NO. 20-405

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

Sonja K. Dickens
CITY OF MIAMI GARDENS
OFFICE OF THE CITY ATTORNEY
18605 NW 27th Avenue
Miami Gardens, FL 33056

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
2117 Leroy Place, NW
Washington, DC 20008
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Petitioner

(Additional counsel listed on inside cover)

Erwin Chemerinsky
University of California
Berkeley School of Law
215 Law Building
Berkeley, CA 94720
(510) 642-6483
echemerinsky@law.
berkeley.edu

Joel Liberson
Trial and Appellate
Resources, P.C.
3655 Torrance Blvd.
3d Floor
Torrance, CA 90503
(917) 848-3218
joel@taresources.
com

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INTRODUCTION

This case presents an entrenched issue of vital importance about whether a court of appeals may *sua sponte* raise Article III standing and impose a summary-judgment standard of proof when the district court limited discovery to a different threshold issue, leaving the question of Article III standing in its pleadings posture. When, as here, the non-moving party repeatedly requested and was denied further discovery that would have addressed the issue raised post-briefing by the court of appeals, this Court's decision in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) (*ALBC*), should have foreclosed the result below.

Notably, *ALBC* arose from within the Eleventh Circuit, yet its lessons have not been heeded, as it has used this impermissible tactic to dispose of other cases,[1] as well as this one. The Eleventh Circuit's denial that *ALBC* applies, which drew the dissent of two judges when presented en banc, renders it an issue that warrants this Court's review because the court below is consciously giving short shrift to *ALBC*. The judges on the original panel used this case, in the decision below and in an unusual concurrence from denial of rehearing en banc, to provide the clearest and most extensive explanation of why the Circuit refuses to follow *ALBC's* essential teachings and ascribed to the decision extraordinarily narrow scope. In so doing, the Eleventh Circuit has jettisoned the idea that a party is entitled to discovery on a standing issue raised *sua sponte* on appeal when those requests were denied in the district court, an approach that no other circuit has adopted and thus in direct and irreconcilable conflict with all sister circuits.

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[1] *See* Pet. 25-27. Wells Fargo discounts those rulings because they did not discuss *ALBC*, Br. in Opp. 20-21, but counsels' failure to raise the precedent does not change the use of a *sua sponte* standing issue without a fair opportunity to develop the record in each instance. Moreover, Wells Fargo expresses puzzlement at the relevance of *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020), which, like *ALBC*, questioned a plaintiff organization's standing because it "failed to identify any of its members, much less one who will be injured by the ballot statute," plainly not a question that had been raised in the district court. Its relevance is obvious.

I. THE DECISION BELOW CONFLICTS WITH *ALBC's* CENTRAL HOLDING AND CLEAR APPLICABILITY.

A. Wells Fargo Distorts the Record to Argue *ALBC* is Inapplicable.

Respondent Wells Fargo opposes review by distorting the record and arguing against a straw man its imagination concocts. It claims it brought a summary-judgment motion on standing, so that *ALBC* does not apply. Br. in Opp. 16. Yet, the decision it defends recognized that Wells Fargo's *partial* summary-judgment motion on the statute of limitations did not raise Article III standing but instead was based on a "flawed premise" that the City had to suffer "an injury that was caused by a loan originated during the limitation period." Pet. App. 36a. The decision explains that "[b]efore oral argument, we asked the parties to address whether the City established standing under the standard ordinarily applicable at summary judgment and, if not, *whether the limitations on the subject matter of discovery and summary judgment imposed by the district court* mandate the application of a more lenient standard." Pet. App. 24a (emphasis added). The court then held that the ordinary summary-judgment standard applied. *Id*.

The Bank also argues the City should have sought additional discovery, but the City's many motions, including a Rule 56(d) motion (Dist. Ct. Dkt. No. 169), were either denied or ignored by the district court, *see, e.g.,* Dist. Ct. Docs. 58, 161,181, and 193, as the court viewed the requested discovery to be outside the limited inquiry it authorized. *See* Dist. Ct. Dkt. No. 71a (limiting discovery to the "narrow issue of whether there were [discriminatory] loans during the two-year statute of limitations."); Dist Ct. Dkt. No.

