Nos. 15-1111, 15-1112

In the Supreme Court of the United States

BANK OF AMERICA CORP., ET AL., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA

WELLS FARGO & CO. AND
WELLS FARGO BANK, N.A., PETITIONERS,

v.

CITY OF MIAMI, FLORIDA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICUS CURIAE

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. Many of the Chamber's members participate directly in these markets. As a result, the Chamber has direct insights into the deleterious effects the decision below

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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. Counsel for the Chamber provided timely notice of the Chamber's intent to file this brief, and all parties in both cases have consented.

would have on mortgage markets and the ability of lenders to provide the funding essential to fuel urban growth and development in historically underserved communities. The Chamber respectfully submits that its views on the implications of these cases shed light on the legal and policy questions presented here.

SUMMARY OF ARGUMENT

The Eleventh Circuit dealt with two issues under the Fair Housing Act of widespread applicability and importance: the statute's "zone of interests" and proximate causation. Each is independently deserving of this Court's review not only because the Eleventh Circuit's decision contravenes the Court's precedent, but also because the policy implications for financial institutions, residential lending, and the national economy are so broad.

I. The decision below cannot be justified as a matter of policy relating to fair lending and available credit or precedent relating to statutory interpretation. Indeed, it is inconsistent with both.

A. By extending Fair Housing Act remedies to municipalities that have allegedly suffered remote and conjectural economic harms—such as a diminution of their tax base—the Eleventh Circuit has exposed lending institutions to virtually boundless liability, with no limiting principle apparent to provide even a modicum of predictability or proportionality. Under the Eleventh Circuit's re-reading of the statute, it would appear that essentially *any* entity or individual who can claim indirect injury by prohibited conduct may sue. The list of proper plaintiffs would not be limited to municipalities, but presumably could include any others who might, in some attenuated

sense, be considered foreseeable "victims" of discrimination.

Interpreting the FHA to provide a remedy to those who are not discriminated against and whose injuries do not arise from the *race*-based aspect of the defendant's conduct untethers the Act's capacious remedies from its core purposes. Expanding the scope of potential liability so drastically is unnecessary for deterrence purposes in light of robust enforcement by both multiple federal agencies and private victims of discrimination. In any event, any marginal gain in deterrence is outweighed by the potential harm the Eleventh Circuit's ruling will cause to the purposes of the FHA and other statutory regimes designed to expand lending in historically underserved communities. In particular, the decision below threatens to deter legitimate, socially desirable lending activities by imposing legal risks that far outweigh any commercial benefit borrowers might derive from such activities.

B. The Eleventh Circuit's ruling also conflicts directly with this Court's recent precedents. In two decisions in the past five years, the Court has made clear that Congress is presumed to legislate against a background understanding that a plaintiff may only invoke a statutory cause of action if it meets both of two criteria: it falls within the "zone of interests" the statute protects and the defendant's wrongdoing proximately caused its injuries. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Thompson* v. *N. Am. Stainless, LP*, 562 U.S. 170 (2011). Those decisions displaced overbroad language in certain older cases—which the Eleventh Circuit treated as binding—suggesting that the FHA's private cause of action extends to any individual who

can claim injury, no matter how remote from the allegedly discriminatory act.

II. The proper scope of FHA standing represents an issue of exceptional national significance and one that is being raised in the lower courts with increasing frequency. The potential liability for mortgage lenders under the Eleventh Circuit's decision (and under the decisions of district courts that have reached the same conclusion) is breathtaking, a fact not lost upon lawyers and their municipal clients. A slew of cases premised on the same theory has already been filed, and more are sure to follow in the wake of the Eleventh Circuit's ruling. The prevalence of such suits, the amounts at stake, the national policy of encouraging lending in low- and middle-income and minority neighborhoods, and the importance of the FHA in setting the structure of the nation's housing markets all militate in favor of this Court's prompt review.

III. Despite its importance, the question presented here is likely to remain largely insulated from appellate review, primarily due to the intense settlement pressures defendants face. On top of that, the denial of a motion to dismiss is not appealable absent interlocutory certification. But even if the issue were likely to reach the courts of appeals with some frequency, additional percolation would not serve any significant law-development function. The relevant question—what is the binding Supreme Court precedent—is already clearly presented, and there is little space for doctrinal elaboration in this context. The question is narrow, and its resolution by lower courts involves simply choosing between two sets of this Court's precedents. And although additional percolation would produce no appreciable benefits, deferring this

Court's review would threaten to harm residential lending (and the broader economy) significantly in the interim, as banks would naturally adjust their lending practices to avoid extensive and unpredictable liability.

