No.

IN THE

Supreme Court of the United States

CITY OF MIAMI GARDENS,
Petitioner,
v.
WELLS FARGO & CO.,
AND
WELLS FARGO BANK, NA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), this Court held that when a plaintiff receives neither proper notice that its standing is being questioned nor an opportunity to produce the requisite evidence, that *sua sponte* dismissal on Article III standing grounds violates "elementary principles of procedural fairness." All circuits, save the Eleventh Circuit in this and several other cases, adhere to the underlying idea that plaintiffs should have an opportunity for discovery and provide evidence if summary judgment is sought on issues of standing. Here, the Eleventh Circuit *sua sponte* raised the issue of injury-in-fact to ascertain Petitioner's standing for the first time after briefing was completed on an appeal of a partial summary judgment motion directed at the statute of limitations and for which discovery had been limited solely to the limitations issue, thereby denying Petitioner an opportunity to obtain evidence pertinent to the Eleventh Circuit's *sua sponte* inquiry.

This Petition presents the following issue:

Whether, by raising standing *sua sponte* at oral argument in an appeal concerning a partial summary-judgment decision focused solely on the statute of limitations and where discovery was limited to that purpose, the Eleventh Circuit's decision dismissing this case, conflicts with this Court's binding precedent in *Alabama Legislative Black Caucus* and violates due-process in conflict with decisions of this Court and sister circuits.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Miami Gardens respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinions of the Eleventh Circuit denying rehearing en banc is reported at 956 F.3d 1319 and included in the Appendix ("App.") at 2a-21a. The opinion of the panel of that court is reported at 931 F.3d 1274 (App. 22a-66a). The district court's order and opinion is reported at 328 F.Supp.3d 1369 (App. 67a-95a).

JURISDICTION

The Eleventh Circuit entered judgment July 30, 2019. App. 22a. The City of Miami Gardens timely petitioned for rehearing en banc, which was denied with accompanying opinions on April 27, 2020. App. 2a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provision of the Federal Rules of Civil Procedure are reproduced below:

Rule 26

* * *

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

INTRODUCTION

In *Bank of America Corp. v. City of Miami*, 137 S.Ct. 1296 (2017), this Court confirmed that municipalities have statutory standing under the Fair

Housing Act (FHA), 42 U.S.C. § 3601 *et seq*., to pursue compensation for lost property taxes resulting from discriminatory mortgage lending. While that case climbed the appellate ladder, this case, brought under the same theory by Miami Gardens, was pending.

Originally, Wells Fargo attacked Miami Garden's standing based on the pleadings. *City of Miami* foreclosed that challenge. Wells Fargo then insisted Miami Gardens could not pursue its continuing-violation claim unless it first proved the Bank had made a discriminatory loan within the FHA's limitations period, had foreclosed on the loan, and the City lost tax revenue from that loan. To that end, it sought to limit discovery to limitation-period loans.

The City objected to Wells Fargo's theory and the discovery limitations. It argued *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982), rejected that "wooden" approach to an FHA continuing-violation, that limitation-period loans were too recent to demonstrate those effects, and that earlier similar loans could provide a robust analysis of statistical disparities in the Bank's lending. Nonetheless, the district court granted the Bank's motion, strictly curtailed discovery to limitations-period loans, and, after multiple stays while Miami's case proceeded through appeals, adopted Wells Fargo's theory and granted its partial summary judgment motion, which ended the case.

The City appealed, and the Eleventh Circuit agreed that Wells Fargo's argument reflected a "flawed premise." Still, the Eleventh Circuit asked *sua sponte,* that the City at oral argument point to record evidence of Article III injuries flowing from the earlier loans. Even though neither Wells Fargo or the district court had raised Article III standing after *City of Miami* settled the pleading standard, the City

objected to the significantly curtailed discovery that had to be completed within an extraordinarily short 31-day discovery period, and the district court rejected repeated the City's attempts to extend discovery, the Eleventh Circuit ruled that the City's standing would be evaluated on the summary-judgment standard, rather than the pleading standard, and that standing was lacking because of insufficient record evidence. Notably, the necessary evidence to establish injury-in-fact related to prior loans and existed in the sole possession of the Bank. Miami Gardens had no means to establish standing without it.

Although rehearing en banc was denied, the dissenting judges found that the panel's *sua sponte* action violated this Court's mandatory precedent in *Alabama Legislative Black Caucus*, because it did not comport with elementary principles of procedural fairness. Certiorari is warranted to uphold the principles announced in *Alabama Legislative Black Caucus* and assure that case's central holding is not evaded through specious distinctions.

STATEMENT OF THE CASE

I. The Complaint.

On June 13, 2014, the City of Miami Gardens (City) filed a detailed and comprehensive sixty-six-page complaint alleging that Wells Fargo & Co. and Wells Fargo Bank, N.A. (Wells Fargo or Bank) violated the FHA by issuing discriminatory mortgage loans to minority borrowers, resulting in an excessive number of defaults and foreclosures by minority borrowers and direct, significant, and continuing harm to the City. The Complaint alleged both disparate impact and treatment theories of liability. Doc. 1. The district court dismissed without prejudice a First Amended Complaint because the court deemed

that the degree of specificity violated Fed. R. Civ. P. 8(a)(2)'s short, plain, and concise mandate. Doc. 28. The Third Amended Complaint (TAC) is the operative pleading. Doc. 38.

The TAC alleged that minority borrowers received more expensive loans than similarly situated white borrowers and that since 2004 Wells Fargo had steered minority borrowers to more costly loans than they could afford. When a minority borrower sought to refinance, Wells Fargo either refused to extend credit at all or offered more onerous terms than comparable non-minority borrowers, the differences being evident through a regression analysis. *Id*. at ¶¶ 1, 2, 3, 5-7, 8, 41-42, 48, 50-51, 55. Additionally, the TAC included allegations regarding Wells Fargo's discriminatory lending practices from three former Wells Fargo employees. *Id*. at ¶¶ 21-38.

