No. 20-81

In The
Supreme Court of the United States

DIANA BERBER,
Petitioner,
v.
WELLS FARGO BANK, N.A. and MARSHA PAINTER,
Respondents.

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

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BRIEF IN OPPOSITION

Littler Mendelson, P.C.
Wells Fargo Center
333 SE Second Ave., Suite 2700
Miami, FL 33131
Tel: 305.400.7580
rforrest@littler.com

Sherril M. Colombo
Ryan P. Forrest
Counsel of Record

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's refusal to rehear Petitioner's case en banc departed so far from the accepted and usual course of judicial proceedings that the Court should remedy it by using its supervisory power.

2. Whether Wells Fargo's February 20, 2020 settlement agreement with the United States Department of Justice renders erroneous the Eleventh Circuit's judgment for Wells Fargo.

PARTIES TO THE PROCEEDING

1. Petitioner, Diana Berber ("Petitioner"), was the plaintiff-appellant in the Court of Appeals.

2. Respondents, Wells Fargo Bank, N.A. ("Wells Fargo") and Marsha Painter ("Painter") (collectively "Respondents") were defendants/appellees in the Court of Appeals.

RULE 29.6 DISCLOSURE STATEMENT

Wells Fargo's parent corporation is Wells Fargo & Co., and Wells Fargo & Co. is a publicly held company that owns 10% or more of Wells Fargo's stock. Except for Wells Fargo & Co., no other publicly held company owns 10% or more of Wells Fargo's stock.

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INTRODUCTION

This is an employment case that does not merit review. The facts are straightforward. Petitioner is a former Wells Fargo personal banker and Painter was her manager. Petitioner performed poorly and Wells Fargo terminated her.

Petitioner then sued Wells Fargo, alleging that she was subjected to unreasonable sales expectations and that Wells Fargo and Painter ignored fraud by Wells Fargo employees against customers. This, Petitioner claimed, violated Florida's Civil Remedies for Criminal Practices Act ("RICO") and the Florida Whistleblower Act (the "FWA"). In deposition, Petitioner later conceded she was not aware of, or asked to engage in, any fraudulent activity while at Wells Fargo.

The District Court dismissed Petitioner's RICO claim with prejudice, finding she could not plausibly allege she was harmed by a purported enterprise that faced outward toward customers. Likewise, the District Court entered summary judgment for Wells Fargo on Petitioner's Florida Whistleblower Act claim, finding she could not have suffered retaliation because she had not known about or been asked to engage in fraudulent activity, and thus she could not have objected to, or refused to participate in, any such activity.

Petitioner then appealed to the Eleventh Circuit, which affirmed the District Court in full. Petitioner disagreed with Eleventh Circuit's analysis and submitted three requests for rehearing en banc. She claimed extraneous documents that were created after the Eleventh Circuit's ruling, including an unrelated settlement agreement between Wells Fargo and the

Department of Justice and attached extraneous documents (the "Settlement Agreement"), showed she was treated unfairly. The Eleventh Circuit denied Petitioner's requests.

Now Petitioner re-asserts those rehearing arguments to the Court, vaguely asking it to find the Eleventh Circuit should have reheard her case en banc, and also to reverse both the Eleventh Circuit and the District Court by second-guessing their factual determinations on individual state law claims. Both arguments are meritless. Petitioner's first argument fails because she had no right to have her case reheard en banc, and because rehearing en banc was not merited. Petitioner's second argument fails because the lower courts decisions were correct, and nothing about the extraneous documents can weigh on the viability of her claims since they do not rebut her poor work performance or her concessions that that she was not aware of, or asked to participate in, fraudulent activity at Wells Fargo.

If that were not enough to merit denial, Petitioner has also filed a contemporaneous Motion to Set Aside Final Judgment with the District Court. The Motion seeks the same relief as the petition. In so doing, it implicitly concedes that there is no compelling reason to grant the petition because the relief Petitioner seeks is available elsewhere. Consequently, the Court should preserve its limited resources for other meritorious cases of broad significance and legal import.

The Court should deny the petition.

STATEMENT OF THE CASE

In July 2013, Wells Fargo hired Petitioner as a personal banker in Fort Lauderdale, Florida. Pet.

