No. 19-15169

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF OAKLAND, a Municipal Corporation,

Plaintiff-Appellee,

v.

WELLS FARGO & COMPANY; WELLS FARGO BANK, N.A.,

Defendants-Appellants.

Interlocutory Appeal from the United States District Court
for the Northern District of California,
No. 1:15-cv-04321-EMC
District Judge Edward M. Chen

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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October 19, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Amicus Curiae the Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber does not have a parent corporation and no publicly held corporation owns ten percent or more of its stock.

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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. An 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 national concern to the business community.[1]

The Chamber has a substantial interest in this case, which threatens to reshape the impact of the Fair Housing Act on residential lending markets. 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 would have on mortgage markets and the ability of lenders to provide the funding essential to fostering growth and development in historically underserved communities. The Chamber respectfully submits that its views on the implications of the panel's decision shed light on the legal and policy questions presented here.[2]

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[1] No counsel for a party authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Pursuant to Circuit Rule 29-2(a), all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

In *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), the Supreme Court explained that in order to satisfy proximate cause under the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, *et seq*., a plaintiff must demonstrate a "'direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 1299, 1306. Facing substantially the same allegations as in *City of Miami*, the panel here declined to follow the Supreme Court's direction, and instead found proximate cause satisfied even though the City's alleged harm is—by the panel's own assessment—*five steps* removed from Wells Fargo's issuance of allegedly discriminatory loans. Op. 33, Dkt. 73-1. That result cannot be squared with *City of Miami* or with the Supreme Court's proximate cause precedent. *See* Fed. R. App. P. 35(b)(1)(A) ("[T]he panel decision conflicts with a decision of the United States Supreme Court … and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions[.]").

That error alone warrants rehearing, but the potential impact of the panel's decision renders this case of "exceptional importance." Fed. R. App. P. 35(a)(2). Due to its flawed analysis, the panel's decision is likely to foster the same consequences the Supreme Court sought to avoid in *City of Miami*: opening the door to virtually boundless liability under the FHA and inviting *in terrorem* lawsuits seeking billions of dollars in damages for attenuated alleged harms to

municipal finances. 137 S. Ct. at 1306. The tide of potential lawsuits and unpredictable liability threatens to cause lenders to limit their risks by reducing their exposure to cities and municipalities, reducing credit availability to the very individuals and communities the FHA is supposed to serve. The reduction in available credit could be especially pronounced in underserved areas where the effects of the COVID-19 pandemic and an uneven recovery have led to economic distress. Thus, the very localities and people most in need of housing credit and protection under the FHA likely will be harmed by the panel's decision. *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 544 (2015) ("If the specter of … litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose[.]"). For these reasons, rehearing should be granted, and the panel's decision vacated.

ARGUMENT

I. THE PANEL'S DECISION IS INCOMPATIBLE WITH THE SUPREME COURT'S DIRECTION IN *CITY OF MIAMI*

To satisfy proximate cause under the Fair Housing Act, ("FHA"), 42 U.S.C. § 3601, *et seq*., a plaintiff is "require[d]" to demonstrate a "'direct relation between the injury asserted and the injurious conduct alleged.'" *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017). Despite this requirement, the panel embraced a theory of liability with a decidedly *indirect* connection between the

alleged harms to Oakland's tax revenues and the bank's alleged violations. As Oakland's allegations demonstrate, the parties directly injured by the allegedly predatory loans at issue here are minority home buyers. Op. 8-12. But Oakland does not seek to recover damages on the buyers' behalf, and the buyers are not parties to this suit. Rather, Oakland seeks to recover lost property tax revenues, which it alleges can be traced through several intervening, independent steps to the issuance of the loans. Op. 12-13. The panel's analysis cannot be squared with *City of Miami*'s holding that traditional proximate cause principles apply to the FHA. *See* 137 S. Ct. at 1305 ("It is a 'well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause.'" (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)).

A. *City of Miami* requires a "direct relation" between the alleged violation and harm

In *City of Miami*, the Supreme Court examined a suit similar to the one here: a municipality brought an action under the FHA against mortgage lenders for allegedly issuing predatory loans to minority homeowners and sought to recover lost city tax revenues. 137 S. Ct. at 1300-1301. Examining whether the alleged harms caused Miami's injury, the court explained that "[a] claim for damages under the FHA … is no exception to" the traditional requirement of proximate cause. *Id.* at 1305. A plaintiff satisfies that requirement only when "the harm

alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* Thus, "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 1306 (quoting *Holmes v. Securities Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992)). And because a damages claim under the FHA is akin to "tort actions recognized at common law[,] … '[t]he general tendency' in these cases, 'in regard to damages at least, is not to go beyond the first step.'" *Id.*

