No. 20-820

IN THE

Supreme Court of the United States

DENISE JACKSON,

Petitioner,

v.

WELLS FARGO HOME MORTGAGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit correctly affirmed the District Court's dismissal of Petitioner's Amended Complaint alleging violations of the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*; 42 U.S.C. § 1981; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; and state law.

2. Whether the United States Court of Appeals for the Second Circuit correctly affirmed the District Court's finding that granting Petitioner leave to file a second Amended Complaint would be futile.

PARTIES TO THE PROCEEDING

The Petitioner is Denise Jackson and the Respondent is Wells Fargo Home Mortgage.

RULE 29.6 CORPORATE DISCLOSURES

Wells Fargo Home Mortgage is a division of Wells Fargo Bank, N.A. and 100 percent of the stock of Wells Fargo Bank, N.A. is owned, directly and indirectly, by Wells Fargo & Company, a publicly held corporation. Wells Fargo & Company has no parent corporation, and no publicly held corporation owns 10% or more of Wells Fargo & Company's stock. Wells Fargo Bank, N.A.'s parent corporation is WFC Holdings, LLC, and WFC Holdings, LLC is a privately held corporation that owns 10% or more of Wells Fargo Bank, N.A.'s stock; and WFC Holdings, LLC's parent corporation is Wells Fargo & Company, and Wells Fargo & Company is a publicly held corporation that is the Managing Member of WFC Holdings, LLC.

RELATED PROCEEDINGS

Cases related to this proceeding are:

- *Jackson v. Wells Fargo Home Mortgage*, No. 15-cv-5062, U. S. District Court for the Eastern District of New York. Judgment entered March 28, 2019.

- *Jackson v. Wells Fargo Home Mortgage*, No. 19-1446, U. S. Court of Appeals for the Second Circuit. Judgment entered July 21, 2020.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cited Authorities

Page

FEDERAL STATUTES

STATEMENT OF THE CASE

On August 27, 2015, Petitioner Denise Jackson ("Petitioner" or "Jackson"), appearing *pro se*, filed a Complaint ("Initial Complaint") in the United States District Court for the Eastern District of New York against Wells Fargo Home Mortgage[1] alleging civil rights violations in connection with Petitioner's unsuccessful attempts to refinance and/or modify her home mortgage in 2012, 2013 and 2014. Petitioner's allegations of discrimination were based on her status as African American; her general, unsupported, allegations that she was "qualified" for the refinance/modifications sought; and her unsupported assertion that everyone in charge of her various loan applications, none of whom are identified, was purportedly white. Petitioner did not allege, even in conclusory fashion, that the refinance/modifications denied to her were available to others similarly qualified but of different races, much less offer factual allegations in support.

Following Wells Fargo's motion to dismiss the Initial Complaint, Petitioner's federal claims were dismissed, in part on statute of limitations grounds, and otherwise for failure to state a cause of action, with the District Court declining to hear her state law claims. Petitioner thereafter filed an Amended Complaint, which the District Court also dismissed on the same grounds. Jackson appealed the latter dismissal to the Second Circuit, which affirmed the District Court's judgment of dismissal,

1. In 1998, Wells Fargo Home Mortgage merged into and is now a division of Wells Fargo Bank, N.A. (hereinafter, "Wells Fargo").

finding that "even under the liberal pleadings standard afforded *pro se* litigants, the Amended Complaint failed to allege a plausible violation of federal law," and that leave to amend a second time would have been "futile."

Specifically, as detailed below, the Second Circuit found Jackson "failed to state a claim (of discrimination) because she failed to plausibly allege that Wells Fargo denied her application based upon race or color," and that "(the) allegations are simply not enough to support Jackson's conclusory and speculative assertion that she was targeted on the basis of her race." Jackson subsequently moved before the Second Circuit to reconsider the Second Circuit's affirmance, which was denied. The instant Petition for Writ of Certiorari followed.