App. C at 3. Petitioner reported to Painter. *Id.* at 4. As a personal banker, Petitioner had to meet regular sales goals. *Id.* She did not meet those goals. *Id.* In addition, she regularly failed to set a sufficient number of business appointments, failed to attend business-generating events, and came into work late at least once without providing notice. *Id.* Petitioner's supervisor, Painter, repeatedly admonished Petitioner for these failures and issued her several written warnings. *Id.* Petitioner did not heed these warnings by improving her performance. *Id.* So in March 2014 Wells Fargo terminated Petitioner, stating in a letter that she had not "met the performance expectations regarding daily activities to attain sales goals required in this position." *Id.* at 5.

Petitioner then sued Wells Fargo in Florida state court and Wells Fargo removed the action. Pet. App. A. at 4. After four amendments, Petitioner alleged Wells Fargo violated the FWA by terminating her after she refused to engage in fraudulent behavior while being pressured into opening new accounts for existing customers. *Id.* at 6. She also alleged Wells Fargo and Painter violated Florida's RICO statute by ignoring Wells Fargo employees that were defrauding Wells Fargo customers. *Id.* at 10-11. In support, she attached several documents about investigations into Wells Fargo purportedly opening accounts for customers without consent. *Id.* at 5.

Petitioner's case unraveled in deposition. She conceded that nobody at Wells Fargo had asked her to do anything fraudulent, that she never opened accounts for anyone without proper qualifications, and that she was unaware of any instances where Painter asked others to conduct fraudulent activities. Pet. App. C at 9. She further conceded that it was not

until two years after her termination that she began to believe her termination related to any fraudulent conduct. *Id.* at 9.

The District Court then dismissed Petitioner's RICO claim with prejudice for two reasons. First, the District Court found that Petitioner had not alleged Wells Fargo was sufficiently distinct from its parent company, Wells Fargo & Company, to support RICO liability under Florida law. Pet. App. B at 9-10. Second, the District Court found that Petitioner could not plausibly plead proximate causation because her alleged injury – termination – was too attenuated from the outward-facing fraud she alleged was perpetrated on Wells Fargo customers. *Id.* at 10-11.

The District Court then entered summary judgment for Wells Fargo on the FWA claim. That decision was based on three findings. First, the District Court found that because Petitioner had not known about or been asked to perform any fraudulent activity, she could not have objected to or refused to participate in, any fraudulent activities. Pet. App. C at 9. Indeed, the District Court cited Petitioner's summary judgment affidavit, where she admitted she did not come to understand that Wells Fargo was terminating her for failing to engage in fraudulent activities until almost two and half years after the fact. *Id.* As such, the District Court found there was no evidence that Petitioner reported any fraudulent conduct to anyone at Wells Fargo. *Id.* at 10. Second, the District Court found Petitioner could not rebut the evidence that she was terminated for subpar job performance, including her failure to report to work on time at least once without notice, failure to schedule a sufficient amount of sales appointments, and failure to schedule a sufficient number of outside

events to generate sales. *Id.* And third, the District Court found that nothing in the record allowed Petitioner to show Wells Fargo's legitimate, non-retaliatory reason for termination was a pretext for retaliatory conduct. *Id.* at 11. It reasoned that because the record did not show Petitioner been asked to engage in any conduct, she could not have suffered retaliation. *Id.* at 12.

Petitioner then appealed to the Eleventh Circuit. When deciding, the Eleventh Circuit specifically mentioned that in the time between Petitioner's termination and her lawsuit, the Consumer Financial Protection Bureau ("CFPB") investigated Wells Fargo for fraudulent sales practices and reached a settlement. Pet. App. A at 5. With that established, the Eleventh Circuit affirmed the District Court in an unpublished per curiam opinion. *Id.* at 16.

As to Petitioner's RICO claim, it found dismissal was proper because Petitioner's alleged injury – termination – was disconnected from the alleged predicate acts against Wells Fargo customers. *Id.* at 13. The court reasoned that, "[a]t best, [Petitioner's] termination was an unrelated consequence many steps down the causal chain." *Id.* at 13.