In the TAC, the City preliminarily identified hundreds of discriminatory loans Wells Fargo issued to minorities in Miami Gardens between 2004-2012, using publicly available data and principles of extrapolation, that resulted in the commencement of foreclosure proceedings. The City further alleged that it incurred damages resulting from the discriminatory practices associated with those loans. *Id*. at ¶¶ 50-61, 65-67, 68-74. The TAC identified, based upon the limited publicly available data, that at least four similarly discriminatory loans Wells Fargo issued during the limitations period. *Id*. at ¶ 76.

II. Discovery.

Wells Fargo moved to dismiss. Doc. 43. While that motion was pending, on December 4, 2015, Wells Fargo moved for an expedited briefing schedule on a partial summary judgment motion focused on whether the City's case is barred by the FHA's statute

of limitations and asked that discovery be limited solely to loans issued during the two-year limitations period. Doc. 54. The Bank's motion proposed completion of discovery by February 19, 2016 and the filing of partial summary judgment by February 29, 2016. Doc. 54-1.

The City opposed the motion, arguing that it had pleaded a continuing violation so that Wells Fargo's lending practices could not be viewed solely with respect to the previous two years. Doc. 58. The City further argued that the TAC included a claim for disparate impact dating back to 2004, the proof of which cannot be established based solely upon examination of a limited and truncated analysis of loans issued during the limitations period. *Id*. Various stays put the case and the discovery issues in abeyance, as appeals were made in similar cases within the district. When the stays were lifted, the district court granted Wells Fargo motion to bifurcate discovery, specifically limiting "discovery on the narrow issue of whether there were loans during the two-year statute of limitations." App. 71a. Over the City's objection, the district court issued a Scheduling Order on January 19, 2016, setting a February 19, 2016 deadline to complete all discovery "related to loans originated between June 13, 2012 and June 12, 2014" and stayed all other discovery. Doc. 61. The Court further set a February 29, 2016 deadline for Wells Fargo to file its motion for partial summary judgment and a deadline of July 15, 2016 for the City's expert disclosures and reports. The new schedule limited discovery to 31 days.

Although the City served a request for production, interrogatories, a request for admissions, and deposition notices within a day of the Scheduling Order, January 20, 2016, Wells Fargo's response on January 25, 2016 was to produce just one document –

a spreadsheet containing loan data. Subsequently, on January 29, 2016, Wells Fargo produced a second document – another spreadsheet containing loan data. On February 17, 2016, two days before the close of discovery, Wells Fargo produced 48 additional documents, and then on the following day, Wells Fargo produced 263 documents, for a total of 313 documents. Doc. 181-2:3-6. On the last day of discovery, Wells Fargo served its formal responses and objections to the City's first set of RFPs. Doc. 181-4. The Bank produced only five emails and never produced a privilege log, minutes, or notes concerning any meetings, borrower files, documents reflecting contemporaneous analysis of particular borrowers or loans, or documents reflecting communications among employees or with borrowers about specific loan terms. Doc. 181-2.

Despite the paucity of documents, the City took three depositions of Wells Fargo employees on February 15 and 16, 2016 without the benefit of any documents due to the imminent discovery deadline and Wells Fargo's failure to produce to that point. Doc. 181-4. The lack of documents affected the City's ability to take meaningful depositions. On January 29, 2016, the City moved, unopposed, for a 30-day extension of the discovery deadline. Doc. 67. The district court never ruled on this motion. After the close of discovery, the magistrate judge assigned to the case denied the City's request to extend the discovery period during a hearing. Doc. 84, p. 34.

III. The Summary Judgment Record.

The magistrate judge held a hearing on summary judgment (Doc. 138), but issued no report and recommendation. Subsequently, on June 12, 2017, the district court vacated its order referring the motion for partial summary judgment to the magistrate. Doc.

168. The district court never conducted a hearing on the motion despite an order on July 24, 2017 that "[t]he Court will conduct oral argument." Doc. 190.

A. Wells Fargo's Evidence.

Wells Fargo moved for summary judgment premised to a significant degree upon the Rule 30(b)(6) testimony of two City employees, the City Manager and the Community Development Director, and the report of the Bank's data expert, Dr. Bernard Siskin, who opined that none of the four loans the City identified during the limitations period violated the FHA and that various credits and promotional offerings explained the difference between interest rates for the minority and non-minority borrowers identified.

With regard to the Rule 30(b)(6) employees, Wells Fargo relied upon the failure of these individuals to provide deposition testimony specifically identifying: (1) any loans deemed "predatory;" (2) information concerning whether any borrower during the limitations period might have been eligible for more favorable and less expensive loans; (3) minority borrowers who received loans made on different terms than those made to white borrowers; (4) information to support the allegations in the TAC identifying four predatory loans issued during the limitations period; and (5) whether complaints were made to the City by any of the 153 borrowers. Doc. 87, ¶¶ 8-11, 14 (filed under seal).

B. The City's Evidence.

The City's evidence consisted of an expert report from Professor Ian Ayres, who, using a regression analysis, identified matched pairs of loans within the limitations period. He concluded that minority

borrowers received more expensive/riskier loans of the same type from the Bank than did similarly situated non-minority borrowers, and testimony from a former Wells Fargo employee who described the culture at the Bank and his own experiences that created pressure to put minority borrowers into unfavorable loans. Even controlling for different credits that the borrowers received, assuming that the same options were offered to all borrowers, the loans to minority borrowers were more expensive than the nonminority loans, Ayres concluded. Doc. 92, Ex. A, Doc. 208, Ex. A.

IV. Events Subsequent to the Summary Judgment Hearing Before the Magistrate Judge.

Prior to ruling on summary judgment, on June 30, 2016, the court issued an order placing the case in suspense pending the completion of proceedings before this Court in what became *City of Miami*. After the court re-opened the case on May 4, 2017, Wells Fargo re-filed its motion for summary judgment (Doc. 162), and the City submitted a notice that it was re-filing certain motions pending when the court placed the case in suspense. Doc. 193 (filed under seal).

