**No. 19-688**

IN THE

# Supreme Court of the United States

WELLS FARGO & CO., ET AL.,
*Petitioners*,

v.

CITY OF MIAMI, FLORIDA,
*Respondent*.

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

## SUGGESTION OF MOOTNESS


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## INTRODUCTION

A Petition for a Writ of Certiorari was filed in this matter on November 25, 2019 by the Wells Fargo defendants.[1] The City of Miami filed its Brief in Opposition on January 27, 2020. At the same time, the District Court ordered that an amended complaint be filed on February 6, 2020. However, prior rulings made by the District Court that are not subject to interlocutory appeal, narrowed the scope of the City's claims so that the City decided, after its opposition to certiorari was filed, that it would not pursue the matter further. As a result, the City filed an unopposed motion to dismiss the case with prejudice, with each party bearing its own expenses and attorney fees, which the District Court granted on January 30, 2020. (Exh. A).

In light of that order ending the case with prejudice in the District Court and to avert the need for Petitioner to file a reply brief, the City files this suggestion of mootness.

## STATEMENT

The City filed its complaint, alleging violations of the Fair Housing Act, 42 U.S.C. § 3601 et seq, ("FHA"), on December 13, 2013. *See* Pet. App. at 76a. On July 9, 2014, the District Court dismissed the relevant claims with prejudice. Pet. App. 200a. The Eleventh Circuit unanimously reversed. *Id*. at 154a-155a.

This Court granted certiorari and affirmed in part, reversed in part. *Id*. at 84a. On remand, on May

[1] Petitioners are Wells Fargo & Co. and Wells Fargo Bank, N.A. (collectively, "Wells Fargo" or "Bank").

3, 2019, the Eleventh Circuit unanimously held that the City's pleading met the FHA's proximate cause standard for some but not all of its claimed injuries based on "the broad and ambitious scope of the FHA, the statute's expansive text, the exceedingly detailed allegation found in the complaints, and the application of the administrative feasibility factors laid out by the Supreme Court." *Id*. at 3a-4a.

Wells Fargo sought but was denied a petition for rehearing or rehearing en banc. Order, *City of Miami v. Wells Fargo & Co.*., No. 14-14544 (11th Cir. Aug. 8, 2019). It was subsequently denied a stay of the mandate pending the Bank's petition for certiorari. Order, *City of Miami v. Wells Fargo & Co*., No. 14-14544 (11th Cir. Oct. 9, 2019). Justice Thomas then similarly denied a stay pending its petition. Order, *Bank of Am. Corp. v. City of Miami*, No. 19A429 (Oct. 30, 2019).

## ARGUMENT

### I. The Case is Moot, and the Petition Should be Denied.

Dismissal of the case with prejudice by the District Court renders the case moot. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."). When a case "becomes moot at any point during the proceedings[, it] is 'no longer a "Case" or "Controversy" for purposes of Article III,' and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).

This jurisdictional restriction "denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' [and] subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990) (citation omitted). It, therefore, "is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals," because "parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id*. at 477-78 (citations omitted).

## II. Vacatur of the Decision Below Is Not Warranted.

Although the case is moot, the petition for certiorari should be denied and the decision below should not be vacated pursuant to *United States v. Munsingwear, Inc*., 340 U.S. 36 (1950) . Vacatur serves the purpose of "clear[ing] the path for future relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. *Id*. at 40. It is an equitable remedy that ensures that "those who have been prevented from obtaining the review to which they are entitled [are] not ... treated as if there had been a review." *Id*. at 39. The rationale behind *Munsingwear* vacatur is that the party seeking review should not suffer "'any legal consequences'" "by what [this Court] ha[s] called a 'preliminary' adjudication." *Camreta v. Greene*, 563 U.S. 692, 713 (2011) (quoting *Munsingwear*, 340 U.S. at 40-41). Here, because the entire matter was dismissed with prejudice and the decision below was limited to the proximate-cause standard applicable in FHA cases, there will not be any relitigation nor will the decision be binding on any of the parties.

