No. 19A429

In the Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,

Applicants,

v.

CITY OF MIAMI,

Respondent.

On Application for Stay

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF MANDATE

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INTRODUCTION

This Court unanimously disapproved Miami's preferred proximate-cause reasoning and set out the correct principles. Three Justices of this Court went further, and applied those principles to Miami's allegations and explained why Miami's "exceedingly attenuated" causal chain did not satisfy the FHA's proximate-cause principles. *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1311 (2017) (Thomas, J., concurring in part and dissenting in part). Miami now straightforwardly rejects these Justices' views as "not controlling" and even "outlandish." Opp. 15, 16. That by itself goes a long way toward showing that a grant and a reversal are likely.

Never mind those three Justices, says Miami—their reasoning is not controlling as a matter of *stare decisis*. But what Miami fails to acknowledge is that the concurring Justices *agreed* with the opinion of the Court—*i.e.*, all eight participating Justices rejected Miami's and the Eleventh Circuit's theory of proximate cause. And while the Court remanded the case, it did so with instructions to apply the same common-law "directness principles" to the FHA as to other statutes. The Eleventh Circuit did not.

Any case in which a lower court fails to follow this Court's instructions for a remand is important, but this case is particularly important given what is at stake. More than a dozen large local governments have suits like these on file—and most are pursuing multiple lenders. Represented by outside contingency-fee counsel, these large jurisdictions seek to recover a substantial share of their nine- or ten-

figure municipal budgets. While Miami conveniently tries to downplay the financial stakes, they are enormous and growing—especially since this Court's decision prompted four more large jurisdictions (Philadelphia, Sacramento, and two Washington, D.C.-area counties) to file new lawsuits. Indeed, Philadelphia, the fifth-largest city in America, filed just two weeks after this Court's decision. While counsel may have learned not to put their nine-figure money demands *in their complaints*, that in no way suggests that they have lowered their sights.

Miami's cases against, and other municipal FHA suits pressing similar claims within the Eleventh Circuit, have been stayed since the middle of 2016. Most of that time was consumed by the court of appeals' two-year delay in producing a lengthy but erroneous opinion. The Court should continue the stay for the modest additional time that will allow it to review the petitions for certiorari, and if it grants them, to reverse.

I. There is a reasonable probability that this Court will again grant certiorari.

As the application explained, the Eleventh Circuit on remand replaced the proximate-cause test that this Court disapproved—"foreseeability"—with one that is, if anything, even broader. Miami does not dispute the breadth of the Eleventh Circuit's holding, but contends that it is not certworthy. Its reasons do not hold up.

First, Miami does nothing to dispute the fundamental conflict between the Eleventh Circuit's application of common-law proximate-cause principles to the FHA, on the one hand, and this Court's (and other courts') application of common-law proximate-cause principles to other federal causes of action, on the other. To

the contrary, Miami embraces it. The single sentence Miami offers in defense merely asserts that this Court "did not tell the lower courts to apply the proximate-cause standard used in RICO or antitrust cases." Opp. 17.

The Court unambiguously held (citing the leading RICO case discussing proximate causation) that "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" 137 S. Ct. at 1306 (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)). On remand, the Eleventh Circuit instead required just a "logical bond"—a relation, but not a direct one. Op. 22, 23. And while the Eleventh Circuit did limit that rule to the Fair Housing Act, as Miami emphasizes, Opp. 6, it did not ground that distinction in any consideration this Court has ever recognized, nor in any consideration that separates the FHA from, say, RICO. The court simply held that there are exceptions, and this should be one. Appl. 17-18. But even if this did fit some exception to the general first-step rule that this Court noted in its opinion, that would not justify disregarding common-law "directness principles" *altogether*. 137 S. Ct. at 1306.

Second, Miami massively and misleadingly understates the nationwide importance of this issue, Opp. 14, suggesting that this issue arises in only a few relatively low-dollar cases. That is demonstrably incorrect: the theory the Eleventh Circuit has blessed is the theory that outside contingency-fee counsel have been advancing on behalf of a number of heavily-populated municipalities or urban-area

counties, looking for recoveries running into the hundreds of millions of dollars. And the number of cases is growing.

Miami says there is "no basis" to assert that these cases involve "massive dollar amounts," Opp. 14, even confronted with pleadings in which the plaintiffs *say* they are seeking nine-figure sums. Appl. 13.[1] Here is more "basis": in mid-2017, Cook County, Illinois, filed amended complaints in three cases in the wake of this Court's decision. Those lawsuits are now actively in discovery, and their operative complaints continue to seek amounts as high as *$1 billion.*[2]

Miami's suggestion that these suits will eventually go the way of the Memphis and Baltimore settlements, which "were resolved for less than $10 million," is a misleading one. Opp. 14. Those cases were resolved more than a decade ago and as part of a larger settlement with the federal government, not one driven solely by outside contingency-fee counsel. And, suffice it to say, Miami is not before the Court stipulating that its cases are worth less than $10 million.