Thereafter, on June 13, 2017, the City filed its Motion to Strike Wells Fargo's Re-Filed Motion, or in the Alternative, Allow for Additional Discovery pursuant to Federal Rule of Civil Procedure 56(d). Doc. 169. Two days later, the district court vacated his order referring the summary judgment motion to the magistrate judge. Doc. 170. On July 18, 2017, the City filed a Motion to Compel Responses to the First and Second Requests for Production of Documents (the first set was propounded on January 20, 2016, and the Second Set on May 19, 2017). Doc. 181. On July 24, 2017, the district court denied the City's motion to

strike or compel discovery responses and stayed discovery pending resolution of the summary judgment motion. Doc. 190.

On January 2, 2018, the Court issued an order setting a trial date of May 14, 2018. Doc. 216. In response thereto, on January 17, 2018, the City filed a Renewed Motion to Compel Discovery Responses and Lift the Discovery Stay (Doc. 211), which the Court denied on January 31, 2018. Doc. 215. On January 9, 2018, the City filed a Renewed Motion Requesting Leave to File a Nine Page Supplemental Report from its expert, attached to the motion as Exhibit A (Doc. 208), which was granted on January 11, 2018. Doc. 209.

On June 29, 2018, the district court issued an Order Granting Summary Judgment. Doc. 222.

V. The Summary Judgment Order.

The order granting the Bank's summary judgment motion held that no discriminatory loans were issued within the limitations period, credited the testimony of the Bank's expert over the City's expert, discounted the matched pairs identified by the City's expert, held that the City's reliance on a former Wells Fargo employee's declaration, even if the court had not struck it, was insufficient to convince a reasonable jury, and, ultimately, that the City had not made out a *prima facie* case of discrimination. App. 80a-93a.

To reach these conclusions, the district court declared that the identification of two loans within the limitations period that exemplified the discrimination complained of over an eight-year period "is insufficient record evidence to show the policies produced 'statistically-imbalanced lending patterns" and thus "fails to show a violation of the Fair Housing

Act during the limitations period under a disparate impact theory." App. 85a-86a.

It also found the disparate-treatment evidence insufficient because it held that the matched pairs proffered by the City's expert, which underwent a regression analysis that accounted for differences based on incentives the Bank offered some borrowers, need to be "nearly identical" in its loan details and insufficient to demonstrate racial discrimination. App. 90a-92a.

VI. The Eleventh Circuit's Decision.

The City appealed, arguing that the district court erred in granting summary judgment on claims properly evaluated as continuing violations under the FHA, especially when the court improperly limited discovery and proof to the two-year period prior to the filing of the Complaint and so truncated the discovery process that the Bank could withhold mandatory discovery without penalty. The City further argued it was error to hold that the disparate-impact claim could not be pursued because of the small number of disputed loans in that two-year limitations period and to rule the disparate-treatment claim failed by examining only two loans, rather than the entire body of similar loans. It further argued that the court erred in assigning more weight to Wells Fargo's expert than the City's expert, rather than allowing a jury to reach a decision, given the court's findings that both parties' experts passed the gatekeeper threshold and thus were eligible for presentation to the trier of fact, as well as requiring the City's Rule (30)(b)(6) representative to have knowledge of the expert's findings and conclusions before the expert had received discoverable data from Wells Fargo.

On May 30, 2019, two weeks before oral argument took place on June 14, the court sent counsel a letter asking them to be prepared to address whether the record contained "sufficient evidence of an injury caused by Wells Fargo's conduct to satisfy the requirements of Article III, regardless of when that injury occurred," a question the court raised *sua sponte*.

The subsequent *per curiam* decision rejected Wells Fargo's statute of limitations argument, agreeing with the City that the argument rests on a "flawed premise" that "the City has standing only if it suffered an injury that was caused by a loan originated during the limitation period." App. 36a. The panel held that that the Bank's position, which had been accepted by the district court, "conflates the *constitutional* requirements of standing with the *statutory* requirement of timeliness." *Id.* (emphasis in orig.). The opinion continued:

> an injury need not occur as a result of conduct that occurred within the timeframe provided by the statute of limitations applicable to the plaintiff's cause of action to satisfy those requirements. The City has standing so long as one of the loans challenged as discriminatory has caused or will cause the City to suffer a *de facto* injury redressable by favorable decision.

> Whether a complaint about that loan or loans would be timely is a separate issue.

Id.

The court then turned to the question it posed *sua sponte*. It acknowledged that the district court had said, in response to a request for further discovery, that the "district court reiterated that the only merits issue to be considered on summary judgment was whether the City could satisfy the statute of limitations." App. 30a.

It held that, because courts have an independent obligation to examine their own jurisdiction, standing, examined at the summary-judgment stage was an appropriate question to raise, and that mere allegations in the complaint would not suffice. App. 34a-35aa. It held that the City should have anticipated the standing question it raised and requested discovery that went to that question. In the absence of discovery, the City's ability to point to the delinquency of one of the matched loan pairs in its expert report and ten loans that originated before the limitations period, which had been attached both to the City's complaint and to the expert report, were insufficient to confer standing because any injury from those loans were not imminent, but "conjectural or hypothetical." App. 37a. It held that the City was obligated to produce more evidence than that.

The panel rejected the City's argument that, because summary judgment and the related discovery was limited to the limitations issue and the City's requests for expanded discovery into earlier loans were rejected, the standing issue remained at the motion-to-dismiss stage, where the City's allegations were sufficient. It instead held that "the scheduling order was not to bar the parties from raising

jurisdictional issues on summary judgment," because the panel would not impute to the district court an abdication of its obligation to assure its own jurisdiction. App. 39a. It further held that Wells Fargo's summary judgment motion related to the limitations period was framed in terms of standing and, even if mislabeled, should have prompted the City to seek discovery on its injuries from earlier loans. App. 40a.