### A. This Court Remanded the Case in 2017 to Obtain Percolation in the Lower Courts, and the Court of Appeals Decision Importantly Contributes to that Process as the First Circuit Court to Reach the Issue.

In 2017 in this case, this Court explicitly "declin[ed]" to decide "the precise boundaries of proximate cause under the FHA and to determine on which side of the line the City's financial injuries fall." Pet. App. 86a. Instead, it held that "lower courts should define, in the first instance, the contours of proximate cause under the FHA and decide how that standard applies to the City's claims for lost property-tax revenue and increased municipal expenses." *Id.*

That direction invoked a well-recognized process of percolation that allows the Court to sample potentially divergent views from the lower courts before determining whether a single approach is preferable. As Justice Frankfurter, writing for the Court, stated in *Maryland v. Baltimore Radio Show,* 338 U.S. 912, 918 (1950): "It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

Percolation allows multiple judicial voices to explore a new question, which "may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting).

On remand, the Eleventh Circuit faithfully examined this Court's guidance and developed an appropriate approach to proximate cause for cases

brought by local governments, providing the first decision by a circuit court to apply this Court's guidance from *City of Miami*. On February 10, 2020, just one week from the time of this filing, the Ninth Circuit will hear oral argument on the same FHA proximate-cause issue in a case brought by Oakland. *See City of Oakland v. Wells Fargo & Co.*, No. 19-15169; Oral Argument Calendar, Feb. 10-14, 2020, available at https://www.ca9.uscourts.gov/calendar/view.php?caseno=19-15169. Should the Ninth Circuit arrive at a contrary decision, a cognizable circuit split would occur for the first time, providing an opportunity for this Court's consideration of the resulting certiorari petition.

This Court has recognized that "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). For that reason, this Court held that issues of vacatur must "take account of the public interest." *Id.*

Relying on these observations, the Ninth Circuit denied vacatur in a mooted case because "the lack of prejudice weighs heavily in favor of denying the motion." *Dickens v. Ryan*, 744 F.3d 1147, 1148 (9th Cir. 2014) (en banc). It further noted that "[b]oth parties' claims have been subjected to en banc review[, and n]either party is entitled to additional appellate review, because the decision to grant a petition for

certiorari is discretionary." *Id*. It concluded that there is "no reason to undo this precedent and force future panels to duplicate our efforts by re-deciding issues we have already resolved within the contours of article III." *Id*. The instant case stands in a similar position, although here en banc review was denied as unwarranted.

Not only is Wells Fargo unaffected by the continued existence of the decision below because the City will not be able to revive the instant lawsuit, vacatur would not affect the continuing persuasive value of the decision. As Judge Sentelle wrote for a unanimous court,

> it is not self-evident that the precedential effects of a mooted judgment should be any less persuasive than if the mooting events had not occurred. Preclusion is normally based on a decision as to the controversy between the litigating parties. Precedent ordinarily is not. Precedent, more often than not, is drawn from cases not involving either of the parties for or against whom the precedent is offered.

*Mahoney v. Babbitt*, 113 F.3d 219, 222 (D.C. Cir. 1997). *Mahoney's* rationale suggests that the only thing that might be accomplished by vacatur is to force reconsideration in the Eleventh Circuit of the issue, should it arise again, because courts outside the Eleventh Circuit would still consult it for its persuasive value (as would courts within the Eleventh Circuit). That limited value, which in the en banc view of the Ninth Circuit in *Dickens* would require a court to "duplicate [its] efforts by re-deciding issues we have

already resolved within the contours of article III," renders vacatur an empty exercise and completely unwarranted.

One scholar's study of vacated decisions found that courts will often "cite a vacated opinion while adding the modifying 'on other grounds,'" which "strongly suggest[s] … the opinion retains some force precisely because that vacatur was predicated on grounds other than those for which the opinion is now being cited." Charles A. Sullivan, *On Vacation*, 43 Hous. L. Rev. 1143, 1146 (2006) (footnote omitted).