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1 Notably, the complaints filed in the recent Philadelphia, Sacramento, Montgomery County, and Prince George's County FHA cases simply refrain from mentioning any dollar figure at all, as if to avoid public scrutiny over the amount of recovery sought by these municipalities (and their outside counsel).

2 *See* Second Am. Compl., ECF No. 177, at ¶ 399, *Cty. of Cook v. Bank of Am. Corp.*, No. 14-cv-2280 (N.D. Ill. filed July 7, 2017) ("As such, compensatory damages alone in this case may exceed $1 billion. . . ."); Second Am. Compl., ECF No. 106, at ¶ 421, *Cty. of Cook v. Wells Fargo & Co.*, No. 14-cv-9548 (N.D. Ill. filed June 21, 2017) ("As such, compensatory damages alone in this case may exceed $300 million. . . ."); Second Am. Compl., ECF No. 136, at ¶ 346, *Cty. of Cook v. HSBC N. Am. Holdings Inc.*, No. 14-cv-2031 (N.D. Ill. filed July 10, 2017) ("As such, compensatory damages alone in this case may exceed $300 million. . . .").

Miami also says that there has been "no flood of new lawsuits," in part because of the statute of limitations. Opp. 13-14. After *Bank of America*, the municipal governments of four highly populated jurisdictions brought new lawsuits against Applicants here. *City of Philadelphia v. Wells Fargo & Co.*, No. 17-cv-2203 (E.D. Pa. filed May 15, 2017); *see Prince George's Cty. v. Wells Fargo & Co.*, No. 18-cv-3576 (D. Md. filed Nov. 20, 2018); *Montgomery Cty. v. Bank of Am. Corp.*, No. 18-cv-3575 (ECF No. 1) (D. Md. filed Nov. 20, 2018); *City of Sacramento v. Wells Fargo & Co.*, No. 18-cv-416 (E.D. Cal. filed Feb. 23, 2018). The most recent were filed in November 2018—belying the suggestion that the statute of limitations has stanched the flow of new cases. Those (and other) municipal plaintiffs have taken the view that, under the continuing violations doctrine, they are allowed to bring an FHA claim so long as banks continue to service any of the allegedly discriminatory loans, and so long as it remains possible that those loans will go into foreclosure—even if the loans were made long before the two-year limitations window. *E.g.*, *Montgomery Cty. v. Bank of Am. Corp.*, No. 18-cv-3575, 2019 WL 4805678, at *5-*6 (D. Md. Sept. 30, 2019). In short, municipal plaintiffs do not see the statute of limitations as an obstacle.

Third, while the Eleventh Circuit ruling has emboldened some more district courts to allow tax-loss claims like Miami's to go forward, the lower courts remain conflicted on that issue. Three district courts previously dismissed such claims—and, contrary to Miami's representation here, those cases cannot be ignored as "premised on [a] very different legal theory." Opp. 11. Notably, plaintiff's counsel

in those cases do not think so either: after the Eleventh Circuit issued its decision on remand, the plaintiff (Cook County) filed motions for reconsideration in all three of those cases, each representing that its "alleged tax base injury is identical to the injury alleged by the City of Miami," opining that the Eleventh Circuit had "disagree[d]" with the district court, and urging the district court to adopt the Eleventh Circuit's reasoning instead.[3]

The conflict with this Court's decisions on a question of national importance would be a sufficient basis for certiorari. The disagreement among lower courts merely confirms it. Miami suggests that this Court wait to see whether the Ninth Circuit will side with the defense position. But even if that were to happen, there is no reason to think that the plaintiffs' counsel would bring their one loss to this Court rather than continue to litigate around the country, as the decision below and others like it allow them to do.

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.

Three Members of this Court have already examined the complaint under review and concluded that it failed to allege proximate cause. *Bank of America*, 137 S. Ct. at 1311 (Thomas, J., concurring in part and dissenting in part). *No* Member of this Court suggested that Miami's complaint, as written, satisfied the proximate-cause standard—even though Miami had urged the Court to affirm on that basis. *See* Br. for Resp. 50-57, *Bank of America* (No. 15-1111). While the Court's opinion

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[3] *E.g.*, Pl.'s Mot. for Reconsideration at 2, 10, ECF No. 224, *County of Cook v. Wells Fargo & Co.*, No. 14-cv-9548 (N.D. Ill. filed June 4, 2019).

remanded on that question, there is certainly a "fair prospect" that a majority of the Court will take the same view three Justices have already taken—especially since that view is consistent with how the Court has applied proximate cause under other statutes that, like the FHA, have "common-law origins." 137 S. Ct. at 1306. Miami's defense of its complaint, and of the Eleventh Circuit's remand decision, depends on this Court's willingness to adopt a view of proximate cause broader than anything this Court has ever applied in any other case.