ARGUMENT

The decision below allows any individual or entity to bring a Fair Housing Act suit if it has suffered any foreseeable economic injury as a result of a defendant's conduct—even an injury far remote from the alleged racially discriminatory act at issue. That extraordinary result not only conflicts with this Court's precedents, but also threatens dire real-world consequences for residential lending markets and for the broader economy. Although the question presented is both extremely important and arises frequently, it will likely remain insulated from appellate review in light of intense settlement pressures and the general inability to appeal interlocutory rulings. The Court should take the opportunity to resolve this issue before it wreaks havoc on lending markets in low-income and traditionally underserved communities.

I. THE ELEVENTH CIRCUIT'S RULING IS WRONG AS A MATTER OF BOTH POLICY AND PRECEDENT.

A. The Decision Below Will Produce Dire Consequences Without Advancing The Purposes Of The Fair Housing Act.

1. The Eleventh Circuit's decision exposes banks accused of violating the FHA to effectively limitless liability and arguably requires them to make major, undesirable adjustments in their lending practices. Subject only to a vague foreseeability requirement,

the decision holds that the FHA's cause of action extends to the outer boundaries of Article III. Pet. App. 19a, 38a.[2] The remoteness of the foreseeability requirement is illustrated by the multi-link causal theory in these cases, which the Eleventh Circuit endorsed: the City of Miami alleges that defendants made predatory loans disproportionately to minority borrowers, who in turn defaulted in greater than expected numbers, which in turn caused urban blight, which in turn decreased the value of surrounding properties, which in turn reduced the city's tax base and necessitated additional municipal services to the allegedly now-blighted areas. *Id.* at 3a, 10a; *Wells Fargo* Pet. App. 8a.

This logic, of course, is not limited to municipalities. When an alleged victim of housing discrimination is foreclosed upon, a host of people and entities could claim to have suffered some sort of concrete Article III harm: neighboring property owners, who suffer a loss in property value; the handyman who once made money doing odd jobs at the now-empty house; local charities and social service organizations, who face declining contributions; and on and on, *ad infinitum*. Under the Eleventh Circuit's ruling, all these parties who have never been discriminated against could nonetheless have a claim for *housing discrimination*. In *Thompson*, this Court described an analogous result as "absurd," citing the example of "a shareholder [who] would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value

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[2] Unless otherwise noted, citations are to the petition in *Bank of America*, as the Eleventh Circuit's opinion in that case contains the fullest explanation of its reasoning. Pet. App. 2a n.1.

of his stock decreased as a consequence." 562 U.S. at 176-177 (reasoning that "absurd consequences would follow" if the Court expanded the ability to sue under Title VII to the limits of Article III).

2. The Eleventh Circuit's extreme interpretation is not necessary to vindicate the FHA's purposes. Permitting municipalities to recover from lenders for purely economic harm benefits only lawyers and municipal budgets—not the victims of the alleged discrimination. Importantly, the allegedly racially discriminatory character of the challenged conduct is totally irrelevant to the City's alleged injury: it does not matter to the City *why* the foreclosures occurred. Its harm stems simply from the mere fact of the foreclosures. The City would have suffered identical harm had the foreclosures occurred as a result of the housing collapse, high unemployment, profligate borrowers, misguided loan origination practices, or any other race-neutral cause.

In this respect, the facts of these cases bear no relationship to the facts of the cases upon which the City (and the Eleventh Circuit's opinion) relies. In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 208 (1972), for example, plaintiffs were tenants of a segregated housing complex who alleged that they had been deprived of the benefits of living in an integrated community. As this Court there observed, their injuries fell within the core of the FHA's concerns. Ensuing cases similarly involved plaintiffs who had suffered some sort of *race-based* injury at the hands of the defendants. See *Thompson*, 562 U.S. at 176 (stating that the holdings in cases following *Trafficante* were consistent with a "zone of interests" limitation, even if they did not explicitly adopt one).