Just as the panel did here, the court of appeals in *City of Miami* found proximate cause satisfied despite "'several links in the causal chain' between the charged discriminatory lending practices and the claimed losses"—a view the Supreme Court repudiated on the ground that the alleged harm was "'too remote' from the defendant's unlawful conduct." 137 S. Ct. at 1305-1306. As the Court noted, "[t]he housing market is interconnected with economic and social life" so "[a] violation of the FHA may, therefore, 'be expected to cause ripples of harm to flow' far beyond the defendant's misconduct," and yet "[n]othing in the statute suggests that Congress intended to provide a remedy wherever those ripples travel." *Id.* at 1306.

B. The panel failed to adhere to *City of Miami*

Despite the clear parallels to *City of Miami*, the panel failed to adhere to the Supreme Court's direction. Instead, it allowed Oakland's claim to proceed even as

the panel candidly acknowledged that "[the] alleged wrongdoing did not immediately cause Oakland's lost property-tax revenues" and "the drop in Oakland's tax base is several steps removed from Wells Fargo's discriminatory lending practices." Op. 33. In fact, the court noted that *five* necessary and independent steps were needed to connect the alleged FHA violation to the alleged harm, with the City required to prove causation at each step in the chain.[3] On its face, such an indirect link between an alleged FHA violation and harm cannot satisfy the requirement that "the harm alleged ha[ve] a sufficiently close connection to the conduct the statute prohibits." *City of Miami*, 137 S. Ct. at 1305; *see also*, *id.* at 1306 ("'The general tendency'" in cases where proximate cause is at issue "is not to go beyond the first step."). Oakland's FHA claims should have been dismissed.

The panel's erroneous proximate cause conclusion was premised on a number of subsidiary errors under *City of Miami*. For one, the panel incorrectly looked to the text and legislative history to support expansive proximate cause under the FHA. Op. 23. *City of Miami* already made clear that FHA claims are subject to standard proximate cause principles: such claims are "analogous to a

[3] The panel noted that the District Court found the following five steps in the causal chain from alleged violation to harm: "(1) the unlawful discrimination was carried out by Wells Fargo; (2) leading to default by the individual borrowers; (3) which in turn led to foreclosures; (4) which led to lower property values; and (5) consequently lower property-tax revenues for Oakland." Op. 33, n.20.

number of tort actions recognized at common law, and we have repeatedly applied directness principles to statutes with common-law foundations." 137 S. Ct. at 1306 (citations and quotation marks omitted). Moreover, the panel erroneously relied on FHA *standing* precedent for its expansive view of proximate cause. *See, e.g.*, Op. 35 (discussing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100-109 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972); and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982)). But *City of Miami* likewise instructed that FHA standing and proximate cause are analytically distinct: many alleged economic harms may fall within the "zone of interests" of the FHA, 137 S. Ct. at 1305, but that does not allow parties to recover for such harms without regard to standard proximate cause principles. The FHA is not a freestanding remedy for aggregate, structural economic injuries like those alleged by Oakland; it is a straightforward anti-discrimination statute designed to provide remedies to persons who suffer direct injury from race-based or other forms of discrimination in housing. 42 U.S.C. § 3605(a).

The panel's analysis of the administrative feasibility of its proximate cause formulation is similarly flawed. To start, the panel cited *Holmes*, 503 U.S. 258, as providing a determinative three-factor test for whether proximate cause exists. Op. 28-29. But *Holmes* sets forth no such discrete test; rather, the Supreme Court in

Holmes explained that proximate cause "demand[s] … some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268.

Even if, *arguendo*, *Holmes* laid out a three-factor test, the panel misunderstood those "factors." The first "factor"—determining whether damages are attributable to the violation—makes clear that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269. The panel's decision ignores the remote nature of the City's alleged injury and fails to explain how a series of regression analyses, including an as-yet unperformed hedonic regression, which omit key variables across five independent actions satisfies the direct-injury requirement.

As to the second and third "factors," the panel misapplied these as well. "[A]pportioning damages among plaintiffs removed at different levels of injury" will actually be extremely difficult under the panel's view of proximate cause, since virtually any person or entity with a tie to an affected housing market could conceivably sue under the panel's analysis. *Holmes*, 503 U.S. at 269. Further, the panel failed to adequately explain why Oakland homeowners could not use the same "aggregate" analysis to sue to recover the very same lost property values that are part of City's causal chain here. And here, not only can "directly injured victims … generally be counted on to vindicate the law," *id.* at 269-270, but the

Department of Justice ("DOJ") and the Department of Housing and Urban Development ("HUD") aggressively enforce the FHA against lenders and others, as discussed below.