Significantly, as detailed below, annexed to Petitioner's Amended Complaint (and, thus, incorporated therein by reference) were documents demonstrating legitimate, non-race-based reasons for denying Petitioner a refinance or modification and that Petitioner was *unqualified* to receive the loans for which she applied. Petitioner never addressed this lack of qualification and, in fact, seemingly conceded in her own submissions when she stated that it took *98%* of her income to meet her present loan obligations, and, therefore, making it impossible for her to have met a 31% or even a 40% debt-to-income threshold even at a reduced interest rate under a refinance.

Additionally, though not specifically addressed by the Second Circuit, Petitioner's claims as they relate to her 2012 application were dismissed as time-barred, as Jackson had only two years after the alleged discriminatory practice to bring a civil rights claim and the action herein was

commenced in 2015.[2] These *substantive* defects rendered dismissal proper and a second amendment futile, as both the District Court and Second Circuit properly held.

Now, in seeking review of the Second Circuit's opinion affirming the District Court's dismissal with prejudice of her Amended Complaint, Petitioner has not identified any basis for this Court's review, nor has she articulated any public interest or important federal question that requires this Court's consideration. The principal purpose for certiorari review "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law," a purpose not implicated by this Petition. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Supreme Court Rule 10.1, now Supreme Court Rule 10(a)).

As detailed below, Jackson seemingly argues that a "split" among state and federal courts exists because Wells Fargo and other banks "win" some litigations and "lose" others, without identifying those cases or even whether they relate to comparable discrimination claims. Much of the Petition is instead devoted to attacks by Petitioner on her appellate counsel, or to other issues entirely irrelevant to the disposition of her Petition. Those include purported procedural issues at the District Court prior to its hearing and determination of the motion to

2. In her Petition, Jackson seems to mistakenly believe that the statute of limitations is measured from the time the motion to dismiss the Amended Complaint was decided by the District Court, rather than by commencement of the action and, therefore, seemingly asserts that the District Court caused the statute of limitations to run with respect to her claims as to her 2012 loan refinance efforts.

dismiss the initial Complaint, rather than the motion as to the Amended Complaint that was the subject of the appeal at issue.

Accordingly, the Petition for Writ of Certiorari should be denied.

I. Statement of the Facts

As noted above, this is a Petition for a Writ of Certiorari following the Second Circuit's affirmance of the District Court's dismissal with prejudice of Petitioner's Amended Complaint based on the District Court's determination that—like Jackson's previously dismissed Initial Complaint—the Amended Complaint asserted partially time-barred claims and otherwise failed to state a valid claim for relief.

a. Procedural History

Jackson commenced the action herein on August 27, 2015, alleging "[a] civil rights violation" and "discrimination" based on Wells Fargo's alleged "unfair lending practices" in connection with Jackson's loan refinance and modification efforts.[3] In her Initial Complaint, Jackson purported to assert claims under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; 42 U.S.C. 3605 (the "Fair Housing Act" or "FHA"); 42 U.S.C. 1981 ("Section 1981"); 42 U.S.C.

3. On September 1, 2006, Jackson executed the relevant mortgage (the "Mortgage"), secured by property located at 215 Maple Street, Brooklyn, New York, for $334,950, payable to First Republic Mortgage Bankers, Inc. ("Republic Bank").

2000d ("Title VI of the Civil Rights Act of 1964" or "Title VI"); and 42 U.S.C. 2000a. (A. 99).[4]

Wells Fargo timely appeared on October 14, 2015 by requesting a pre-motion conference in contemplation of a motion to dismiss Jackson's Initial Complaint. (A. 73). After the District Court granted Wells Fargo's request to make this motion at the pre-motion conference, Wells Fargo moved to dismiss Jackson's Initial Complaint pursuant to Rule 12(b)(6). (A. 71).

By Report and Recommendation dated January 19, 2017, Magistrate Judge Steven L. Tiscione recommended that the District Court grant Wells Fargo's motion to dismiss. (A. 12). However, particularly in light of Jackson's *pro se* status, the Magistrate recommended that Jackson be granted leave to amend her Initial Complaint "so that she may have the opportunity to correct its myriad of defects and to expound upon its conclusory allegations." (*Id.*).