221 (acknowledging scope was limited to "the existence of discriminatory loans during the limitations period."); Pet. App. 18a. By ruling on the partial summary-judgment motion without a report or recommendation from the magistrate judge, without ruling on pending discovery motions, and without holding the hearing the scheduling order set, the district court made plain its impatience with the City's insistence on further discovery on the limited inquiry. *See* Pet. 7-8.

Wells Fargo's fractured approach to *ALBC's* applicability is evident from its denial that the court of appeals raised Article III injury-in-fact *sua sponte*. Br. in Opp. 18, 24. That self-evidently false representation contradicts Wells Fargo own otherwise highly selective and distorted statement of the case, where it accurately reports that Article III standing was raised by the appellate court in a May 30, 2019 letter shortly before the argument, Br. in Opp. 10 (citing CA. May 30, 2019 Letter, at 1; Pet. App. 36a.), which asked whether the summary-judgment standard was appropriate on Article III standing given the limitations imposed by the district court.

The Question Presented has a clear basis in the record.

B. *ALBC's* Central Holding Plainly Applies to this Case.

Wells Fargo argues that *ALBC* does not apply to this case. Br. in Opp. 16. *ALBC's* extensive treatment in the decisions below belies that contention. The original decision attempted to distinguish the procedure it utilized from *ALBC*. Pet. App. 41a-43a. The panel then wrote a special three-judge concurrence to the denial of rehearing en banc to elaborate more extensively on its limited reading of

ALBC. Pet. App. 4a, 9a, 10a-11a, 14a. Moreover, the dissent from the denial of rehearing en banc emphatically found the decision below in conflict with *ALBC*. *See* Pet. App. 15a ("The panel's decision clearly conflicts with *Alabama Legislative Black Caucus*.") (footnote omitted); *see also* Pet. App. 15a-18a. It further noted the "panel is demonstrably wrong; in fact, *Alabama Legislative Black Caucus* spoke to nearly identical circumstances." Pet. App. 20a n.2.

In *ALBC*, this Court held that a three-judge district court that included one panel member from this case violated "elementary principles of procedural fairness" when the court, "acting *sua sponte*," required certain specified evidence of Article III standing after the court had conducted a bench trial, when the record had closed and when the plaintiff had no reason to believe the evidence was needed. 575 U.S. at 271.

Similarly here, the Eleventh Circuit, acting *sua sponte,* required record evidence of injury-in-fact from mortgage loans issued outside the limited discovery time period permitted by the district court. Therefore, the City was never on notice that it would need to produce that information (which it had sought unsuccessfully) on appeal prior to receiving the court's letter asking that it be addressed at oral argument.[2]

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[2] Wells Fargo suggests that the information was not solely in its control, Br. in Opp. 19, but only the bank had complete information about the borrowers' characteristics that would have allowed the City to conduct its disparate-impact and disparate-treatment analyses to identify the loans that foreclosed and injured the City. Indeed, the en banc dissent makes clear, "Wells Fargo controlled the evidence that the City needed to prove its Article III standing." Pet. App. 17a.

To be clear, Wells Fargo moved for bifurcation of the case and restricted discovery, so that a limited threshold issue about the statute of limitations could be resolved. Pet. App. 27a-28a. It told the district court that limited discovery would merely test whether the City was eligible to proceed with its continuing-violation case by first demonstrating the existence of at least one discriminatory loan within the limitations period.