The panel distinguished this Court's holding *Alabama Legislative Black Caucus*, and the Eleventh Circuit's own similar holding in *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994) as applying to a *district court* and its too-early *sua sponte* requirement of proof of standing without an opportunity for discovery, rather than an appellate court's similar request years into the litigation. App. 42a.

Judge William Pryor, joined by one member of the panel, filed a concurrence, expressed the belief that "it would be difficult to overstate how misguided this litigation has proved to be. For example, even if we had jurisdiction to decide the merits of this appeal, we would have to agree with the district court that Wells Fargo is entitled to summary judgment." App. 47a. The concurrence went through the limitations period evidence in the record and found it too statistically insignificant to demonstrate a violation, holding that the proper standard to invoke the continuing-violation doctrine is to prove first "*a violation* of the Act occurred in the limitation period," rather than "at least one loan in the [limitation] period that exemplifies the discriminatory practice pleaded by the City." App. 65a (emphasis and ellipsis in orig.).

VII. Petition for Rehearing En Banc.

The City timely petitioned for rehearing en banc on September 13, 2019, after receiving an extension of time. Eight-and-a-half months later, on April 27, 2020, the Eleventh Circuit denied the petition, "a majority of the Circuit Judges who are in regular active service having voted against it." App. 3a.

Still, Judge Pryor, joined by members of the original panel, wrote a concurrence, defending the decision from the dissenters' criticisms. The concurrence reiterated that the City should have requested discovery going to the Article III injury-in-fact issue even if the district court had limited discovery to loans during the limitation period over the City's objection, because standing had been discussed in the parties' meet and confer months earlier, even if not part of the summary-judgment inquiry. App. 6a. The concurrence provided additional reasons to distinguish the Eleventh Circuit's decision in *Huntsville* – that the issue there was a preliminary injunction, justifying a "more lenient standard" than applicable in the present case. App. 9a. The concurrence also called *Alabama Legislative Black Caucus* "inapposite," because that "plaintiff had introduced evidence that led to at least a 'common sense inference' that it had standing, [and] neither the defendant nor the district court challenged the basis of that inference." App. 10a. Here, the concurrence said, the City failed, when given the opportunity at oral argument, to create an inference or to explain how discovery would do more than provide "statistical analysis" that the concurrence dismissed as requiring the court "to speculate about how that analysis would turn out." App. 14a.

Judge Wilson, joined by Judge Martin, dissented from the denial of rehearing en banc. The dissent

likened what the panel had done to a "teacher who takes away a student's pencils before a test, refuses to give them back, and then gives the student a failing grade when she turns in a blank page. That is simply not fair." App. 19a. It said that the *sua sponte* dismissal on standing grounds occurred "even though the City received neither proper notice that it failed to prove standing nor a legitimate opportunity to discover or produce the requisite evidence." App. 15a.

The dissenters found that the "panel's decision clearly conflicts with *Alabama Legislative Black Caucus*," which scored a similar *sua sponte* dismissal without an opportunity for discovery as "violat[ing] 'elementary principles of procedural fairness.'" App. 15a-16a. The dissent noted that, as in *Alabama Legislative Black Caucus,* Wells Fargo's attack on the City's "standing" "was off-base too because it focused on the 'statutory requirement of timeliness'—i.e., the statute of limitations—rather than 'the constitutional requirements of standing,'" as the original panel found. App. 17a (quoting App. 36a). Thus, "as in *Alabama Legislative Black Caucus*, Wells Fargo's meritless argument failed to put the City on notice that it needed to demonstrate that it met the *constitutional* requirements of standing." App. 17a (footnote omitted).

The dissent called the panel's attempt to distinguish the "nearly identical circumstances" of *Alabama Legislative Black Caucus* "demonstrably wrong." App. 20a n.2. To the dissenters, if there was any difference between the two cases, it is that the City received even *less* opportunity for discovery in its case. It stated, "unlike in *Alabama Legislative Black Caucus*, the City of Miami Gardens had no opportunity to prove its standing, much less the opportunity of a trial. Not only that—despite its

repeated requests, the City never even got the necessary discovery to prove its standing, something the *Alabama Legislative Black Caucus* plaintiff didn't need." App. 17a.

The dissent noted that to prove its injury of reduced property taxes attributable to discriminatory Wells Fargo loans, "the City first needed to identify more FHA-violative loans by Wells Fargo dating years before the statute-of-limitations period . . . from Wells Fargo's database." *Id.* The dissent further noted that, "[h]ere, unlike in *Alabama Legislative Black Caucus*, the defendant Wells Fargo controlled the evidence the City needed to prove its Article III standing." *Id.* Reviewing the record, the dissent said,

> the City never got that discovery. Not after it objected to the initial discovery limitation and stay. Not after it argued time and again for full discovery. Not after its motions to compel full discovery. Not ever.

App. 18a.

Because the issue was only raised after briefing was completed and shortly before oral argument, the dissent also criticized the panel's decision for treating oral argument as though it was a "legitimate opportunit[y] for the City to produce evidence of its standing. But briefing and oral argument are no substitutes for discovery." *Id.* It concluded that the process used to dismiss the City's case "was simply not fair," and in conflict with A*labama Legislative Black*. App. 19a, 18a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW RAISED INJURY-IN-FACT STANDING *SUA SPONTE* WITHOUT FAIR NOTICE, IN CONFLICT WITH THIS COURT'S DECISION IN *ALABAMA LEGISLATIVE BLACK CAUCUS V. ALABAMA*.

A. *Alabama Legislative Black Caucus* Requires Fair Notice and an Opportunity to Discover Relevant Evidence before a Court May Dismiss a Case *Sua Sponte* on Standing.

