lower courts, in the first instance, 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." *City of Miami II*, 137 S. Ct. at 1306. The Banks' focus on the concurrence is misplaced because the majority did not issue a fractured decision. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Rather than ignore or misapprehend this Court's instructions as the Banks suggest, the Eleventh Circuit faithfully applied the majority's guidance to reach two different conclusions based on different claims, understanding that compliance with proximate-cause requirements depend on the nature of the claim and the content of the pleading. That the Banks believe the result to be erroneous, does not provide grounds for certiorari. The Eleventh Circuit carefully parsed and applied this Court's guidance and correctly articulated the relevant considerations. *See* 923 F.3d 1270-75. The Banks appear to believe those considerations were misapplied, yet,

"misapplication of a properly stated rule of law" rarely provides grounds for certiorari. S.Ct. Rule 10.

The fact that the court did not buy the Banks' outlandish reinvention of the complaint to turn a simple causation argument into a multi-step trek does not render the case certworthy, let alone subject to reversal. As the experienced panel held, "the Banks overstate the length of the causal chain by reading the complaints unfavorably to the City, ignoring, among other things, allegations that Bank of America 'fail[ed] to offer refinancing or loan modifications to minority customers on fair terms' and that Wells Fargo 'limit[ed] the ability of minority borrowers to refinance out of the same predatory loans that they previously received from the Bank.'" *City of Miami III*, 923 F.3d at 1276-77. In fact, the court observed that "[a]t the very least there might only be one step between the denial of refinancing and a bank's foreclosing on a property already in default." *Id.* at 1277. The Court further observed, critically, the "Bank counts a reduction in a home's market value and a concomitant tax assessment of that property as comprising two distinct steps in the causal chain," *id.*, when it is plainly a single act.

What the Banks entirely ignore, which the Eleventh Circuit did not, was that this Court defined 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.'" *City of Miami* II, 137 S.Ct. at 1306 (quoting *Lexmark*, 572 U.S. at 133, and *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S.

258, 268 (1992)). Contrary to the Banks' argument, that instruction did not tell the lower courts to apply the proximate-cause standard used in RICO or antitrust cases.

For these reasons, the proposed petition for certiorari is ill-taken and lacks the indicia necessary for certiorari and is highly unlikely to be granted or lead to reversal.

III. THE BANKS FAIL TO RAISE ANY COGNIZABLE IRREPARABLE INJURY.

The only claim the Banks make to irreparable injury is that they "will incur significant litigation expenses from remanded proceedings that would be completely unnecessary if this Court reverses the Eleventh Circuit." Application 21. Yet, this Court is clear that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). Moreover, as the Banks concede, the dispute they wish to raise with this Court involves a prior operative complaint and not the current one that is before the District Court. Application 21. The current operative complaint is subject to a new motion to dismiss but further action in the case has been stayed during the current appeal. Third Amended Complaint, *City of Miami v. Bank of America Corp.*, No. 1:13-cv-24506-WPD, ECF No. 102 (S.D. Fla. Apr. 29, 2016).

The Banks assert that "[d]elaying any remand while this Court considers whether to grant certiorari would not prejudice Miami." Application 22. Yet, this case was filed in December 2013, ROA, Vol. 1, Docket/Tab# 1: Compl., and, in nearly six years, has yet to move beyond a motion to dismiss. For that reason, the City has not yet been able to propound a first set of discovery requests, take even one deposition, or been able to engage in any meaningful litigation to advance the case beyond an

unduly protracted challenge to the pleadings. Moreover, the City's complaint does not seek only monetary damages, but injunctive relief as well. Justice delayed is justice denied here.

CONCLUSION

For the foregoing reasons, the application for a stay pending the filing of a writ of certiorari should be denied.

October 28, 2019

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants state City of Miami is a Florida municipal corporation.