Even if the only indication of the likely outcome were the Court's opinion remanding to the Eleventh Circuit, the decision on remand is not consistent with that remand instruction, as already explained. Briefly, the Court instructed the Eleventh Circuit that it needed to examine the complaint for "some *direct* relation" between the claimed FHA violation and the claimed injury. 137 S. Ct. at 1306 (emphasis added). And as already explained, p. 3, *supra*, the Eleventh Circuit instead parsed this Court's words at length and came up with a formulation that—quite literally—reads out the word "direct" entirely. The Eleventh Circuit's test comes straight from the dictionary definition of the word "relation." *See* Op. 22 (quoting *Webster's Third New International Dictionary* 1916 (2002)). As this Court has aptly quoted, "everything is related to everything else." *Maracich v. Spears*, 133 S. Ct. 2191, 2200 (2013) (citation omitted). Thus, without the modifier "direct," that test is not the test this Court adopted unanimously in order to avoid imposing liability for an FHA violation wherever "ripples of harm" may "travel." 137 S. Ct. at 1306 (citation omitted).

Whatever may be said of Miami's proposed causal chain, it plainly is not "direct." Like the Eleventh Circuit, Miami quibbles with how to describe particular steps and tries to collapse a few of them. Opp. 16. But it cannot skip over these key points: Not every default leads to foreclosure. Not every foreclosure leads to vacancy, much less blight. Not every vacancy lasts long enough to depress property value. And not every decline in one property's value also depresses the *neighbors'* property values—but it is the alleged decline in neighbors' property values that makes up the lion's share of Miami's claim. Miami must show that the chain of causation reaches from the loan office all the way to the neighbors' homes, and so on to the municipal treasury.

Miami calls this an "outlandish reinvention of the complaint." Opp. 16. But this is exactly how the concurring Justices read the face of the complaint, 137 S. Ct. at 1311—indeed, it is the *only* way to read the complaint. And "[i]n light of this attenuated chain of causation, Miami's asserted injuries are too remote from the injurious conduct it has alleged." *Id.* at 1311-1312.

III. Staying the mandate will not prejudice Miami and will avoid significant and unrecoverable litigation expenses.

Miami addresses the equities only briefly and does not dispute the key points: Miami *agreed* to the stays that have been in place since certiorari was granted in June 2016. *See* No. 1:13-cv-24506-WPD, ECF No. 127 (S.D. Fla. filed July 6, 2016); No. 1:13-cv-24508-WPD, ECF No. 101 (S.D. Fla. filed June 30, 2016). If a stay is denied and this case resumes, so will at least seven other municipal FHA cases pending within the Eleventh Circuit, all of which have been stayed pending

proceedings in this case. Appl. 22. Discovery in a case of this sort is highly expensive. Appl. 21-22. And the defendants—including other lenders in addition to Bank of America and Wells Fargo—could not recoup their litigation expenses if this Court holds, as it should, that these cases never should have survived the pleading stage.

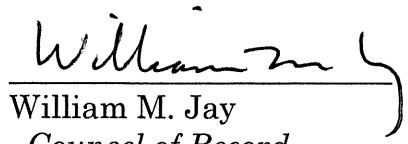
Seeking to give some urgency to the district-court proceedings, Miami notes that its complaint sought injunctive relief. Opp. 18. But as the stay application pointed out, Miami acknowledged below that the challenged practices have likely ceased. *See* Opposition to Motion to Stay Issuance of the Mandate at 3 n.1, *City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. filed Sept. 9, 2019); Appl. 22-23. Miami does not respond.

A modest further extension of the stay would permit this Court to consider petitions for certiorari that, if granted, could bring an end this litigation. The most equitable course is to grant that stay rather than require the parties—in this case and others—to bear the cost of resuming litigation while this Court considers whether these cases have any future at all.

CONCLUSION

For all of these reasons, and those presented in the application, the mandates of the United States Court of Appeals for the Eleventh Circuit, issued on October 22, 2019, should be recalled and stayed pending the filing and disposition of a petition for a writ of certiorari.

Respectfully submitted,



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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the Application remains accurate.