After receiving two extensions from the Court, Jackson filed an amended complaint on May 16, 2017 (A. 25) and, on June 6, 2017, filed an "Addendum," consisting of various documents (A. 36), which, together, comprise Jackson's Amended Complaint.

Wells Fargo thereafter requested a pre-motion conference in contemplation of a motion to dismiss Jackson's Amended Complaint. The District Court granted Wells Fargo leave to proceed with its motion. (A. 73).

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4. Citations to the Joint Appendix before the Second Circuit are cited herein as "(A.___)."

By Report and Recommendation (the "Report") dated August 10, 2018, Magistrate Judge Tiscione again recommended that the District Court grant Wells Fargo's motion, and that leave to file a second amended complaint would be futile. (A. 127). Jackson served objections to the Report. (A. 156). By Memorandum and Order dated August 30, 2019, the District Court dismissed the action finding "no merit to Jackson's objections and no error in the Report and Recommendation." (A. 211).

Upon Jackson's appeal, the Second Circuit, by Summary Order dated April 24, 2020, affirmed the District Court's judgment of dismissal, holding that "even under the liberal pleadings standard afforded *pro se* litigants, the Amended Complaint failed to allege a plausible violation of federal law," and that leave to amend a second time would have been "futile." Specifically, the Second Circuit found Jackson "failed to state a claim (of discrimination) because she failed to plausibly allege that Wells Fargo denied her application based upon race or color" and that "(the) allegations are simply not enough to support Jackson's conclusory and speculative assertion that she was targeted on the basis of her race."[5]

The instant Petition for Writ of Certiorari ensued.

b. The Allegations of Petitioner's Amended Complaint

Jackson, an African-American woman, alleged civil rights violations in connection with her three unsuccessful

5. As noted above, Petitioner subsequently moved before the Second Circuit to reconsider the Second Circuit's affirmance, which was denied by Order dated July 14, 2020.

attempts to refinance or modify her existing home mortgage loan with Wells Fargo. (A. 25, 36). The only factual basis alleged for her discrimination claims was that "I am African American," that she "qualified" for the refinance/modification attempts, and that "[e]very person that had authority over my loan application was white, everyone I spoke to who had authority over my loan request was white." (A. 25).[6] Again, Jackson failed to identify any such person, how she communicated with them or upon what basis she concluded they were white, given that Petitioner alleged no in-person communications in connection with any of the refinance/modification attempts.

More specifically, Jackson alleged that in 2012 she requested a loan modification from Wells Fargo, but was denied, and instead, was "offered" a streamline refinance.[7] (A. 25). Jackson alleged that although she was "approved" for this refinance, Wells Fargo refused to close on the loan." (*Id.*). Notably, the "approval" upon which Jackson relies specifically stated, *inter alia*, that "your final approval is not guaranteed" and the loan approval "may be subject to re-qualification based on additional qualification or additional loan requirements." (A. 60).

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6. Notably, these are the same civil rights violations alleged in Jackson's Initial Complaint, in addition to her prior claims of fraud, deceptive business practices and breach of contract under state law, which were not subsequently referenced in the Amended Complaint. (A. 99).

7. It should be noted that Jackson was initially approved for the refinance in 2012 and subsequently found not to be qualified in 2013 because the "streamline modification" initially set to close in 2012 did not require a review of Petitioner's financial circumstances. Only the pre-closing determination that Jackson was in default in her escrow account and her inability to cure that default prevented the 2012 "streamline modification." (A. 193).

Moreover, also annexed by Petitioner and incorporated by reference to the Amended Complaint[8] was a "resolution letter" ("Resolution Letter") from Wells Fargo explaining, *inter alia*, why Wells Fargo ultimately denied Jackson's streamline refinance application in June 2012, after initially issuing a conditional approval. (A. 193).[9] As Wells Fargo explained in the Resolution Letter, nearly $6,000 was due and owing on Jackson's existing loan based upon an escrow account shortage and late fees. (*Id.*). Because Jackson did not have sufficient funds to pay these charges—*and these charges could not be included in the refinanced loan amount*—Wells Fargo denied her application. (*Id.*). Notably, Jackson, despite her claims of "qualification," never disputed her inability to pay these charges in 2012 or alleged facts to the contrary.[10]

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8. *See e.g. McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184 (2d Cir. 2007).