Indeed, the D.C. Circuit regards a decision vacated by this Court "without addressing the merits of a particular holding in the panel opinion" to "continue[] to have precedential weight … in the absence of contrary authority." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (citation omitted). This treatment of vacated decisions coincides with the similar treatment of non-precedential unpublished opinions, *see, e.g., United States v. Hammond*, 912 F.3d 658, 662 (4th Cir.), *cert. denied*, 140 S. Ct. 80 (2019) or summary dispositions. *See, e.g., Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 450 n.5 (2d Cir. 2012) (although lacking precedential value, "'[w]e are, of course, permitted to consider summary orders for their persuasive value, and often draw guidance from them in later cases.'") (citation omitted). *See also Sullivan*, 43 Hous. L. Rev. at 1148 ("a vacated opinion is …at least as persuasive as many other nonbinding judicial statements. Under this view, a court citing an opinion 'vacated on other grounds' is merely noting that the views cited were not directly contradicted by the higher court's actions, much the same as would be true when a court's opinion was 'reversed on other grounds.'").

After all, "a logical and well-reasoned decision, despite vacatur, is always persuasive authority, regardless of its district or circuit of origin or its ability to bind." *In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 898 (Bankr. S.D.N.Y. 1993). *See also County of Los Angeles v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) ("Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, the expression of the court below on the merits, if not reversed, will continue to have precedential weight.") (citations omitted); *U.S. ex rel Espinoza v. Fairman*, 813 F.2d 117, 125 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987) (decision vacated by Supreme Court remains persuasive precedent where Court did not reject the decision's underlying reasoning).

Where, as here, "the decision stands as the most comprehensive source of guidance available" on the questions at issue, although vacated, a decision's persuasive power still has significant influence. *Christianson v. Colt Indus. Operating Corp*., 870 F.2d 1292, 1298 (7th Cir. 1989). Thus, the public interest favors letting stand the well-litigated and strong declaration by the Eleventh Circuit on how the proximate-cause principles apply to FHA actions.

### B. This Petition for Certiorari Would Have Otherwise Been Denied.

The "ordinary practice" of this Court is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Indiana & Kentucky, Inc*., 139 S. Ct. 1780, 1782 (2019) (per curiam). This practice strongly suggests that the Bank's petition

would have been denied. The Bank does not assert an actual circuit conflict, only a contrived conflict between this decision on FHA proximate cause and other decisions involving "different statutory and factual contexts." Pet. 14. Yet, this Court has already held that proximate-cause is statute-specific. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014). *See also Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267 (1992) (holding that the proximate cause inquiry requires review of "some statutory history."). Even common-law proximate cause took "many shapes." *Id.* at 268. *See also CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011) ("Common-law 'proximate cause' formulations varied.").

No federal circuit other than the Eleventh Circuit has yet reached the FHA proximate-cause issue presented in this case, although the Ninth Circuit argument on February 10 will present another circuit's consideration of the same issue. Under the "ordinary practice" discussed in *Box*, certiorari should be denied.

Wells Fargo's other attenuated conflicts also do not render its petition certworthy. It asserts a conflict over the use of statistical evidence, although the uses it proffers from two other circuits are not comparable and involve what one court described as unexplained dicta. *See City of Oakland v. Wells Fargo Bank, N.A.*, No. 15-CV-04321-EMC, 2018 WL 3008538, at *9 (N.D. Cal. Jun. 15, 2018). Its other claimed conflict, covered in three scant paragraphs claims that in evaluating different statutes, circuits emphasize different parts of the phrase "some direct relation." Pet. 20. The argument and the substance of the argument are too

insubstantial to provide a basis for certiorari, even it was the basis of a real conflict, which it is not.

Although the Brief in Opposition provides much greater detail and reasons why the case is not certworthy, some support for that position might be derived from Justice Thomas's denial of the Bank's motion for a stay. Order, *Bank of Am. Corp. v. City of Miami*, No. 19A429 (Oct. 30, 2019). While such orders do not ordinarily explain their rationale, and this one conformed to that practice, the factors considered in denying the stay suggest that a grant of the forthcoming petition was unlikely, as the first factor is whether "four Members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers).

