No. 14-14544

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CITY OF MIAMI, a Florida Municipal Corporation,
Plaintiff-Appellant,

v.

WELLS FARGO BANK & CO., WELLS FARGO BANK, N.A.,
Defendants-Appellees.

On Remand from the Supreme Court of the United States

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLEES' PETITION FOR REHEARING EN BANC

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May 31, 2019

Case No. 14-14544

City of Miami v. Wells Fargo Bank & Co.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae the Chamber of Commerce of the United States of America (the Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company and no publicly held company has ten percent or greater ownership in the Chamber.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Amicus Curiae the Chamber certifies that, in addition to the persons and entities named in the parties' certificates of interested persons, the following individuals or entities have or may have an interest in the outcome of this case:

1. Wilmer Cutler Pickering Hale & Dorr LLP, Law Firm for Amicus Curiae the Chamber of Commerce;
2. Reginald J. Brown, Attorney for Amicus Curiae the Chamber of Commerce;
3. Daniel P. Kearney, Attorney for Amicus Curiae the Chamber of Commerce;
4. Jeremy Dresner, Attorney for Amicus Curiae the Chamber of Commerce;
5. Andrew Jaco, Attorney for Amicus Curiae the Chamber of Commerce;
6. Steven P. Lehotsky, Attorney for Amicus Curiae the Chamber of Commerce; and
7. Janet Galeria, Attorney for Amicus Curiae the Chamber of Commerce.

STATEMENT PURSUANT TO ELEVENTH CIRCUIT RULE 35-5(C)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether a plaintiff may plausibly allege a violation of the Fair Housing Act based on nothing more than "logical continuity" between the defendant's alleged violative conduct and the plaintiff's alleged injury or whether a more direct relationship is required to establish proximate cause.

s/ Jeremy Dresner
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INTEREST OF THE CHAMBER OF COMMERCE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every economic sector, and from every region of the country. One important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.[1]

The Chamber has a substantial interest in these cases, which threaten to reshape the impact of the Fair Housing Act on residential lending markets.[2] Many of the Chamber's members participate directly in these markets. As a result, the Chamber has direct insights into the deleterious effects the panel's decision below would have on mortgage markets and the ability of lenders to provide the funding essential to foster growth and development in historically underserved communities. The Chamber respectfully submits that its views on the implications of the decision below shed light on the legal and policy questions presented here.

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[1] No counsel for a party authored this brief in whole or in part, and no one other than the Chamber, its members, or its counsel contributed any money intended to fund the preparation or submission of this brief.

[2] The Chamber has already participated in this case, appearing as an amicus curiae before the Supreme Court.

STATEMENT OF ISSUES AND INTRODUCTION

The panel once again has adopted a proximate cause standard that provides no meaningful limit on liability under the Fair Housing Act ("FHA" or "the Act"). The panel's first decision was already vacated by the Supreme Court. That decision held that liability under the Act extended to *any* financial injuries that were merely a "foreseeable" result of the alleged violation, regardless of how many "links in the causal chain" existed between the violation and the alleged injury. The Supreme Court rejected that standard, explaining that "foreseeability" sweeps in harms that are "'too remote' from the defendant's unlawful conduct," *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014)), and instructing the panel to apply the same "directness principles" applicable to "tort actions recognized at common law," *id.* (quoting *Curtis v. Loether*, 415 U.S. 189, 195 (1974)).

The panel's second decision fails to heed the Court's instruction. Rather than identify a "direct" injury, the panel looked for a "logical bond" between the alleged conduct and harm—an analysis that is hardly distinguishable from the foreseeability standard rejected by the Court. Thus, the panel found a "logical bond" connecting a bank's issuance of mortgage loans, the subsequent defaults of homeowners on their loans, eventual foreclosures on the affected homes,

abandoned homes, a general reduction in property values, and ultimately a loss of City property tax revenue. That conclusion cannot be squared with the Court's requirement of a "direct relation between the injury asserted and the injurious conduct alleged," or its admonition that proximate cause generally does not "go beyond the first step." *Bank of America*, 137 S. Ct. at 1299 (citations omitted).