9. The Resolution Letter attached by Jackson to her Amended Complaint was transmitted by Wells Fargo to respond to certain concerns raised by Jackson, including with respect to her refinance/modification applications in 2012 and 2013, and therefore referenced Jackson's failure to qualify for them. (*Id.*) The Resolution Letter also referenced Wells Fargo's offer for her to re-apply for a refinance in 2014. (*Id.*). Petitioner seemingly argues that the invitation to *apply* amounted to loan *approval*, though Petitioner does not even allege she provided financial information and/or demonstrated her loan qualification in connection with that 2014 application. Indeed, as noted above, Petitioner's own submissions indicated she could in no way afford the refinance. (A. 163).

10. Although Jackson did not make this argument to the Second Circuit or submit these documents to the District Court, she attaches documents to her Petition (*see* Appendix D, Exhibit J) that seemingly purport to belatedly dispute her lack of

Jackson next alleged that in 2013 she again applied for a loan modification with Wells Fargo. (A. 25). Jackson alleged that, although she was "qualified," Wells Fargo denied a modification because "[s]he could not afford [her] house." (*Id.*). Petitioner offered no factual allegations to support her purported qualification. However, the Resolution Letter, submitted by Petitioner with her pleadings, also explained why Wells Fargo was unable to offer Jackson a loan modification in July 2013—to wit, because "in accordance with program guidelines," to qualify for a modification, the post-modification payment must be within 40% of Jackson's monthly income, and that Wells Fargo was unable to create a post-modification payment within that range. (A. 193). Jackson, despite her claim of "qualification," never disputed that calculation or alleged any facts to the contrary.[11]

Jackson next alleged that, in 2014, she again applied for a refinance, pursuant to the invitation made in the Resolution Letter from Wells Fargo. (A. 25). Jackson claimed that although she was "qualified" and was

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qualification for the 2012 loan, notwithstanding that such claim was properly rejected as time-barred. Regardless, documents that reference the loan escrow balance in *2014* are irrelevant to the issue of the escrow default and Petitioner's inability to close in *2012*, an issue that Petitioner had multiple opportunities to address below but failed to do.

11. Indeed, Jackson seemingly concedes—despite her conclusory claim of "qualification"—that her loan payment exhausted nearly her *entire income*. (A. 156, at p. 8). It should be noted that Jackson now attaches a "HAMP letter" (Appendix D, Exhibit E), which is likewise simply an invitation to apply, as "evidence" of her qualification in 2013—a document that in any event was never submitted to the District Court at any point.

specifically invited to re-apply, Wells Fargo again refused to "close." (A. 193). However, the Resolution Letter highlighted that, in order to reapply, Jackson would need to submit a new financial application to allow Wells Fargo "to determine the loan terms for which you may qualify" and that "[e]ligibility is subject to current underwriting and investor guidelines." (*Id.*). Again, despite her conclusory allegations of "qualification," Jackson did not allege that she even submitted a financial application or that she demonstrated eligibility. Jackson also failed to allege any change of circumstances from 2013 when Wells Fargo found that no affordable modification could be provided and Jackson seemingly conceded such. (A. 163). Jackson simply equates an invitation to reapply in 2014 with "qualification."

Finally, Jackson alleged that Wells Fargo colluded with non-party Republic Bank (the originating lender) "in the unlawful practice of redlining." (A. 25). According to Jackson, "Wells Fargo concealed the fact that Republic Bank owned my mortgage from 2006-2016." (*Id.*).[12] But Jackson failed to allege what concealment occurred or any factual allegations as to "redlining" by either Wells Fargo (which preliminarily approved her for the 2012 refinance, for which Petitioner was unable to close, and reviewed or offered to review her again twice afterwards) or Republic (which undeniably made the initial loan to Jackson).