As to Petitioner's FWA claim, the Eleventh Circuit held that Petitioner's case failed because she was unaware of any potentially fraudulent activities and because the record was devoid of any evidence showing she ever affirmatively objected to, or refused to participate in, any fraudulent activities. *Id.* at 6-7. The Eleventh Circuit also echoed the District Court by finding that Petitioner failed to rebut Wells Fargo's legitimate, non-retaliatory reason for termination. *Id.* at 9. Instead, it found that the record revealed

alternative grounds for Petitioner's termination, including her failure to report to work on time without notice at least once, and failure to generate sufficient business meetings and events. *Id.* at 10.

Petitioner then requested rehearing en banc because she disagreed with the Eleventh Circuit panel's findings. Five days later, she asked a second time for rehearing en banc, citing an unrelated document issued after the Eleventh Circuit's decision by the Office of the Comptroller of the Currency about some Wells Fargo employees had purportedly acted improperly. A month later, Petitioner asked a third time for rehearing en banc, citing Wells Fargo's execution of the Settlement Agreement, which generally stated some Wells Fargo employees had acted improperly by opening accounts for customers without customer consent. The Eleventh Circuit then denied that request, indicating that no judges were interested in rehearing the case en banc.

On July 7, 2020, Petitioner filed with the Court, arguing that the Eleventh Circuit's opinion and its subsequent order denying rehearing en banc was rendered erroneous by the Settlement Agreement. Petitioner asks the Court to reverse the Eleventh Circuit in full, and to remand the case with directions to allow her to proceed to trial.

Importantly, on July 17, 2020, Petitioner filed a Motion to Set Aside Final Judgment in the District Court under Federal Rule of Civil Procedure 60(b) and (d). Similar to the petition, she claims that the District Court's judgment was rendered erroneous by the Settlement Agreement. And like in the petition, she asks that District Court's judgment be reversed and that she be allowed to proceed toward trial.

REASONS TO DENY THE PETITION

The Court should deny this fact-bound petition for several reasons. First, Petitioner does not provide a clear issue for the Court to resolve, as her question presented concerns about the propriety of denying rehearing en banc, while her conclusion asks the Court to reverse the lower courts and allow her to proceed to trial. Second, the issues are neither complex, nor novel, and will require the Court to expend the kind of judicial resources best used elsewhere on matters of broad import. Third, the Eleventh Circuit had no duty to rehear Petitioner's case en banc. Fourth, the lower courts decided Petitioner's Florida RICO claim correctly. Fifth, the lower courts decided Petitioner's FWA claim correctly. And sixth, the Settlement Agreement does not affect Petitioner's case. Wells Fargo will make each argument in turn.

I. The Petition is Vague, Fact-Based, Unremarkable, and Unnecessary.

There is no basis for the Court to grant the petition here. "A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. The Court's Rules list the following instances in which certiorari may be granted:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings,

> or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. The Rules also provide that, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

This case does *not* involve (1) a conflict between United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; (3) a conflict on an important question among state courts of last resort; or a (4) a conflict between the Court's decisions and those of lower courts. Instead, at best, this case involves a limited and fact-bound question of the application of the Federal Rules of Appellate Procedure and of two Florida-based claims. Still, the precise bounds of Petitioner's argument – and therefore what the case involves – is unclear. Petitioner's Question Presented implies the Eleventh Circuit erred by denying her requests for rehearing en banc, while her conclusion asks the Court to reverse the lower courts and remand

with directions to allow her case to proceed to trial. That should foreclose her argument because the Court should not use its limited resources to guess at Petitioner's intentions.

In addition, this case is not sufficiently compelling or rare to merit granting the petition. Chief Justice William Howard Taft once stated, "The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit." Hearings on the Jurisdiction of Circuit Court of Appeals and United States Supreme Court before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. No. 33, p. 2 (1922). This case falls far short of that metric. Nothing about the propriety of Petitioner having her case reheard en banc or of the propriety of the lower courts' substantive decisions can be extended broadly. Consequently, this is not the type of case the Court should take.

Moreover, and contrary to Petitioner's vague and unsupported arguments, the Eleventh Circuit's decisions were correct. Starting at the beginning, Wells Fargo terminated Petitioner for performing deficiently at her job. Petitioner sued Wells Fargo and admitted in deposition that she could not support key elements of her claims, including that she did not know of, or commit, any fraudulent activity. The District Court and the Eleventh Circuit cited Petitioner's admissions when making the unremarkable and correct findings that her claims could not withstand scrutiny. After and unrelated to those decisions, Wells Fargo entered into the Settlement Agreement. But the Settlement

Agreement did not mention Petitioner or any relevant person. Thus, when Petitioner sought rehearing en banc based on the Settlement Agreement, the Eleventh Circuit used its discretion to deny her requests. There is no error for the Court to remedy upon review.