This error in the panel's proximate cause analysis, by itself, warrants rehearing en banc. But the potential impact of the panel's decision makes this case exceptional. The panel's decision portends the very same consequences that the Court sought to avoid—virtually boundless liability under the FHA that could allow almost anyone to pursue claims for economic harms entirely remote from the alleged misconduct. Municipalities beyond the City of Miami, already having relied on the panel's first decision to bring their own lawsuits, will find nothing to deter them in the panel's "logical bond" test. And the breadth of the panel's analysis again paves the way for non-municipal plaintiffs—the corner grocer, the neighboring homeowner, the real estate agent, among others—to bring claims for their own alleged economic injuries.

The result of the panel's analysis, if left uncorrected, will likely be a decrease in the availability of credit to city homeowners and underserved communities, contrary to the purposes of the FHA. Facing a potential wave of lawsuits and unpredictable legal risks, lenders may seek to manage their liability

by reducing their exposure to cities and municipalities. This consequence could be especially pronounced in those areas where hard times might be hurting property values or causing tax revenue shortfalls—in other words, the very localities that may be most in need of housing credit and that the FHA was designed to serve. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015).

ARGUMENT

I. THE PANEL'S DECISION WILL HAVE ADVERSE POLICY CONSEQUENCES THAT ARE CONTRARY TO THE PURPOSES OF THE FAIR HOUSING ACT

The panel's decision threatens near-limitless liability under the FHA, opening the door to suits for attenuated economic injuries by cities, businesses, individuals, and others—none of whom experienced race-based housing discrimination prohibited by the Act. That is exactly what the Supreme Court sought to avoid in rejecting the "foreseeability" standard initially adopted by the panel. "A violation of the FHA may … be expected to cause ripples of harm to flow far beyond the defendant's misconduct," (Op. 18), but the Court made clear that "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel," *Bank of America*, 137 S. Ct. at 1306. Despite the Court's insistence on "direct" causation, *id.*, the panel's second decision amounts to a repackaging of the "foreseeability" standard into an equally limitless "logical bond" test.

1. The panel's decision thus invites "massive and complex damages litigation" under the FHA. *Id.* at 1299 (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983)). The decision opens the federal courts to a myriad of lawsuits from municipalities and others alleging remote and indirect economic injuries from housing discrimination. This is plainly contrary to the Court's direction that proximate causation principles generally do not recognize damages "beyond the first step." *Bank of America*, 137 S. Ct. at 1306. The panel nevertheless adopted a test of such breadth that it had to grapple with issues such as whether corner grocers or homeowners whose business income or property value was reduced by a neighbor's discrimination-induced foreclosure, may sue for damages under the FHA—injuries that are plainly beyond what the Act contemplates.

The wave of FHA claims based on such attenuated alleged harms has already started. Cities in the Eleventh Circuit and throughout the country have brought lawsuits alleging similar theories of liability,[3] and the panel's decision is

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[3] *See Montgomery County v. Bank of Am. Corp.*, No. 1:18-cv-03575 (D. Md.); *Prince George's County v. Wells Fargo & Co.*, No. 8:18-cv-03576 (D. Md.); *City of Sacramento v. Wells Fargo & Co.*, No. 2:18-cv-00416 (E.D. Cal.); *City of Philadelphia v. Wells Fargo & Co.*, No. 2:17-cv-02203 (E.D. Pa.); *County of Cook v. Wells Fargo & Co.*, No. 1:14-cv-09548 (N.D. Ill.); *County of Cook v. Bank of America Corp.*, No. 1:14-cv-02280 (N.D. Ill.); *County of Cook v. HSBC N. Am. Holdings Inc.*, No. 1:14-cv-02031 (N.D. Ill.); *Cobb County v. Bank of America Corp.*, No. 1:15-cv-04081 (N.D. Ga.); *Dekalb County v. HSBC North America Holdings, Inc.*, No. 1:12-03640 (N.D. Ga.); *City of Miami Gardens v. Bank of*