Even if the Eleventh Circuit's broad interpretation of the FHA's cause of action might conceivably deter a few additional instances of discrimination at the margins, working such a radical expansion in the law for such a speculative benefit is unnecessary in light of vigorous enforcement by actual victims of discrimination and the federal government. Both the Department of Justice and the Department of Housing and Urban Development, for example, continue to engage in aggressive enforcement efforts. See *Recent Accomplishments of the Housing and Civil Enforcement Section*, U.S. Dep't of Justice (Mar. 1, 2016), https://www.justice.gov/crt/recent-accomplishments-housing-and-civil-enforcement-section; U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing: FY 2012-2013*, at 1 (Nov. 7, 2014) (noting that in 2012 and 2013, HUD and related agencies "obtained over $425 million in compensation for victims of housing discrimination"). And HUD just last year announced an aggressive new rule designed to help communities that receive federal funding meet their obligations under the FHA. See *generally Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272 (July 16, 2015).

Furthermore, any incremental deterrence value of the Eleventh Circuit's ruling is far outweighed by the harm it threatens to cause to lending markets in underserved communities. Well-functioning lending markets are crucial for urban development and for poverty reduction more broadly. See, *e.g.*, Thorsten Beck, *et al.*, *Finance, Inequality and the Poor*, 12 J. Econ. Growth 27 (2007) (finding that financial development not only boosts aggregate growth, but also disproportionately helps the poor). Needless to say, financial institutions may refrain from activities that

pose legal risks disproportionate to any commercial gain they might recoup. Cf. Ian McKendry, *Banks Face No-Win Scenario on AML 'De-Risking'*, American Banker (Nov. 17, 2014), http://www.americanbanker.com/news/regulation-reform/banks-face-no-win-scenario-on-aml-de-risking-1071271-1.html. Indeed, such a result may be compelled by safety-and-soundness considerations, which require banks to identify and contain risks.

Lending markets cannot thrive if their leading providers are threatened with burdensome litigation and expansive liability to a vast class of plaintiffs based on an attenuated chain of causation. Common sense and bitter experience suggest that lenders, under the watchful eyes of financial regulators following established safety-and-soundness principles, may respond to the burden imposed by the Eleventh Circuit by offering fewer loan products suitable for low-income individuals, thus reducing the credit options available to less-qualified borrowers. This Court has recognized as much: "If the specter of disparate-impact 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 as well as the free-market system." *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2524 (2015). The Eleventh Circuit has set the dial to maximum legal risk without addressing that doing so is unnecessary and likely counterproductive because it threatens to restrict the availability of credit where it is most vital.

B. The Decision Below Is Contrary To This Court's Recent Precedents.

1. The Eleventh Circuit's ruling conflicts with two recent, unanimous opinions by this Court. In *Thompson* v. *North American Stainless, LP*, 562 U.S. 170 (2011), the Court addressed the right to sue under Title VII, which, like the FHA, provides a cause of action to any "aggrieved" person. The Court expressly rejected expansive language from earlier FHA cases, including *Trafficante*, which had suggested that Title VII's cause of action extends to the very edges of Article III. It said such language was "ill-considered" "dictum" and "decline[d] to follow it." *Id.* at 176. As the Court put it, embracing the dictum of the earlier cases literally would lead to "absurd consequences," such as suits brought by plaintiffs who had only remote or indirect economic injuries. *Id.* at 176-177. Those very words are equally applicable here.

The *Thompson* Court proceeded to hold that the use of "aggrieved" in Title VII incorporates a "zone of interests" test, which enables suit by "any plaintiff with an interest arguably sought to be protected by the statute, while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII." *Id.* at 178 (internal quotation marks, citation, and alteration omitted). Under this test, a plaintiff generally lacks standing if its injury represents mere "collateral damage" of the "unlawful act." *Id.*

Then in *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), the Court established even more fundamental rules, identifying two background principles against which Congress is presumed to legislate absent an affirmative indication to the contrary. The first is the "zone-of-interests" test articulated in *Thompson*. *Id.* at 1388. The second pertains to causation: when Congress

creates a cause of action, it is presumed to incorporate the common-law requirement of proximate cause. *Id.* at 1390. This requirement ensures that a plaintiff's harm is not "too remote from the defendant's unlawful conduct." *Ibid.* (internal quotation marks omitted). Accordingly, proximate cause is generally absent "if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Ibid.* (quoting *Holmes* v. *Secs. Investor Prot. Corp.*, 503 U.S. 258, 268-269 (1992)).