Petitioner's requests are also incongruous with the Court's role and function because they seek intensive factual analysis and judicial activism. First, Petitioner asks the Court to add facts where none exist by extending the Settlement Agreement to her case. Second, she asks the Court to delve into a factual analysis to find that the Settlement Agreement rendered the Eleventh Circuit's judgment erroneous for reasons she does not disclose. Third, she asks the Court to undercut the Eleventh Circuit's judicial discretion by finding it should have reheard her case en banc. Last, she asks the Court to remand the case with directions to allow her to proceed toward trial. The Court regularly passes on cases such as this because they involve issues that are "primarily a question of fact." *See, e.g. N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981).

Finally, Petitioner has shown that the Court should deny the petition by moving to set aside final judgment in the District Court. That motion argues that the District Court should reopen the case in light of the Settlement Agreement – the same result Petitioner seeks here. It makes little sense for the Court, as a body of last resort, to consider this case if relief is available elsewhere. This is particularly true because the District Court is "in the best position to determine the relevant facts and adjudicate the dispute." *Puckett v. United States*, 556 U.S. 129, 134

(2009). Consequently, the Court should deny the petition and allow this case to proceed, if at all, at the District Court.

II. The Eleventh Circuit's Decisions Were Well Within the Accepted and Usual Course of Judicial Proceedings.

As best can be discerned, Petitioner's primary argument is that the Eleventh Circuit departed so far from the accepted and usual course of judicial administration that the Court should remedy it by using its supervisory power. That argument fails.

The Court limits use of its supervisory power to exceptional circumstances involving "the proper administration of judicial business." *Nguyen v. United States*, 539 U.S. 69, 81 (2003) (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). That traditionally occurs where there is a broadly applicable question of whether a court has exceeded or deviated from its authority. *See id. at 83* (vacating judgment issued by an appellate panel of two Article III judges and one Article IV judge because the Article IV judge did not have the authority to decide an appeal); *see also Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010) (finding district court erred in promulgating local rules by violating an act of congress). This case does not involve such a question.

Under 28 U.S.C. § 46(c), rehearing en banc occurs when "ordered by a majority of the circuit judges of the circuit who are in regular active service." Federal Rule of Appellate Procedure 35 echoes that requirement and specifies that "[a]n en banc hearing or rehearing *is not favored and ordinarily will not be ordered* unless (1) en banc consideration is necessary to secure or maintain uniformity of the court's

decisions; or (2) the proceeding involves a question of exceptional importance." *Id.* (emphasis added). In turn, Eleventh Circuit Internal Operating Procedure 35-3 characterizes rehearing en banc as "an extraordinary proceeding" and clarifies that "[a]lleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for en banc." 11th Cir. R. 35-3.

The Court has recognized that "[r]ehearing in banc is a discretionary procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions." *Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990); *see also* Advisory Comm. Notes for 1998 Amend. Fed. R. App. 35(a) (changing "may" for "will" to "emphasiz[e] the discretion a court has with regard to granting en banc review."). That discretion is balanced by the reality that "en banc decision making requires substantial expenditure of scarce appellate court resources." *Boxer X v. Harris*, 459 F.3d 1114, 1115 (11th Cir. 2006) (Carnes, J. dissenting). And "[b]ecause they are so cumbersome, en banc procedures are seldom used merely to correct the errors of individual panels." *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001). Accordingly, courts have found that cases of limited import do not merit the discretionary expenditure of scarce judicial resources. *See United States v. Blaylock,* 275 F.3d 1030, 1031 (11th Cir. 2001) (finding "[e]n banc rehearing is "an extraordinary procedure" intended for correction of "precedent-setting error[s] of exceptional importance.") (Carnes, J. concurring); *see also Watson*