The City not only objected to the discovery limitations; it also objected to the theory behind it: that to qualify to proceed with its continuous-violation theory of the case, it had to first demonstrate that a loan issued by the bank within the two-year limitation period went into foreclosure and resulted in diminished taxes for the City. Dist. Ct. Dkt. No. 222. That approach, the City argued, violated the mandate in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), where this Court held it was error to focus 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. The City argued that loans issued before the two-year period that preceded the complaint would show injuries within the limitations period, but the district court solely concerned itself with loans made within the limitations period and granted the motion to bifurcate discovery. It then granted summary-judgment on precisely the grounds *Havens* foreclosed.

Despite that limitation and focus, the court of appeals wanted record evidence of what the City unsuccessfully argued should have been within the proper scope of discovery, even while acknowledging the City was not permitted to obtain that discovery, and, in response to the City's motion for further

discovery, 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." Pet. App. 30a.

Wells Fargo now insists that somehow the City should have done more to obtain the evidence that the district court maintained was outside the scope of the limited inquiry it authorized. The district court's displeasure in the City's repeated requests to expand discovery,[3] including its Rule 56(d) motion, was evident in its refusal to rule on those motions and its decision to grant summary judgment without a report and recommendation from the magistrate judge and without the set hearing. Pet. 7-8. That Catch-22, a district court that refuses to order further discovery and a court of appeals that faults a plaintiff for failing to obtain it, is precisely the type of violation of "elementary principles of procedural fairness" that *ALBC* condemns and the Eleventh Circuit has ignored.

Wells Fargo also argues that *ALBC* provides a limited exception to the Article III standing analysis only where there is an inference that standing could be met, there is no prior challenge to standing, and there is an inference standing could be easily addressed. Br. in Opp. 17. The City disagrees with that mechanical construction of *ALBC*. The case held that, in the face of a post-trial challenge, the plaintiff

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[3] For loans issued prior to commencement of the limitations period, necessary for the City to connect its injuries to Wells Fargo's conduct, the en banc dissent noted "[b]ut 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." Pet. App. 18a.

association need not provide additional information such as a specific membership list," in the absence of a request when only other standing issues were raised. *ALBC*, 575 U.S. at 270.

Here, the City was never asked to show an injury from loans issued within the continuing-violation but before the limitations period – and specifically prohibited from seeking discovery on them. To avoid the issues presented on appeal concerning the specious basis, in conflict with *Havens* on which the partial summary judgment motion was based, the decision below ruled solely on its *sua sponte* question of injury-in-fact. As the en banc dissenting judges wrote, seeking evidence at oral argument is a "worthless" opportunity "if the plaintiff never had the opportunity to discover such evidence." Pet. App. 18a. Paraphrasing *ALBC*, the dissenters added, "'elementary principles of procedural fairness required that the [panel], rather than acting *sua sponte*, give the [City]' that which it never got—full discovery." *Id*. Thus, when the central holding of *ALBC* is combined with Rule 56(d)'s clear mandate to defer the issue or permit discovery, the decision below cannot stand.

Still, the City even satisfies Wells Fargo's fanciful approach to *ALBC*. First, a common-sense inference is present because foreclosures generated by discriminatory lending injure a city's tax base. Nat'l Comm'n on the Causes of the Financial and Economic Crisis in the U.S., Financial Crisis Injury Report xxii, 390 (2011), available at https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf (finding that "[l]enders made loans that they knew borrowers could not afford," which had "catastrophic consequences" that would include foreclosures, and "upended local [municipal] budgets that relied on property taxes.").

Second, Wells Fargo's only challenge to the City's standing was misdirected (as in *ALBC*). The decision below established that Wells Fargo only challenged statutory standing, not Article III standing. Pet. App. 36a. Finally, the City might have readily met the inquiry – Wells Fargo's third *ALBC* condition – if permitted discovery, because Wells Fargo had accurate information on the loans it issued, borrower characteristics, and consequent developments with that loan, which would have allowed the City to run the regression analysis the court of appeals found missing (as opposed to its pleading, which depended on publicly available information). In short, even under Wells Fargo's purposely elevated criteria, the City was capable of meeting the prerequisites for application of *ALBC*.

II. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR TO CONSIDER THE QUESTION PRESENTED.