12. Although not necessary for the disposition of this Petition or to the previous appeal or underlying motions, Wells Fargo, not Republic Bank, owned the loan at all relevant times. Petitioner is likely making this misstatement because the mortgage was not assigned to Wells Fargo until 2016. (A. 127).

Based on these allegations, Jackson asserted causes of action under the Equal Protection Clause, the Fair Housing Act, Section 1981, Title VI, and New York General Business Law 349, as well as common law causes of action for fraud and breach of contract. (A. 25). Jackson sought monetary damages of $20 million, "removal of all negative information reported to all credit agencies regarding [her] mortgage payment history," and to have "all attorn[eys] and court fees paid by the defendants in the event this goes to trial." (*Id.*).

c. The District Court's Dismissal of the Amended Complaint

Wells Fargo moved to dismiss the Amended Complaint. After the Magistrate Judge's Report, and an objection by Petitioner that amounted to another amendment of the already amended pleading (A. 127, 156), the District Court dismissed the Amended Complaint. (A. 211).

The District Court first upheld the Magistrate Judge's conclusion that the statute of limitations barred Jackson's FHA claim with respect to her 2012 refinance attempt, rejecting Jackson's argument that the 2014 denial extended the statute of limitations on such claim because the 2012, 2013 and 2014 denials were "separate and discrete events." (*Id.*) The District Court then found the Report also correctly concluded that the FHA claims failed to state a claim:

> [A]lthough Plaintiff alleged that she "qualified for, met the terms and conditions, was eligible for, and met all requirements of the loans that [she] requested and applied for"… [the

> Magistrate Judge] did not err in concluding that these allegations constituted "formulaic recitations of the elements of a cause of action" that "will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quotation omitted). As the Report observed, the amended complaint incorporates a Resolution Letter that plainly indicates that Plaintiff did not meet the income-to-debt ratio required for her 2013 loan and was unable to pay the fees required for her 2012 loan.

(*Id.*). The District Court further noted that:

> Plaintiff does not adequately allege that the housing opportunity she was denied remained available to other renters or purchasers…. Although Plaintiff need not plead discriminatory animus on the part of Defendant to state an FHA claim, she must nevertheless allege facts showing that Defendant treated her "differently from similarly situated [individuals] not in the protected [racial] class[], despite her qualifications for the loan[s], because of her race." *Boykin v. KeyCorp*, 521 F. 3d 202, 206 (2d Cir. 2008) (quotation omitted).

(*Id.*).

As to the Section 1981 claim, the District Court held that, again, Jackson's claims were premised on nothing more than "conclusory allegations" of discrimination, and adopted the Magistrate's recommendation to dismiss this claim. (*Id.*). Petitioner's Equal Protection claim was likewise rejected because, *inter alia*, Wells Fargo was a "private entity" and not a "state actor." (*Id.*).

After demurring to exercise supplemental jurisdiction as to Jackson's state law claims, the District Court declined to allow Jackson a further amendment, agreeing with the Magistrate Judge's conclusion that despite having had "multiple opportunities" to allege sufficient facts, "Plaintiff's allegations of discriminatory intent, deceptive practices, and fraud still lack any factual basis and are purely conjectural." (*Id.*).

d. The Second Circuit's Affirmance of the Dismissal

The Second Circuit affirmed the District Court's dismissal of the Amended Complaint and the denial of any further amendment by Petitioner.

In its *de novo* review of the Amended Complaint and the District Court's denial of further leave to amend, and reading the *pro se* pleading liberally, the Second Circuit held that:

> We affirm the judgment of dismissal because even under the liberal pleadings standard afforded *pro se* litigants, the [Amended Complaint] failed to allege a plausible violation of federal law. We further conclude that the district court did not err in denying Jackson leave to amend [ ] for a second time because amendment would have been futile.

(Appendix A). After reciting the applicable standards of law for Jackson's FHA, Section 1981 and Title VI claims, the Second Circuit held that:

> We need not decide whether the district court applied the proper pleading standard because we conclude, based on our independent review of the pleading, that the [Amended Complaint] failed to allege a plausible violation of federal law regardless. *See Dettelis v. Sharbaugh,* 919 F. 3d 161, 163 (2d Cir. 2019) ("We may affirm on any ground that finds support in the record.").