v. Geren, 587 F.3d 156, 160 (2d Cir. 2009) ("En banc review should be limited generally to only those cases that raise issues of important systemic consequences for the development of the law and the administration of justice."); *see also Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1342 (D.C. Cir. 1981) ("the collective wisdom of the federal judiciary is that en banc review must be soundly justified, else the game will not be worth the candle.") (Robinson, J., dissenting, joined by Edwards and Ginsburg, J.J.). In addition, it is clear that en banc review is not a mechanism to disagree with a panel's result. *See United States v. Rosciano,* 499 F.2d 173, 174 (7th Cir. 1974) ("The function of en banc hearings is not to review alleged errors for the benefit of losing litigants."); *see also E.E.O.C. v. Ind. Bell Tel. Co.*, 256 F.3d 516, 529 (7th Cir. 2001) (en banc) (Posner, J., concurring) (noting that "we do not take cases en banc merely because of disagreement with a panel's decision, or rather a piece of a decision"); *Hart,* 266 F.3d at 1172 n.29 (stating same).

Against that backdrop, Petitioner's argument fails. As a threshold matter, Petitioner provides no legal authority or substantive argument to support her claim that the Eleventh Circuit erred by denying her requests for rehearing en banc. Nor could she, because there is no statute or rule that grants a party a right to rehearing en banc. Instead, as the Court has recognized, en banc review is a matter of judicial discretion reserved for matters of exceptional importance. *See Jenkins*, 495 U.S. at 47 n.14. Petitioner cannot show that the Court should have exercised its discretion for three reasons.

First, en banc review was not merited because, as more fully set forth below, the Eleventh Circuit

decided Petitioner's case correctly. Second, Petitioner's case is not one of exceptional importance. Illustrative examples of exceptionally important include where courts have dealt with the scope and application of the state secrets doctrine, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 (9th Cir. 2010) or with systemic issues involving the broader practice of law, *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007) (granting en banc review to determine whether a claim of excessive force must be subsumed into a claim of unlawful seizure). This case lacks those types of weighty issues. It concerns only individual facts – whether Petitioner was the victim of a RICO predicate act and whether she was terminated in retaliation for reporting or refusing to commit fraudulent activity. Those facts cannot be extended broadly. And even if the subject was broader, the Eleventh Circuit's decision was not binding on lower courts because it was unpublished. *See* 11th Cir. R. 36-2; *see also Lenis v. U.S. Atty. Gen.*, 525 F.3d 1291, 1292 n.3 (11th Cir. 2008) (noting unpublished opinions have no precedential value).

And third, even if the Eleventh Circuit's decision on the merits was incorrect, its exercise of discretion about rehearing en banc did not limit Petitioner's right to seek additional review or recourse. To the contrary, Petitioner has since continued her case in *two* other venues – in the Court with her petition, and in the District Court with her Motion to Set Aside Final Judgment. Thus, Petitioner has not shown that the Court should use its limited resources to hear her case, or that any remedy is appropriate.

III. The Lower Courts Determined the Case Correctly.

Petitioner also asks the Court to reverse the lower courts in light of the Settlement Agreement. That argument fails because the lower courts correctly decided Petitioner's claims and because the Settlement Agreement is irrelevant and immaterial.

a. The Lower Courts Properly Disposed of Petitioner's Florida RICO Act Claim.[1]

The Court should deny the petition because the lower courts decided Petitioner's Florida RICO claims correctly. In her Complaint, Petitioner alleged that Wells Fargo and Painter were liable under Florida's RICO statute. That statute provides that, "It is unlawful for any person[,] employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of criminal activity . . . ." Fla. Stat. § 772.103(3). To allege a violation of the Florida RICO statute, a party must claim there has been the (1) conduct; (2) of an enterprise; (3) through a pattern; (4) of criminal activity. *See id.*

Florida courts look to federal courts for guidance in interpreting RICO provisions. *Gross v. State*, 765 So. 2d 39, 42 (Fla. 2000). Therefore, Florida has adopted the Court's finding that RICO liability requires an injury to be proximately caused by a predicate criminal act. *Bortell v. White Mountains Ins. Grp., Ltd.*, 2 So. 3d 1041, 1047 (Fla. 4th DCA 2009) (citing *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268

[1] Although the petition does not explicitly mention the Florida RICO claim, the claim is enveloped by Petitioner's request to reverse the Eleventh Circuit and remand so she can proceed to trial. Therefore, Wells Fargo will address the Florida RICO claim here.