II. THE PANEL'S DECISION THREATENS ADVERSE CONSEQUENCES THAT ARE CONTRARY TO THE PURPOSES OF THE FAIR HOUSING ACT

The panel's flawed decision not only ignored *City of Miami*, but also opens the door to near-limitless liability under the FHA by allowing suits based on attenuated economic injuries from cities, businesses, and others, none of whom suffered race-based housing discrimination under the FHA. 137 S. Ct. at 1299.

The burdens of defending against such expansive FHA claims are potentially significant. Defendants will be faced with substantial pressure to settle even meritless claims due to the massive potential damages at stake. Even the *in terrorem* effect of such suits can impose real costs on defendants. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-558 (2007) (warning of the risk to defendants of "*in terrorem*" settlements). And the panel's decision likely will make it easier for actions based on indirect harms to survive a motion to dismiss, as critical issues of causation are left for dueling expert regression analyses.

The panel's drastic expansion of liability is also entirely unnecessary to protect minorities 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 directly harmed, have ample remedies and incentives to bring suit under the Act, given the availability of punitive damages, attorneys' fees, and equitable relief. *See* 42 U.S.C. § 3613(c)(1)-(2) (providing relief which may be granted under the FHA). Moreover, both the DOJ and HUD aggressively enforce the FHA against lenders and others. Under 42 U.S.C. § 3614(a), Congress assigned exclusive statutory authority to bring actions alleging a pattern or practice of housing discrimination to the Attorney General, which may also 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.[4] In light of these enforcement mechanisms, there is no basis for the panel's conclusion that suits like Oakland's are necessary to deter FHA violations. Op. 32.

Further, any additional deterrence from suits like Oakland's may significantly harm residential 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 risks being felt

[4] National Fair Housing Alliance, *2018 Fair Housing Trends Report* 16-17 (Apr. 30, 2018), https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf.

most severely in underserved areas, contrary to the FHA's purpose. *See Texas Dep't of Hous. & Cmty Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 544 (2015) (explaining 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").

These additional potential barriers to credit availability are especially alarming now, given the state of the economy and the COVID-19 pandemic. For most low- and middle-income families, homeownership is the key to building wealth.[5] As one report on the benefits of stable housing put it: "[h]omeownership boosts the educational performance of children, induces higher participation in civic and volunteering activity, improves health care outcomes, lowers crime rates and lessens welfare dependency."[6] Homeowners are also better able to weather economic downturns and other unforeseen disasters—like a pandemic—since they can tap into the equity in their home.

But the homeownership gap between black and white households has widened to its largest level in 50 years, maintaining an approximately 30

[5] Yun & Evangelou, *Social Benefits of Homeownership and Stable Housing*, National Association of Realtors (Dec. 2016), https://cdn.nar.realtor/sites/default/files/documents/Homeownership-Stable-Housing2016.pdf.

[6] *Id.* at 15.

percentage point gap from 2016 to the present.[7] The increased gap in home ownership has in turn exacerbated growing wealth inequality.[8] And the COVID-19 pandemic is likely to increase the gap in homeownership still further. Recent U.S. Census Bureau data suggests that the pandemic is already widening the gap in access to stable housing.[9] Thus, by inviting new potential obstacles to underserved communities' access to credit at a time when credit is most needed, the panel's expansion of FHA liability may exacerbate the economic effects of COVID-19 and increase disparities in wealth.

In short, the panel's proximate cause analysis ignores the Supreme Court's direction in *City of Miami*, and its massive expansion of FHA liability invites significant adverse practical consequences, including for the very communities the FHA is designed to protect.

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[7] U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, Second Quarter 2020*, at table 7 (July 28, 2020), https://www.census.gov/housing/hvs/files/currenthvspress.pdf.

[8] Dettline et al., *A Wealthless Recovery? Asset Ownership and the Uneven Recovery from the Great Recession*, Board of Governors of the Federal Reserve System (Sept. 13, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/asset-ownership-and-the-uneven-recovery-from-the-great-recession-20180913.htm.

[9] *See, e.g.*, U.S. Census Bureau, *Measuring Household Experiences during the Coronavirus Pandemic, Week 14 Household Pulse Survey: September 2 – September 14, Housing Tables*, at tables 1a, 2a, and 3a (Sept. 23, 2020), https://www.census.gov/data/tables/2020/demo/hhp/hhp14.html.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing and rehearing en banc.

Respectfully submitted,

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