In *Alabama Legislative Black Caucus*, a three-judge district court raised Article III standing *sua sponte* after a full trial. It held that the plaintiffs, having put no evidence into the record about its individual members and the legislative districts in which they resided, had failed to establish associational standing to challenge newly drawn district lines or racial-gerrymandering in the state as a whole. *See* 575 U.S. at 268-69. Unrebutted testimony described the plaintiff-association as having members in nearly every Alabama county, but the district court deemed this evidence insufficiently specific about having members in the challenged districts, because counties could contain multiple districts within them. *Id*. at 269.

This Court disagreed. It held that the testimony about statewide membership supports, "[a]t the very least, [a] common sense inference … strong enough to lead the Conference reasonably to believe that, in the absence of a state challenge or a court request for more detailed information, it need not provide additional information such as a specific membership

list." *Id*. at 270.

Acknowledging that while a court has "an independent obligation to confirm its jurisdiction, even in the absence of a state challenge," this Court held that "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence." *Id*. at 270-71.

B. The Facts and Circumstances Here Match Those That Gave Rise to the Holding in *Alabama Legislative Black Caucus*, Placing the Decision Below in Clear Conflict with that Precedent.

As Judge Wilson wrote on his own behalf and for Judge Martin, dissenting from the denial of rehearing en banc, the "panel's decision clearly conflicts with *Alabama Legislative Black Caucus*." App. 15a. He went on to say "[i]f 'elementary principles of procedural fairness required that the [court], rather than acting *sua sponte*, give the [plaintiff] an opportunity to provide evidence' supporting its standing there, they do even more so here." App. 16a (quoting *Alabama Legislative Black Caucus*, 575 U.S. at 271).

Judge Wilson accurately described the case's procedural posture as consisting of "nearly identical circumstances," except that, "despite its repeated requests," the City "had no opportunity to prove its standing, much less the opportunity of a trial." App. 20a n.2, 17a (emphasis added). The district court limited discovery to the issue raised by Wells Fargo, whether the complaint was timely. Even so, the City asked for discovery of loans issued by Wells Fargo

within its boundaries outside the limitations period, because it would provide more robust statistical analyses and allow the City to show that loans within the limitations period were discriminatory in the same manner as those before it, thereby constituting a continuing violation. The City was denied this evidence.

As Judge Wilson accurately put it,

> the City never got that discovery. Not after it objected to the initial discovery limitation and stay. Not after it argued time and again for full discovery. Not after its motions to compel full discovery. Not ever.

App. 18a.

The only standing argument that Wells Fargo made in the district court was based on the statute of limitations, which is very different from the Article III standing argument than the Eleventh Circuit raised *sua sponte*. The Bank argued that the City lacked standing because no discriminatory loans were issued during the limitations period, challenging the City to identify at least one loan that was more expensive and/or riskier for minorities than a similarly situated non-minority borrower *and* that, within that two-year period, had caused injury to the City.[1] The Eleventh Circuit dismissed Wells Fargo's position, which it continued to argue on appeal, as "rest[ing] on a flawed premise" and "conflat[ing] the constitutional requirements of standing with the statutory

[1] The City had pleaded that it normally takes more than three years for a discriminatory loan to result in foreclosure and thereby deprive the City of property tax revenue. Doc. 38, ¶ 49.

requirement of timeliness." App. 36a. Nonetheless, it held that this mislabeled Article III argument was sufficient to provide the City with fair notice that its Article III standing was being questioned at the summary-judgment stage, rather than the motion-to-dismiss stage.

Yet, as *Alabama Legislative Black Caucus* made clear, a challenge to standing premised on an erroneous legal theory fails to provide the requisite notice. 575 U.S. at 270. Because the *Alabama Legislative Black Caucus* argument did not challenge standing as the court did, just as is the case here, and despite "an independent obligation to confirm its jurisdiction, even in the absence of a state challenge," *id*., this Court held "elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence." *Id*. at 271.

Because the Bank's challenge here did not suggest that the City had to provide evidence from the loans issued outside the limitations period of foreclosures and lowered property taxes (and actually opposed inquiry into earlier loans) and because, despite the City's opposition to the limitation and request for broader discovery, the district court limited discovery to the limitations period loans, the City had no basis to believe it needed to seed the record with injuries from loans that preceded the limitations period, which was information that would be subject to discovery and record evidence once Wells Fargo's partial summary judgment motion was denied for its "flawed premise."[2]

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[2] As Judge Wilson's dissent further noted, App. 19a n.1, the decision below was also a departure from the Eleventh Circuit's own precedent of *Huntsville*, which

While *Alabama Legislative Black Caucus* found the association's proffer of testimony that it had members in every county, even if districts were not county-based, allowed a common-sense inference in support of Article III standing, the Eleventh Circuit refused to credit the City's unrebutted evidence of ten properties that it asserted were exemplary of those saddled with discriminatory loans that had suffered diminishing property values according to regularly maintained government records and which was attached to its complaint (Doc. 38-1), and its expert report (Doc. 92, Ex. A, at 67), where its significance was discussed (Doc. 92, Ex. A, ¶ 52).

The panel, however, reasoned that the chart of the ten properties with property values dropping over time, leading to foreclosure, did the City "no good" because the "City did not produce any evidence of the effect of these foreclosures on property-tax revenues or municipal spending." App. 38a. Unlike *Alabama Legislative Black Caucus*, the panel refused to credit the natural implication that dropping property values mean lowered property tax revenues.

The decision also disputed the relevance of

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anticipated *Alabama Legislative Black Caucus,* by holding that a defendant's failure "to question the plaintiffs' standing in the district court does affect the standard to which we will hold plaintiffs at this stage of the proceedings." *Huntsville*, 30 F.3d at 1336. While it is "not unfair to require every plaintiff to file a complaint which contains sufficient allegations of standing and to prove standing at trial," it may "well be unfair, however, to impose a standing burden beyond the sufficiency of the allegations of the pleadings on a plaintiff seeking a preliminary injunction, unless the defendant puts the plaintiff on notice that standing is contested." *Id*.