(1992))[2]. When determining whether a predicate act proximately caused an injury, a court must ask whether the alleged violation led directly to the plaintiff's injuries. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006).

Against that backdrop, Petitioner alleged an enterprise existed between Wells Fargo, Wells Fargo & Co. (Wells Fargo's parent company), and Painter. Pet. App. A at 13. Petitioner further claimed that Wells Fargo committed fraud upon customers in an ongoing fashion constituting a pattern by opening unrequested accounts. *Id.* Finally, Petitioner alleged she was injured by being terminated for not committing the purportedly fraudulent acts that her co-workers did. *Id.* Analyzing Petitioner's allegations, the courts below found she could not plausibly allege the enterprise's alleged outward-facing predicate criminal acts directly caused her termination. *Id.*; Pet. App. B at 11. Specifically, the Eleventh Circuit noted that "at best, [Petitioner's] termination was an unrelated consequence many steps down the causal chain." Pet. App. A at 13. That holding was squarely in line with the law. *See Anza*, 547 U.S. at 458 (finding a plaintiff failed to state a RICO claim upon which relief could be granted when damages did not flow directly from the relevant conduct); *see also Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1, 18 (2010) (same).

Anza is particularly apposite. There, a company brought a RICO suit against its competitor alleging it was harmed when the competitor gained a

[2] "[T]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

competitive advantage by selling products without sales tax. 547 U.S. 451, 454 (2006). The district court dismissed the complaint, finding it failed to state a claim upon which relief could be granted. *Id.* at 455. The claim then wended its way to the Court, which found, "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 461. Where an alleged violation does not lead directly to a plaintiff's injuries, a RICO claim is not cognizable. *Id.* Through that lens, the Court found that the company's claim was not cognizable, because the competitor's failure to collect sales tax injured the state, and any corresponding competitive advantage did not directly injure the company. *Id.* at 458.

Likewise, in *Hemi Group*, the City of New York (the "City") filed a RICO claim against a company that sold cigarettes to City residents online, but failed to submit customer information so the City could follow up to collect tax revenue. 559 U.S. at 5. Specifically, the company was required by law to submit purchaser information to the State of New York (the "State"), who would then forward it to the City for tax collection purposes. *Id.* When the company failed to submit the information to the State, the City filed a RICO action claiming the company's actions caused it to lose tax revenue because it could not follow up with cigarette consumers. *Id.* at 7. The complaint was dismissed without discussion of proximate cause and the case progressed toward the Court. *Id.* at 7-8. Upon review, the Court recognized *Anza* to find that the City had not satisfied the requirement of proximate cause. *Id.* at 10. It stated, "the conduct constituting the alleged fraud was [the company's] failure to file [the required]

reports. *Id.* at 11. That conduct did not directly cause the injury for two reasons. First, the State acted as a third party between the company and the City, thereby preventing any direct causation. *Id.* Second, "as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud." *Id.* Specifically, "the conduct directly responsible for the City's harm was the customers' failure to pay their taxes" not the company's predicate act of alleged fraud by failing to submit the information to the State. *Id.* Thus, the Court found the City's claims were not viable as pled. *Id.* at 18.

So it is here. Petitioner alleged Wells Fargo was liable under Florida's RICO act because it and Painter allegedly worked together to commit fraud upon customers, and because she was terminated. But, as in *Anza* and *Hemi Group*, Petitioner did not allege a direct link between the alleged commission of the predicate act (fraud) and Petitioner's termination. Nor could she plausibly do so, because the fraud purportedly faced outward toward customers, not toward her. Thus, the lower courts correctly adjudicated Petitioner's claim.

b. The Lower Courts Properly Disposed of Petitioner's Florida FWA Claim.

The Court should also deny the petition because the lower courts correctly decided Petitioner's FWA claim. Under the FWA, "An employer may not take any retaliatory personnel action against an employee because the employee has . . . objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of the law, rule, or religion." Fla. Stat. § 448.102(3). FWA retaliation claims are analyzed through the same framework as

claims under Title VII of the Civil Rights Act of 1964. *See Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000).