Similarly, although this Court did not explain the rationale behind the denial of certiorari after the case had been mooted in *Velsicol Chemical Corp. v. U.S.,* 435 U.S. 942 (1978) (mem.), it did so after the Solicitor General had argued in favor of denial and that vacatur should not occur. *See* Eugene Gressman *et al*., Supreme Court Practice § 5.13, at 357 (9th ed. 2007); *Commodity Futures Trading Comm'n v. Bd. of Trade of City of Chicago*, 701 F.2d 653, 657 (7th Cir. 1983) (describing what occurred in *Velsicol*). Indeed, as in *Dickens*, where the en banc Ninth Circuit concluded that certiorari was unlikely and full adjudication of an issue of greater public value and no adverse consequences to the parties, the Eleventh Circuit's decision should not be vacated.

### C. *Munsingwear* Vacatur is Properly Reserved for Final Judgments.

The decision below was not a final judgment but an interlocutory review on remand of the standards applicable to proximate cause at the pleading stage of an FHA action. Dismissal with prejudice assures that there will not be any relitigation of the case between the parties. For that reason, no party is prejudiced by the guidance that the Eleventh Circuit provided on the applicable legal standard because the decision does not control the merits of the now-mooted case.

Vacatur is generally reserved for cases in which a losing party is unfairly deprived of a chance to litigate a final judgment to conclusion on appeal. The consensus in the circuits is that, when the issue decided is an interlocutory one, the "usual practice is just to dismiss the appeal as moot and not vacate the order appealed from." *Gjertsen v. Board of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984). *See also McLane v. Mercedes-Benz of N. Am.*, 3 F.3d 522, 524 n.6 (1st Cir. 1993) ("In the case of interlocutory appeals, however, the usual practice is just to dismiss the appeal as moot and not vacate the order appealed from.") (internal quotation omitted); *In re Tax Refund Litig.*, 915 F.2d 58, 59 (2d Cir. 1990) (same); *Fleming v. Gutierrez*, 785 F.3d 442, 449 (10th Cir. 2015) (same); *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1122 (11th Cir. 1995) (same).

In reaching that widely shared conclusion, the Seventh Circuit reasoned that "only a final judgment has res judicata or collateral estoppel effect, [so] there is no harm in letting an interlocutory order stand." *Gjertsen*, 751 F.2d at 202. Here, neither potential effect exists, and the rationale for vacatur, "spawning

any legal consequences" for the losing party, *Munsingwear*, 340 U.S. at 41, thus disappears.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied and the decision below should not be vacated.

Respectfully submitted,

February 3, 2020

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# APPENDIX

**EXHIBIT A**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 13-cv-24508-DIMITROULEAS

CITY OF MIAMI, a Florida municipal corporation,
Plaintiff,
v.

WELLS FARGO & CO., and WELLS FARGO BANK, N.A.,

Defendants.
_____/

**ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR DISMISSAL WITH PREJUDICE**

THIS CAUSE is before the Court on the Plaintiff's Unopposed Motion for Dismissal of this lawsuit with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

The Court, having reviewed the Motion, noting that it is unopposed, and being otherwise fully advised in the premises, hereby **ORDERS** and **ADJUDGES** as follows:

1. The Motion [DE 116] is **GRANTED.**

2. Pursuant to Federal Rule of Civil Procedure 41(a)(2) and the Plaintiff's unopposed request, this case is hereby **DISMISSED**

**WITH PREJUDICE**, with each party to bear its own costs and expenses, including, without limitation, attorneys' fees.

3. The Clerk is **DIRECTED** to **CLOSE** this case and **DENY AS MOOT** any pending motions.

**DONE AND ORDERED** in Chambers, at Fort Lauderdale, Broward County, Florida, this 30th day of January, 2020.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States
District Judge

Copies to:
Counsel of record