Alabama Legislative Black Caucus because it believed that "Wells Fargo actively contested the City's proof of injury and causation." App. 43a. However, as the Eleventh Circuit's opinion concedes, Wells Fargo erroneously challenged only that the City had could proceed "only if it suffered an injury that was caused by a loan originated during the limitation period." App. 36a. The panel mistakenly credited a broader challenge to a single paragraph in the Wells Fargo partial summary judgment motion that did nothing more than indicate the standard by which summary judgment is determined. App. 40a. The substantive paragraph of the Bank's motion and argument, however, limited its challenge to satisfying the statute of limitations. Because Wells Fargo did not actively contest the City's Article III standing on the basis raised by the panel, the case is indeed exactly like *Alabama Legislative Black Caucus*, as Judge Wilson's dissent stated. App. 20a n.2.

The Eleventh Circuit also inaptly distinguished *Alabama Legislative Black Caucus* as applying only to a district court and only to the early stages of a case. App. 42a. However, that characterization of *Alabama Legislative Black Caucus* robs it of its central holding. The case was not about more limited authority residing in a district court, but about *fundamental principles of fairness* embodied in due process where courts raise an issue of standing independently and not fairly joined at that point of the proceedings when the plaintiff has had no opportunity to put in material evidence or engage in discovery. Those factors were plainly existent here. Moreover, that fact that this was an appeal or that the case is several years old (only due to various stays) makes no difference, given that the issue was raised *sua sponte* by the appellate court after briefing had been completed and a mere two weeks before oral argument in precisely as in

Alabama Legislative Black Caucus, except that that was after a full trial and completion of all discovery.

Judge Wilson's dissent, App. 20a-21a n.3, made the rather obvious point that *City of Miami,* seemed to settle the standing issue for the stage that Miami Garden's case was situated so that no one sought to challenge it then. *See* 137 S. Ct. at 1304 (finding "reduced property values, diminishing the City's property-tax revenue," sufficient at the pleading stage to convey standing). Judge Wilson stated, "the district court diligently evaluated and monitored its jurisdiction and the City's standing for years," so that the City "had every reason to believe that the district court had no concerns whatsoever about the City's standing at partial summary judgment, which was limited to the statute-of-limitations issue." App. 20a n.3.

In addition, the case was still at an extremely early stage despite the time that had passed because it had proceeded in fits and starts, as it was repeatedly stayed at the district court, first pending the Eleventh Circuit appeal in *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262 (11th Cir. 2015), and again during the pendency of that case before this Court. 137 S.Ct. 1296, where this Court held municipalities have standing to pursue claims for lost property taxes under the FHA. *See* App. 20a-21a n.3.

The issue before the district court was limited to whether the Bank had issued discriminatory loans within the limitations period and discovery was severely curtailed to that end, App. 71a, pursuant to the proportionality principle of Fed. R. Civ. P. 26(b)(1). Under the Eleventh Circuit's flawed analysis of *Alabama Legislative Black Caucus,* the district court would have ruled in conflict with that mandatory precedent if it had done exactly what the Eleventh

Circuit actually did, *because it is a district court*. That an appellate court rendered the decision, however, does not change the relevant holding of *Alabama Legislative Black Caucus* or its applicability to this case.

C, The Use of the *Sua Sponte* Standing Inquiry to Short-Circuit Cases Post-*Alabama Legislative Black Caucus* Has Occurred in a Number of Cases and Puts the Eleventh Circuit at Odds with this Court's Instructions.

The conflict between *Alabama Legislative Black Caucus* and the Eleventh Circuit's use of a judicial objection to standing without adequate notice or opportunity for a proper response is not limited to this case. The device has been used impermissibly in the last few years by this circuit in at least three other cases.

Most recently, the Eleventh Circuit employed the device in *Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377 (11th Cir. Sept. 3, 2020) (*Jacobson II*), a case in which three voters and six organizations challenged a Florida statute that mandated that candidates of the party that won the last gubernatorial election appear first on ballots, followed by the party whose candidate finished second. After a bench trial, the district court held the requirement unconstitutional. The Eleventh Circuit's September 3, 2020 opinion replaces and supersedes an earlier opinion in the case, issued April 29, 2020 and reported at 957 F.3d 1193, 1208 (11th Cir. 2020) (*Jacobson I*). That opinion specified an independent and alternative ground to reverse the district court on the basis of standing that had not been previously raised.

That alternative basis for its ruling reversing the

district court addressed the traceability and redress elements of standing. *Id.* at 1207. The court defended its decision to raise the issue by saying it was "unaware of any principle of judicial restraint that counsels against addressing multiple elements of standing" and cited this case as precedential support. *Id*. at 1210 (citing *City of Miami Gardens v. Wells Fargo & Co.*, 931 F.3d 1274, 1283-84 (11th Cir. 2019)). The main opinion concedes, as the partial dissent points out, that the "Secretary never advanced in this case the argument we adopt today," but justifies its intercession much as it did here, on its view of an argument made in the district court by appellants' counsel, even if not framedas a challenge to standing. *Jacobson I,* 957 F.3d at 1210-11.

Subsequently, in the revised opinion, the citation to *Miami Gardens* was dropped and a political-question justification was moved from a concurrence to the majority opinion, while the "partial dissent" became a full dissent. Still, the same concession about adopting an argument never advanced by the Secretary and the justification from the earlier opinion remains. *See Jacobson II,* 2020 WL 5289377, at *14.

As in this case, the Eleventh Circuit also employs this gambit as though there is an independent question of Article III standing at the appellate level that is different from the same issue in the district court, even without intervening factual or doctrinal change. *See, e.g.*, *United States v. Amodeo*, 916 F.3d 967, 971 (11th Cir.), *cert. denied*, 140 S. Ct. 526 (2019) ("this Court must satisfy itself of its jurisdiction before we can address whether the district court had jurisdiction");[3] *see also id*. at 974 (Rosenbaum, J.,

[3] Perhaps it is notable that *Jacobson* and *Amodeo* were authored by Judge William Pryor, who also

concurring in judgment) ("the panel opinion forgets that Amodeo has the same basis for being heard by us as he had for being heard by the district court.").