Under the Title VII framework, a plaintiff must establish a prima facie case by proving "(1) [s]he engaged in statutorily protected expression; (2) [s]he suffered an adverse employment action; and (3) there is some causal relation between the two events." *Rice-Lamar v. City of Fort Lauderdale*, 853 So. 2d 1125, 1132 (Fla. 4th DCA 2003). The burden then shifts to the employer to "proffer a legitimate, non-retaliatory reasons for the adverse employment action." *Rice-Lamar*, 853 So. 2d 1132; *see also Olmsted v. Taco Bell*, 141 F.3d 1457, 1460 (11th Cir. 1998) (finding same). Then, the employee may still prevail if she can "prove by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct." *Rice-Lamar*, 853 So. 2d 1132.

With that established, Petitioner claimed she refused to engage in fraudulent sales practices and Wells Fargo terminated her as a result. Pet. App. A at 6. Yet she acknowledged nobody ever asked her to commit fraud and that never knew any fraud was being committed. *Id.* The courts below recognized those concessions, and the complete lack of evidence showing she objected to the practices she allegedly did not know about, to find she had not engaged in any statutorily protected activity. Pet. App. A at 7; Pet. App. C at 9. In addition, both courts noted that even if Petitioner had made a prima facie case, she still could not rebut Wells Fargo's legitimate, non-retaliatory reason for termination – her poor performance and inability to make sales goals. Pet. App. A at 9; Pet. App. C at 9-10. The Eleventh Circuit expounded on that conclusion by finding that the

record revealed additional legitimate justifications for termination, including working late and failing to arrange business appointments, and failing to arrange out of office business events. Pet. App. A at 10. These unanimous decisions were squarely in line with law.

c. The Settlement Agreement is Irrelevant and Immaterial.

Finally, Petitioner argues that the Settlement Agreement rendered erroneous the lower courts' decisions. That argument fails for several reasons. First, the Settlement Agreement is irrelevant. It generally states that Wells Fargo employees were subjected to aggressive sales plans. Pet. at 8. It then generally states that managers exerted extreme pressure on subordinates including by explicitly or implicitly encouraging unlawful and unethical conduct. *Id.* at 8-9. And it states that some employees responded by engaging in unlawful or unethical practices including identity theft, falsification of bank records, or selling products of little to no worth to customers. *Id.* at 9. But the Settlement Agreement does not mention Painter, Petitioner, Petitioner's office, or anything that would directly apply to this case. And Petitioner has provided no other reason for the Court to believe the Settlement Agreement would be relevant here.

Second, nothing about the Settlement Agreement was new. Indeed, when it rendered its Opinion, the Eleventh Circuit specifically mentioned Petitioner's allegation that the CFPB had investigated Wells Fargo for its sales practices, and that Wells Fargo reached a settlement on the subject. Pet. App. A at 5. Petitioner does not attempt to grapple with that

reference, or to explain how or why the Settlement Agreement is distinguishable. Regardless, when the Eleventh Circuit rendered its Opinion, it was aware that federal agencies had engaged Wells Fargo. Thus, Petitioner cannot cognizably argue that the Settlement Agreement should have changed the Eleventh Circuit's calculus.

Lastly, even if the Settlement Agreement was relevant it was still immaterial to the issues the lower courts found dispositive. The Settlement Agreement does not impact Plaintiff's inability to plausibly state a Florida RICO claim by alleging she was injured by outward-facing predicate acts. Likewise, the Settlement Agreement cannot change the merits of summary judgment on Petitioner's FWA claim because it cannot erase her concessions that she was unaware of, and was not asked to participate in, any fraudulent activities at Wells Fargo. Further, the Settlement Agreement did not state that Wells Fargo's performance expectations for Petitioner were improper. Thus, the Settlement Agreement does not affect Wells Fargo's legitimate and non-retaliatory decision to terminate Petitioner for her poor performance. Moreover, as the Eleventh Circuit recognized, there were independent grounds for Petitioner's termination beyond her poor performance, including her failure to report to work on time without notice at least once, and her failure to make sufficient efforts to organize sales meetings and events. Therefore, regardless of the Settlement Agreement, the lower courts' unanimous findings are ineluctably correct.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Dated: August 6, 2020

Respectfully submitted,

Sherril M. Colombo
Ryan P. Forrest
Counsel of Record
LITTLER MENDELSON, P.C.
Wells Fargo Center
333 SE Second Ave., Suite 2700
Miami, FL 33131
Telephone: 305.400.7580
rforrest@littler.com

Counsel or Respondents