sure only to encourage this litigation. The panel's analysis also clears the way for inevitable claims by non-municipal litigants. The decision sought to distinguish such claims, suggesting that "corner grocers or neighboring property owners … would have substantially more difficulty" alleging calculable damages attributable to banks' actions, in part because they could not readily resort to "hedonic regression techniques." (Op. 63–64.) But regression analysis is merely a technique for identifying correlations in causally complex circumstances. For the neighborhood plaintiff, whose claim does not depend on aggregate data—*e.g.*, "I lost my grocery business because half the homes in the neighborhood experienced foreclosure"—the availability of regression analysis is beside the point. In any event, the fact that non-municipal plaintiffs may face evidentiary challenges does not mean they will not try to bring suit, and it has no bearing on whether their alleged injuries are legally recoverable under the FHA.

2. The panel's drastic expansion of liability was also entirely unnecessary, because the FHA's prohibition on housing discrimination is already subject to an extensive civil enforcement regime. As an initial matter, private plaintiffs who are discriminated against in a housing transaction, and therefore

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America Corp., No. 1:14-cv-22202 (S.D. Fla., filed on June 13, 2014); *City of Miami Gardens v. Wells Fargo & Co.*, No. 1:14-cv-22203 (S.D. Fla.); *City of Miami Gardens v. Citigroup, Inc.*, No. 1:14-cv-22204 (S.D. Fla.); *City of Miami Gardens v. JPMorgan Chase & Co.*, No. 1:14-cv-22206 (S.D. Fla.); *City of Oakland v. Wells Fargo & Co.*, No. 3:15-cv-04321 (N.D. Cal.).

directly harmed, have ample remedies and incentive to bring suit under the Act, given the availability of punitive damages, attorneys' fees, and equitable relief. Moreover, both the Department of Justice (DOJ) and the Department of Housing and Urban Development (HUD) aggressively enforce the FHA against lenders and others. Congress has assigned to the Attorney General the exclusive statutory authority to bring actions alleging patterns or practices of housing discrimination, which may result in monetary relief to aggrieved persons. Indeed, FHA enforcement by DOJ has obtained an estimated $1 billion in monetary relief from mortgage lending discrimination cases. *See* NATIONAL FAIR HOUSING ALLIANCE, 2018 FAIR HOUSING TRENDS REPORT 16–17. In light of these enforcement mechanisms, there is no basis for the panel's conclusion that suits like the City of Miami's are necessary to deter FHA violations. (Op. 44, 61.)

3. Further, any additional deterrence from suits like the City's will come at the cost of significant harms to lending markets, particularly those that serve low income communities. The expansive and uncertain scope of liability under the panel's proximate cause standard cannot easily be mitigated even through the most effective compliance controls. Faced with the threat of burdensome litigation, many lenders may simply eliminate certain product offerings, further reducing investment and development in urban areas. This consequence flies in the face of the FHA's purposes. *See Inclusive Cmtys. Project*, 135 S. Ct. at 2524 (noting that

if the specter of abusive FHA claims "causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system").

II. THE PANEL'S "LOGICAL BOND" TEST IS INCOMPATIBLE WITH THE SUPREME COURT'S DIRECTION

The panel's proximate cause analysis rendered the Supreme Court's "direct relation" mandate into a new test allowing liability for any injury that has a "logical bond" with the alleged harm. (Op. 23.) In reaching this conclusion, the panel made several critical errors that cannot be reconciled with the Court's direction.