A. This Case Provides a Rare Full Articulation of the Disagreement over the Applicable Legal Principle under *ALBC*.

The Eleventh Circuit has expansively articulated fundamentally unique views about *ALBC*, first in the decision below and then the en banc concurrence by the same panel. As a result, this case presents a uniquely strong vehicle to review *ALBC's* meaning and reach. Because the issue has arisen within the Eleventh Circuit a number of times, the case provides an important opportunity for this Court to assure that its holding is clear and followed, rather than given the runaround by a dissident circuit. The Eleventh Circuit's truncated reading of *ALBC* is unique among the circuits and, without this Court's intervention,

will continue and may proliferate. Wells Fargo's opposition merely glosses over this critical point.

B. The City Justified Its Need for Discovery.

Contrary to Wells Fargo's attempts to reframe the case, the dispute raised focuses entirely on the Eleventh Circuit's actions and not on the district court's management of discovery. Saying so, as Wells Fargo does, Br. in Opp. 26, merely raises a red herring. The City did everything it could to obtain broader discovery. Wells Fargo asserts the City failed "justify its new claims that it needed more discovery to prove its standing." Br. in Opp. 23.

The assertion lacks support in the record. As previously explained, the City opposed Wells Fargo's attempt to limit based on a flawed theory about how a limitations injury is shown, repeatedly argued that full discovery was needed to demonstrate injury, and lost those motions because of the limited time-based inquiry the district court accepted after the bank represented that it intended to file a partial summary-judgment motion limited to a statute of limitations issue and never referenced the City's Article III standing. Wells Fargo opposed the expanded discovery sought by the City, because it claimed the issues about prior loans were not before the court – and the district court agreed. That the Eleventh Circuit disagreed should not inure to the bank's benefit.

C. The Case Does Not Suffer a "Fatal Flaw."

Finally, Wells Fargo wrongly argues in a single paragraph that the issue raised is not outcome-determinative and thus not certworthy. Br. in Opp.

27. It asserts that the city manager as the City's Rule 30(b)(6) representative could not identify a discriminatory loan within the limitations period, and that should be fatal to the City's cause.

Wells Fargo's argument treats as dispositive a city employee's deposition, not an expert witness's, that focused on isolated loans and whether they are inherently discriminatory. Yet, the question was both inconsistent with *Havens* and certainly not information "known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6). In *Havens*, this Court mandated that the focus not be on "isolated incidents" within the limitations period but rather 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." 455 U.S. at 381. Wells Fargo's argument depends entirely on ignoring *Havens* in favor of a loan-by-loan evaluation that undermines the FHA's congressional design prohibiting continuing violations and permitting proof by statistical disparity.

The City proffered expert reports that directly addressed discriminatory lending during the limitations period for the obvious reason that the city manager was not the appropriate witness on this threshold issue. Moreover, as one leading treatise puts it, "the testimony of a Rule 30(b)(6) deponent does not absolutely bind the corporation in the sense of a judicial admission, but rather is evidence that, like any other deposition testimony, can be contradicted and used for impeachment purposes." 7 James Wm. Moore, et al., Moore's Federal Practice § 30.25[3] (3d ed. 2016). It is subject to being "corrected, explained and supplemented," *id.*, which the City did.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Sonja K. Dickens
CITY OF MIAMI GARDENS
OFFICE OF THE CITY ATTORNEY
18605 NW 27th Avenue
Miami Gardens, FL 33056

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
2117 Leroy Place, NW
Washington, DC 20008
(202) 944-2874
robert.peck@cclfirm.com

Erwin Chemerinsky
University of California
Berkeley School of Law
215 Law Building
Berkeley, CA 94720
(510) 642-6483
echemerinsky@law.berkeley.edu

Joel Liberson
Trial and Appellate Resources, P.C.
3655 Torrance Blvd.
3d Floor
Torrance, CA 90503
(917) 848-3218
joel@taresources.com

Counsel for Petitioner

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