The Eleventh Circuit raised the issue independently as well in a case where it ultimately concluded that standing exists. *Greater Birmingham Ministries v. Sec'y of State for Alabama*, 966 F.3d 1202, 1219 (11th Cir. 2020) ("Although the parties did not address this issue in their briefing or at oral argument, the Court is obligated, as a jurisdictional matter, to confirm the Plaintiffs' standing.").

Although a court has an independent obligation to assure its jurisdiction, pulling that trigger before proper discovery is allowed to take place violates the fundamental fairness of notice and an opportunity to be heard that is the hallmark of due process. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (requiring it take place "'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

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authored the lower court decision vacated and remanded in *Alabama Legislative Black Caucus*, *see* 989 F. Supp. 2d 1227 (M.D. Ala. 2013), and who stated during oral argument in this case that he was the judge who posed the s*ua sponte* standing question. Further, in his concurrence in this case, Judge Pryor expressed how, "[d]espite our earlier decision about the sufficiency of the pleadings in a related case, *see City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260 (11th Cir. 2019), it would be difficult to overstate how misguided this litigation has proved to be." App. 47a. That disappointment with the Eleventh Circuit's rulings in similar cases and with this Court's finding of standing in *City of Miami*, 137 S.Ct. 1296 (2017), should not provide a basis for undermining those holdings.

III. THE ELEVENTH CIRCUIT'S RULING CREATES A SHARP AND IRRECONCILABLE CONFLICT WITH OTHER CIRCUITS.

Federal Rule of Civil Procedure 56(d) recognizes that summary judgment is inappropriate if "facts essential to justify … opposition" are unavailable, permitting a court to defer or deny the motion, permit discovery to take place, or other appropriate actions. The Rule's plain language requires that before "entry of summary judgment," a court must afford the nonmoving party "adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

This uncontroversial principal is recognized and adhered to in all circuits. The D.C. Circuit recently put it this way: "[s]ummary judgment usually 'is premature unless all parties have had a full opportunity to conduct discovery.'" *Jeffries v. Barr*, 965 F.3d 843, 855 (D.C. Cir. 2020) (quoting *Haynes v. D.C. Water & Sewer Auth.*, 924 F.3d 519, 530 (D.C. Cir. 2019)).

The First Circuit similarly requires that, when a court considers summary judgment *sua sponte,* the "target is entitled to know both the grounds that the district court will consider and the point at which her obligation to bring forth evidence supporting the elements of her claim accrues" and be afforded "sufficiently advanced" discovery so that the party enjoys "a reasonable opportunity to glean the material facts." *Block Island Fishing, Inc. v. Rogers*, 844 F.3d 358, 363 (1st Cir. 2016) (citations omitted).

There is no disagreement with this well-established principle. *See Nat'l Life Ins. Co. v. Solomon*, 529 F.2d 59, 61 (2d Cir. 1975) (calling summary judgment inappropriate when "one party

has yet to exercise its opportunities for pretrial discovery."); *Doe v. Abington Friends Sch.*, 480 F.3d 252, 258 (3d Cir. 2007) (summary judgment premature because "circumstances of this case require more than was given."); *Adams Hous., LLC v. City of Salisbury*, 672 Fed. App'x 220, 223 (4th Cir. 2016) (party given no "fair chance to litigate" "when no motion for summary judgment was pending, no opportunity for discovery was provided, and no hearing was conducted"); *Allen v. Hays,* 812 Fed. App'x 185, 190 (5th Cir. 2020) (sufficient notice of the matters that might be considered and an opportunity for access to documents at issue required); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 205 (6th Cir. 1995) (same); *McCann v. Badger Mining Corp.*, 965 F.3d 578, 592 (7th Cir. 2020) ("Before summary judgment may be entered, all parties must be given notice of the motion and an opportunity to respond. … [that] include time for discovery necessary to develop facts justifying opposition to the motion."); *In re TMJ Litigation*, 113 F.3d 1484, 1490 (8th Cir.1997) ("summary judgment is proper only after the nonmovant has had adequate time for discovery."); *Program Eng'g, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193 (9th Cir. 1980) ("Generally where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, discovery should be allowed before the trial court rules on a motion for summary judgment."); *Franklin v. Oklahoma City Abstract & Title Co.*, 584 F.2d 964, 967 (10th Cir. 1978) (conversion of motion to dismiss to summary judgment requires some indication that the conversion is occurring and a reasonable opportunity to file "counter affidavits or to pursue reasonable discovery."); *Dunkin' Donuts of Am., Inc. v. Metallurgical Exoproducts Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988) ("summary judgment is inappropriate unless a tribunal permits the parties

adequate time for discovery.") (citation omitted).

Indeed, in instances where, as here, significant data is needed to establish disparate impact and disparate treatment violations,[4] circuits outside the Eleventh find a heightened necessity to afford a sufficient opportunity for discovery. The Seventh Circuit, for example, recognizes that that "conclusion is particularly influenced by the effective denial of plaintiff's requests to obtain the discovery of statistical data needed to establish fully his claim of the disparate impact of the ostensibly neutral exclusions." *Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7, 12 (7th Cir. 1979). The court added that, "where the need for discovery in order to obtain the requisite statistical data to substantiate the claims asserted is clear, and where plaintiff was effectively denied the opportunity to engage in that discovery, we hold that entry of summary judgment is inappropriate." *Id*. The same conclusion was reached in the Second and Ninth Circuits. *Hollander v. Am. Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1990) (summary judgment inappropriate where district court denied motion to compel to obtain needed discovery to assemble statistical case); *Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1362–63 (9th Cir. 1985) (holding summary judgment "patently inappropriate" when district court restricts plaintiff's ability to discover evidence necessary to establish disparate treatment prima facie case).