First, the panel focused unduly on whether proximate cause is *categorically* limited to the "first step" in the causal chain. As the panel necessarily conceded, the number of steps in the causal chain is not only relevant, but is often determinative; the Supreme Court has made this clear. *Bank of America*, 137 S. Ct. at 1306 ("'The general tendency'" in these cases, "'in regard to damages at least, is not to go beyond the first step.'" (quoting *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 10 (2010))). And while the panel correctly recognized that the "first step" rule is subject to limited exceptions, it failed to show why this type of case is one of them. The panel principally relied on *Lexmark* in which the Supreme Court held that a company whose potential customers are deceived into withholding business could sue a competitor for false advertising. But *Lexmark*'s

limited exception for Lanham Act claims cannot support the panel's "logical bond" test. To even remotely fit the facts of this case to *Lexmark*'s rationale, the panel had to skip several steps in the causal chain between the offering of discriminatory loan terms and a decrease in City tax revenue. As the panel put it: "*Once we have reached increased foreclosures* on a neighborhood or citywide basis, it seems to us that the path to the City's substantially decreased tax base is *clear, direct and immediate*; we can discern no obvious intervening roadblocks." (Op. 35 (emphases added).) But even this truncated analysis omits several further steps in the causal chain *beyond* foreclosure—*i.e.*, foreclosures leading to vacant and abandoned properties leading to lower property values leading to lower tax assessments leading to lower tax revenue.

Second, the panel's decision exhibits a misplaced faith in the ability of "hedonic regression" analysis to disentangle the complex causal connections of a city's social and economic life. As an initial matter, it is not clear why the panel thought the issue of "hedonic regression" relevant at all. The panel appears to have reasoned backwards from its judgment that regression analysis is "administratively feasible" to the conclusion that the alleged FHA violations therefore proximately caused the City's property tax injuries. But this reasoning conflates *factual* cause with *proximate* cause. An injury may have many factual causes, some or all of which may conceivably (and even demonstrably) contribute to the injury. But the

law does not assign liability to all of them, and the question of *which* causes should properly incur liability is exactly what proximate cause principles are designed to address. *See, e.g.*, *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) ("[T]he phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes."). Further, the panel glossed over the challenges and complexity of the City's proposed damages theory, again by skipping ahead in the causal chain and making foreclosure the starting point for the regression analysis. In cautioning against "massive and complex damages litigation" under the FHA, the Supreme Court almost certainly had in mind claims grounded entirely in the type of econometric analysis proposed by the City.

Finally, the decision fails to identify any principled limit to its "logical bond" test. The panel seemed to believe that the City's "aggregate" alleged injury somehow distinguishes it from other potential FHA plaintiffs, such as a neighboring homeowner or business. According to the panel, causation is somehow *less* attenuated at the City level, and foreclosure-related injuries to a neighbor or local utility company are still further downstream from the City's harms. *See* Op. 64. This defies common sense. When foreclosure renders a house vacant, the utility company loses a customer, and a neighbor's property may be adversely affected. Those injuries are not derivative of the City's harms, nor do

they require the many intermediate steps (or "hedonic regression" analysis) required to link foreclosures to a drop in tax revenue. The panel's reasoning on this point is almost inexplicable, except that the panel appeared to conceive of FHA litigation as essentially about remedying aggregate, structural injuries like those alleged by the City. But in truth the FHA is a relatively straightforward anti-discrimination statute. It is designed to provide remedies to persons who suffer race-based or other forms of discrimination in housing. And it is precisely the panel's failure to tailor proximate cause to those essential remedial purposes that led it astray and contravened the Supreme Court's direction.

CONCLUSION

This Court should grant the petition for rehearing en banc.

Respectfully submitted.

s/ Jeremy Dresner

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May 31, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 35-5(a), (b), (c), (d), and (j), the brief contains 2,586 words.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of May 2019, I electronically filed this Brief of the Chamber of Commerce of the United States of America As Amicus Curiae Supporting Appellees' Petition for Rehearing En Banc with the Clerk of the Court through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

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