2. The decision below violates the principles of *Thompson* and *Lexmark* in two ways. First, it eschews the zone-of-interests test on the basis of overbroad language contained in *Trafficante* and its progeny. It is debatable whether those decisions extend as far as the Eleventh Circuit believed. See *Thompson*, 562 U.S. at 176 (noting that these cases were consistent with a "'zone of interests' limitation"). To the extent they do, however, they were implicitly overruled by *Thompson* and *Lexmark*. By declining to heed these more recent precedents, the Eleventh Circuit effectively treated the FHA as *sui generis*, immune from the standard rules of statutory interpretation that apply to other federal statutes.

Second, the decision below impermissibly dilutes the proximate-cause element to a mere "foreseeability" requirement. As *Lexmark* makes clear, the hallmark of proximate cause is a "sufficiently close connection" between the alleged injury and "the conduct the statute prohibits." 134 S. Ct. at 1390. Addressing this rule in the context of the Lanham Act, the *Lexmark* Court held that "while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its elec-

tric company, and other commercial parties who suffer merely as a result of the competitor's inability to meet its financial obligations." *Id.* at 1391 (internal quotation marks and alteration omitted). The municipalities here are precisely analogous to *Lexmark*'s list of entities that may *not* sue, and the Eleventh Circuit erred in permitting claims to proceed that even it admitted were based on an attenuated causal chain composed of "several links" and riddled with "confounding variables." Pet. App. 18a, 39a.

II. THE QUESTION PRESENTED IS BOTH SIGNIFICANT AND FREQUENTLY RECURRING.

The proper scope of the cause of action under the FHA is an issue of exceptional national importance. The FHA, which was enacted to eradicate discrimination in the Nation's housing markets, represents one of the most significant federal antidiscrimination enactments in this country's history. See *Inclusive Cmtys. Project*, 135 S. Ct. at 2521. It is widely invoked, see U.S. Dep't of Hous. & Urban Dev., *Annual Report on Fair Housing: FY 2012-2013*, at 18, 36 (Nov. 7, 2014), and its legal interpretation plays a crucial role in setting the incentives that dictate the structure of American home-lending and real estate markets. The scope of the FHA's cause of action—and in particular, the question of who is a proper plaintiff—is a fundamental threshold issue in any suit brought under the FHA, and a dispute concerning its basic contours merits this Court's immediate attention.

This issue is also one that arises with increasing frequency. As discussed above, the potential liability that lenders face under the Eleventh Circuit's ruling is breathtaking—a fact not lost upon municipalities

seeking to shore up their precarious finances. Since the financial crisis, a host of large municipalities have filed suits alleging theories similar to those at issue here, with many filing simultaneously against multiple lenders. See, *e.g.*, *Societal Liability for Predatory Lending*, 49-6 Banker's Letter of the Law 2 (June 1, 2015); see also *Cobb County* v. *Bank of America Corp.*, No. 15 Civ. 4081, Dkt. No. 1, ¶ 582 (N.D. Ga.) (complaint brought by three counties seeking "hundreds of millions of dollars" in compensatory damages).[3] Many of these suits have been permitted to proceed over standing objections. See, *e.g.*, *County of Cook* v. *HSBC N. Am. Holdings Inc.*, 2015 WL 5768575, at *8 (N.D. Ill. Sept. 30, 2015); *City of Los Angeles* v. *JPMorgan Chase & Co.*, 2014 WL 6453808, at *6 (C.D. Cal. Nov. 14, 2014).

The Eleventh Circuit's ruling, as well as similar rulings at the district court level, will only embolden potential plaintiffs and accelerate the deluge of litigation. Suits brought by Oakland, California and Cobb, DeKalb, and Fulton Counties in Georgia were filed after the Eleventh Circuit's decision was handed

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[3] The plaintiffs include Baltimore, Maryland; Birmingham, Alabama; Cobb County, Georgia; Cook County, Illinois; DeKalb County, Georgia; Fulton County, Georgia; Memphis, Tennessee; Miami, Florida; Miami Gardens, Florida; Los Angeles, California; the Los Angeles Unified School District, California; Oakland, California; Providence, Rhode Island; and Shelby County, Alabama. See Pet. 3 n.1; Nicholas S. Agnello, *Cities Are Looking to Fair Housing Act to Fight Redlining*, Law360 (Nov. 5, 2015), http://www.law360.com/articles/723243/cities-are-looking-to-fair-housing-act-to-fight-redlining; Dena Aubin, *Oakland Lawsuit Accuses Wells Fargo of Mortgage Discrimination*, Reuters (Sept. 22, 2015), http://www.reuters.com/article/us-wellsfargo-discrimination-idUSKCN0RM28L20150922.

down. *City of Oakland* v. *Wells Fargo Bank, N.A.*, No. 15 Civ. 4321 (N.D. Cal. filed Sept. 21, 2015); *Cobb County*, No. 15 Civ. 4081 (N.D. Ga. filed Nov. 20, 2015). The increasing prevalence of such lawsuits, the amounts at stake, the potential impact on lending markets, and the fact that these cases implicate a fundamental threshold requirement of one of the nation's most important antidiscrimination statutes all militate in favor of this Court's prompt review.