(*Id.*). Specifically, the Second Circuit held that:

> Jackson failed to state a claim under the FHA, Section 1981, or Title VI because she failed to plausibly allege that Wells Fargo denied her application based on her race or color. The sole allegations of racial discrimination in the [Amended Complaint] were that Jackson is African-American, she qualified for a mortgage refinancing, her applications were denied, and all the decision makers at Wells Fargo were white.... These allegations are simply not enough to support Jackson's conclusory and speculative assertion that she was targeted on the basis of her race. *See Premium Mortg. Corp. v, Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (affirming dismissal of claim where the 'complaint present[ed] only conclusory allegations…and we find them facially implausible.').

(*Id.*).

With respect to further amendment, the Second Circuit concluded:

> Here, Jackson was already granted one unsuccessful opportunity to amend her pleading with the court below, and on her counseled appeal she identifies no new facts that would cure the [Amended Complaint's] deficiencies. The district court thus rightly concluded that granting leave to amend was futile. *See Cuoco v. Moritsugu*, 222 F. 3d 99, 112 (2d Cir. 2000).

(*Id.*).

ARGUMENT

I. Jackson Has Not Met the Criteria for a Grant of Certiorari

As detailed below, nothing in the Petition meets the criteria set forth in Supreme Court Rule 10. The Second Circuit, in affirming the dismissal of the Amended Complaint here, did not "[enter] a decision in conflict with the decision of another United States court of appeals on the same important matter, . . . [decide] an important federal question in a way that conflicts with a decision by a state court of last resort; or . . . so far [depart] from the accepted and usual course of judicial proceedings, or [sanction] such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a).

As noted above, the entirety of Petitioner's argument with respect to a purported circuit "conflict" is Petitioner's contention that "Wells Fargo and other banks" win some

cases and lose others.[13] Petitioner does not identify those cases, or even whether they relate to the discrimination claims raised by Petitioner herein. In fact, there is no actual conflict here as to the applicable law or standard of review.

Nor is there any need for the exercise of the Court's supervisory power. Jackson was afforded an opportunity by the District Court to amend her initial Complaint and annexed documentary support to her Amended Complaint. (A. 25). Jackson then provided additional documentary evidence, whatever the value, in opposition to the Report. (A. 156). Notwithstanding these opportunities, Jackson failed to demonstrate in any way a plausible discrimination claim.

Instead, Jackson undermined her already conclusory claims by effectively confirming that she *lacked* the "qualification" for the loans sought, including failing to dispute the grounds upon which the 2012 and 2013 loans were denied. Moreover, Jackson conceded that paying her loan required virtually all of her income, making it impossible to reach a 31% or 40% debt-to-income ratio (A. 25, 156, at p. 8) (referring to the payment amounting to "98%" of her income).

Indeed, much of Jackson's Petition is devoted to matters entirely irrelevant to a grant of certiorari. Jackson's attacks on the counsel that handled her underlying appeal, and the attorney that handled her

13. Petitioner's submission does not include page numbers but this argument is made on page 1 of the section of her Petition entitled "Reason for Granting Petition."

subsequent appellate motion practice, have no bearing on the grant of certiorari. Jackson's grievances with both counsel—that they purportedly omitted certain documents from the Appendix below—only demonstrates Jackson's fundamental misunderstanding of the nature of an appeal and the record upon which that appeal may be based. The documents Jackson contends were "missing" were appropriately excluded from the Appendix because the documents in question were either submitted by Petitioner solely in connection with Wells Fargo's motion to dismiss Jackson's *Initial Complaint*—not the motion to dismiss Jackson's Amended Complaint—or not at all (or, in some instances were *included* in the Appendix, contrary to Jackson's claim that they were "missing.").