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[4] A prima facie case for both types of discrimination claim may be made out through the introduction of evidence showing gross statistical disparities. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Inc.*, 576 U.S. 519, 543 (2015); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

IV. THE DECISION BELOW WAS WRONG.

The decision below was plainly wrong because the appellate court raised its own issue of Article III standing on an appeal of a partial summary-judgment motion relating to the statute of limitations when the City was explicitly denied any opportunity for the City to obtain the necessary discovery that was in the sole possession of the Bank. Over the City's objection and subsequent motions to expand discovery, the district court limited discovery to discriminatory loans within the limitation period to address the motion before it, pursuant to Rule 26's proportionality principle (App. 71a) and repeatedly denied the City's efforts to expand discovery to pre-limitations period loans that would have satisfied the Eleventh Circuit's inquiry and the City's pleaded continuing violation. *See, e.g.*, Docs. 58 & 67. Because loans within that period were so few[5] and too recent to result in commencement of the foreclosure process and lost tax revenues to the City, any Article III injury-in-fact was either imminent and prospective or the product of a loan originated earlier. However, the district court made clear that it was not permitting inquiry into earlier category of loans. App. 71a. As a result, there was no record evidence to demonstrate the injury that the appellate court's *sua sponte* inquiry sought from earlier loans.

It was error to limit discovery that way because the assertion of a continuing violation has important implications for discovery that the district court failed to appreciate. This Court warned against a "wooden"

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[5] As the Eleventh Circuit recognized, the existence of a single loan with the discriminatory characteristics alleged originated within the limitations period was sufficient to satisfy the statute. App. 5a. *See also Havens,* 455 U.S. at 380-81 (holding one sufficient to invoke a continuing violation under the FHA).

invocation of the FHA's statute of limitations, "which ignores the continuing nature of the alleged violation, [and] only undermines the broad remedial intent of Congress embodied in the Act." *Havens*, 455 U.S. at 380. In such instances, a court errs by focusing on "isolated incidents" within the limitations period rather than the "continuing violation manifested in a number of incidents" because "a 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination." *Id*. at 381.

That error, however, was compounded by the Eleventh Circuit's *sua sponte* inquiry into standing. By failing to permit the necessary discovery and raising the issue without notice – after briefing was long completed and just two weeks before oral argument – the Eleventh Circuit did not follow the usual protocol of assuring that reasonable discovery occurred prior to imposing the summary-judgment standard for standing. The mandate for notice and discovery before summary judgment as a function of fundamental fairness does not depend on the level of the court that undertakes. It is "highly prejudicial" and "clear error" to "undertake a sua sponte summary disposition of the case on an issue that appellant was foreclosed from pursuing during discovery and briefing." *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 972 (6th Cir. 1989).

The Eleventh Circuit badly misconstrues the City's assurance to the district court that it had sufficient evidence for the pending motion to suggest that the City waived its right to seek additional discovery on Article III standing. App. 45a. The suggestion conflates the City's response to the district court's limited inquiry on the statute of limitations, which the City claimed was misdirected, with the City's very clear position that it needed further discovery for a proper inquiry to establish a

continuing violation and injury. *See* App. 45a-46a. As *Alabama Legislative Black Caucus* recognizes, it is impossible to anticipate inquiry into items never properly put into issue. 575 U.S. at 270. Neither Wells Fargo nor the district court ever questioned whether the City was injured by prior loans and the district court specifically prohibited inquiry into it. *See* App. 71a. To press the matter beyond what the City had already done in asking several times for data concerning earlier loans would be useless and antagonize the court. *See Zdanok v. Glidden Co.*, 327 F.2d 944, 953 (2d Cir. 1964) ("where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.").

Besides the City's opposition to bifurcated discovery from the start, Doc. 58, the parties filed a Joint Conference Report wherein the City proposed that the district court allow the parties to complete fact discovery no later than August 8, 2016 (Doc. 53), indicating the need for a more robust discovery inquiry than the district court permitted. Instead, the district court imposed an extraordinarily short period of discovery of 31 days. App. 61a. When the City made an unopposed motion on January 29, 2016, requesting an additional 30 days to conduct discovery, the district court ignored it, never ruling on it. Moreover, Wells Fargo otherwise strenuously opposed expanded discovery, even though the district court recognized that the City did file a motion requesting it. Doc. 67, Doc. 84, at 15:20-16:1.

Indeed, when the City indicated it would stand pat with the discovery it had available to it, the record expressly indicates that the City believed it had sufficient material *for the limited statute-of-limitations inquiry that had been granted,* not for unanticipated questions about injury-in-fact from

earlier loans. This explains why the City did not seek relief pursuant to Rule 56(d) – it was simply unnecessary to establish that the City's complaint was timely – the only issue the City needed to satisfy pursuant to the court's Scheduling Order.

Because discovery had not been permitted outside of the loans within the two-year limitations period and actual Article III standing was not raised in the District Court, the only Article III standing that was ripe for examination *sua sponte* before the appellate court was whether the City had sufficiently *pleaded* its injury. *See Huntsvillle,* 30 F.3d at 1336 ("It might well be unfair, however, to impose a standing burden beyond the sufficiency of the allegations of the pleadings on a plaintiff seeking a preliminary injunction, unless the defendant puts the plaintiff on notice that standing is contested.").

It is axiomatic that standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Given the bifurcation order Wells Fargo sought and won and the limited nature of its summary-judgment motion, the issues addressed by the panel were not raised by the Bank, but remained only part of Wells Fargo's original motion to dismiss. Thus, reference to the allegations and not to evidence would have been proper. *Id*. Because of the similarities between the City's pleaded allegations with those of Miami over the same Bank's practices, this Court's determination in *City of Miami* readily confirms that Miami Gardens has standing, which is why Wells Fargo dropped that challenge. Like Miami, Miami Gardens has made claims of damages arising from foreclosures caused by the Bank's discriminatory lending practices and that is enough to establish Article III standing at this stage. *City of Miami*, 137 S. Ct. at 1304.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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