III. IT IS IMPORTANT FOR THE COURT TO RESOLVE THIS ISSUE NOW, AND THESE CASES REPRESENT GOOD VEHICLES FOR DOING SO.

The Court should clarify the scope of the FHA's cause of action sooner rather than later, and these cases provide good vehicles for doing so. Despite the increasing frequency of municipal lawsuits, the question presented here may remain largely insulated from this Court's review. Regardless of the merits, defendants face intense pressure to settle to avoid the high legal and reputational costs of litigation. Even if a defendant does choose to litigate, denial of a motion to dismiss is not appealable absent interlocutory certification—a tenuous proposition.[4] See *City of Los Angeles* v. *Wells Fargo & Co.*, 2014 WL 3101450, at *2 (C.D. Cal. July 7, 2014) (denying certification).

In addition to these practical realities, the existing legal landscape makes settlement doubly likely. The

[4] The prevalence of early settlement, coupled with the fact that the question of who may sue is a threshold one, means that this issue will often be raised via interlocutory appeal (to the extent it is appealed at all). The interlocutory posture of the current petitions thus does not counsel against granting these petitions.

Eleventh Circuit's ruling is the first appeals court decision to sanction this kind of claim by a municipality, and it may serve as a guidepost for litigants. Furthermore, outside the context of municipal lawsuits, courts of appeals have consistently repeated the language from *Trafficante* and its progeny that the FHA's cause of action extends to any plaintiff who can show an Article III injury. See, *e.g.*, *Anderson Grp., LLC* v. *City of Saratoga Springs*, 805 F.3d 34, 44 (2d Cir. 2015); *Hollis* v. *Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 544 (6th Cir. 2014); *L&F Homes & Dev., LLC* v. *City of Gulfport*, 538 F. Appx. 395, 400 (5th Cir. 2013) (per curiam); *Equal Rights Ctr.* v. *Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). Although none of these opinions addressed the effect of either *Thompson* or *Lexmark*, these kinds of statements may lead defendants to believe that settlement is preferable to litigation.

The Court should intervene now for the additional reason that these cases present a purely legal question of standing. The issue is cleanly presented and has been thoroughly briefed on both sides. Additional percolation in the lower courts is unlikely to be helpful. In the opinions below, for example, the Eleventh Circuit declined to meaningfully engage with any of the relevant issues, holding simply that it was bound by the language contained in *Trafficante* and subsequent cases. Pet. App. 27a-28a. There is no reason to think that other courts will take a different approach. *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (When "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the pre-

rogative of overruling its own decisions."). Ultimately, this Court will have to resolve the tension between *Trafficante* and its progeny, on the one hand, and *Thompson* and *Lexmark*, on the other. Given the importance of the issue and the fact that these cases represent good, rare vehicles, it should take the opportunity here.

Finally, although additional percolation in the lower courts would have few benefits, deferring this Court's review may, as discussed above, cause serious harm to residential lending markets in the interim. The decision by the Eleventh Circuit is likely to encourage litigation by municipalities and other governmental units that are confronting budgetary deficits. See, *e.g.*, Heather Gillers & Juan Perez Jr., *CPS' Billion-Dollar Budget Hole Leaves Unappealing Options*, Chicago Tribune (Apr. 22, 2015), http://www.chicagotribune.com/ct-cps-budget-crisis-met-20150422-story.html (discussing the budget deficit of the Chicago Public Schools). This prospect may lead financial institutions to change their lending practices in historically underserved communities to avoid undue legal risk arising from a combination of the absence of zone-of-interests scrutiny and the absence of meaningful proximate-cause limitations. It is imperative that the Court intervene promptly to stem this rising tide of municipal suits by making clear that the standard requirements for remedial federal statutes—that a plaintiff's claim falls within the zone of interests protected by Congress and that it satisfies the directness requirement of proximate cause—apply with equal force to the FHA.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be granted.

Respectfully submitted.

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