Jackson also misunderstands the clear *meaning* of the documents she claims were missing from the Appendix, whether properly before the Second Circuit or not. Jackson's reliance on a "HAMP letter" as demonstrating her *qualification* for the loan sought in 2013 (Appendix D, Ex. E)—which was, in fact, part of the Second Circuit record (A. 56)—is only a *form letter* reflecting the ability to *apply* for a HAMP loan.

Similarly, Jackson attempts now to rely on documents appropriately outside the appellate record, having never been submitted to the District Court, as "evidence" of her qualification for the 2012 refinance, but points only to documents from 2014 (Appendix D, Ex. J) that can shed no light on the status of her escrow account in 2012.[14]

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14. Petitioner also devotes much time to complaining about purported due process violations during the pre-motion conference held in connection with the motion to dismiss her Initial Complaint,

In addition, Petitioner has neither argued nor demonstrated (and, indeed, could not demonstrate) that the Second Circuit decided an "important question of federal law that has not been, but should be, settled by this Court, or . . . an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Instead, the Second Circuit, in its *de novo* review, acted consistent with well-settled law in affirming the well-reasoned opinion of the District Court's dismissal of Jackson's Amended Complaint. Jackson, again, offers no argument to the contrary.

At most, Jackson makes passing reference to being denied "constitutional protections," seemingly a reference to her complaints that she was not given notice of a conference prior to the motion to dismiss the Initial Complaint. However, Jackson does not dispute that she received notice of and opposed both that motion to dismiss and the subsequent motion to dismiss the Amended Complaint.

In sum, nothing herein merits this Court's extraordinary review of the Second Circuit's routine affirmance of the District Court's dismissal for failure to state a claim following the application of well-settled federal law.

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and alleges that the District Court "tampered" with documents Jackson submitted. Beyond the fact that the appeal herein is the appeal of the dismissal of the *subsequent* Amended Complaint, Petitioner indisputably had the opportunity and *exercised* the opportunity to oppose both motions, including by submitting additional documentary evidence in opposition to the Magistrate Judge's Report for the dismissal of the Amended Complaint (A. 156). None of that is in dispute.

More specifically, it can hardly be disputed that upon a motion to dismiss, as here, a court must determine whether a complaint states a legally cognizable claim by making allegations that, if true, would show that the plaintiff is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, but "[a] pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). A complaint may plausibly entitle a plaintiff to relief when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

There are "[t]wo working principles" that guide analysis of a motion to dismiss: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party," and "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 678, 679.

Although complaints drafted by *pro se* plaintiffs, such as Jackson, are held "to less stringent standards than

formal pleadings drafted by lawyers," *Boddie v. Schneider*, 105 F.3d 857 (2d Cir. 1997), and are interpreted "to raise the strongest arguments they suggest," *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 472 (2d Cir. 2006), "*pro se* status does not relieve a plaintiff of the pleading standards otherwise prescribed by the Federal Rules of Civil Procedure." *Saidin v. N.Y.C. Dep't of Educ.*, 498 F. Supp. 2d 683 (S.D.N.Y. 2007).

Although "[a] *pro se* complaint 'should not [be] dismissed without [the Court] granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated'" *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010), "leave to re-plead can be denied where it is clear no amendments can cure the pleading deficiencies and any attempt to replead could be futile." *Leogrande v. New York*, 2013 WL 1283392, at *15 (E.D.N.Y. Mar. 29, 2013).

Here, the Second Circuit correctly held that Jackson's Amended Complaint failed to meet even these relaxed standards.

II. The Second Circuit Properly Affirmed the Dismissal of the Civil Rights Claims

The Second Circuit properly affirmed the District Court's dismissal of Jackson's unsupported civil rights claims under the FHA, Title VI and the Equal Protection Clause.

a. Jackson's Fair Housing Act Claim

Putting aside whether the claims with respect to the 2012 FHA claim were time-barred, the Second Circuit correctly held that Jackson's FHA claim must be dismissed for failure to state a claim. (A. 222). Under the FHA, to state a claim of housing discrimination, a plaintiff must show: (1) that she is a member of a protected class; (2) that she sought and was qualified to rent or purchase the housing, (3) that she was rejected; and (4) that the housing opportunity remained available to other renters or purchasers. *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). Both the District Court and the Second Circuit correctly held that Jackson's FHA claim was insufficiently pled and conclusory.

Although Jackson was not required to plead discriminatory animus on the part of Wells Fargo to state an FHA claim, she must nevertheless allege *facts* showing that Wells Fargo treated her differently from similarly situated individuals not in the protected racial class, despite that she was qualified for the loans, and that the disparate treatment was because of her race. This she failed to do, or even attempt. Jackson fails to show that either the District Court or the Second Circuit applied the wrong standard or arrived at an inaccurate conclusion, much less that a different result would have occurred in a different Circuit.

b. Jackson's Section 1981 and Title VI Claims

The Second Circuit also properly affirmed the dismissal of Jackson's unsupported Section 1981 and Title VI Claims.

In order to state a claim under either of these statutes, "the plaintiff must show, *inter alia*, that the defendant discriminated against [her] on the basis of race, that that discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001). Jackson does not dispute the application of this standard, or that, as the District Court noted, the standard for liability under these statutes is *more* exacting than the standard required to sustain an FHA claim. Jackson fails to demonstrate in any way any conflict over the use or application of this standard among the Circuit courts or even demonstrate how this standard was incorrectly applied to her herein.

c. Jackson's Equal Protection Clause Claim

Equal Protection claims may only be brought against state actors. A "private entity" like Wells Fargo "does not become a state actor for purposes of § 1983 merely on the basis of the private entity's creation, funding, licensing, or regulation by the government." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012). "Rather, there must be such a close nexus between the [s]tate and the challenged action that the state is *responsible* for the specific conduct of which the plaintiff complains." *Id.* (internal quotations omitted). Courts routinely consider mortgage lenders like Wells Fargo to be private entities in the context of claims like the Equal Protection claim initiated by Jackson. *See, e.g.*, *DeSouza v. Park W. Apts., Inc.*, No. 15-CV-1668, 2018 WL 2990099, at *16 (D. Conn. June 14, 2018); *Secard v. Wells Fargo Bank, N.A.*, No. 15-cv-499, 2015 WL 6442563, at *3 (E.D.N.Y. Sept. 9, 2015); *Brown v. Chase Bank,* No. 13-CV-5309, 2013 WL 5537302, at *2 (E.D.N.Y. Oct. 17,

2013). Petitioner does not address, much less challenge, any of this in her Petition. The Second Circuit's conclusion was clearly correct.

III. The Second Circuit Properly Affirmed the Denial of Leave to Further Amend.

"Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires, it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). "[W]here the plaintiff is unable to demonstrate that [s]he would be able to amend [her] complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999).

Here, the Amended Complaint, and the documents submitted by Jackson purportedly in support thereof, demonstrated the futility of allowing any further pleading. The flaws in Jackson's claims are not the result of unartful pleading. Rather, they are the consequence of the underlying facts, and it cannot be disputed that Jackson was unable to articulate any additional facts that might have aided her claims even when represented on appeal by counsel. Jackson could only recite the bare legal standards of the statutes upon which she relies because there is nothing to support her claims of discrimination—assertions of her race and the denials, without more, simply do not suffice. Jackson could not show she was discriminated against because the truth is that she was demonstrably and concededly not qualified for the loans she sought, much less that similarly unqualified people of different races were treated differently than she was.

CONCLUSION

The District Court's ruling below dismissing the Petitioner's Amended Complaint and denying leave to amend for a second time was entirely proper, particularly where Petitioner's objection to the Magistrate Judge's Report and Recommendation in essence operated as a second, meritless amendment. The Second Circuit's Opinion affirming the ruling of the District Court was well-supported by the record and legal precedent. Nothing in Jackson's Petition implicates any of the considerations for certiorari review set forth in Supreme Court Rule 10. This case simply does not present a novel or pressing issue worthy of this Court's consideration. As such, Wells Fargo respectfully requests that the Petition for Writ of Certiorari be denied.

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Respectfully submitted,

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