No. 15-1112

IN THE

Supreme Court of the United States

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

v.

CITY OF MIAMI, a Florida municipal corporation,
Respondent.

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

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BRIEF IN OPPOSITION

Victoria Méndez
CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
444 S.W. 2nd Avenue
Suite 945
Miami, FL 33130
(305) 416-1800

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W.
Suite 250
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Attorneys for Respondent

Additional counsel listed on inside cover

Erwin Chemerinsky
UNIVERSITY OF
CALIFORNIA, IRVINE
401 East Peltason Drive
Educ. 1095
Irvine, CA 92697
(949) 824-7722

Rachel Geman
LIEFF CABRASER HEIMANN
& BERNSTEIN, L.L.P.
250 Hudson Street
8th Floor
New York, NY 10013
(212) 355-9500

Joel Liberson
Howard Liberson
TRIAL & APPELLATE
RESOURCES, P.C.
400 Continental Blvd.
6th Floor
El Segundo, CA 90245
(310) 426-2361

QUESTIONS PRESENTED

1. Whether the term "aggrieved" in the Fair Housing Act imposes a zone-of-interests requirement that requires more than an interest or injury arguably protected by the statute?

2. Whether the City is an "aggrieved person" under the Fair Housing Act?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent City of Miami, Florida respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

In its Petition, Wells Fargo & Co. and certain of its subsidiaries (collectively, "the Bank") seek this Court's intervention at the same time they will be either answering the Third Amended Complaint or filing a new motion to dismiss, due May 24, 2016, in the United States District Court for the Southern District of Florida. The City has every expectation that the Bank will opt to file a new motion to dismiss. Both the effort before this Court and the anticipated one before the District Court seek to relieve the Bank from answering the Complaint filed by the City of Miami for ongoing violations of the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601 *et seq*. The Bank speculates that there is "little chance" of a circuit conflict on the questions it presents, but urges this Court to review because the decision below is "plainly wrong" and because a decision now would promote efficiency. Pet. 12, 16. However, there is no warrant to use this flawed vehicle to examine the issues presented or do so prematurely.

COUNTERSTATEMENT OF THE CASE

On December 13, 2013, the City of Miami filed a detailed, 62-page Complaint against the Bank, Petitioners here, alleging violations of the FHA by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers

and resulting in significant, direct, and continuing financial harm to the City. The defendants named were Wells Fargo & Co. and Wells Fargo Bank, N.A. The Complaint alleged the discriminatory lending practices at issue are aimed at disproportionately "placing vulnerable, underserved [minority] borrowers in loans they cannot afford" and then "when a minority borrower who previously received a predatory loan sought to refinance the loan, . . . [the Bank] refused to extend credit at all, or on equal terms as refinancing similar loans issued to white borrowers." Compl. ¶¶ 8, 12, *City of Miami v. Wells Fargo & Co.*, No. 1:13-cv-24508 (S.D. Fla. Dec. 13, 2013), ECF No. 1. As the Eleventh Circuit correctly characterized the allegations, the City alleged "the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans." Pet. App. 21a.

The Complaint alleged that a regression analysis of available data reported by the Bank demonstrated that African-American borrowers were 4.321 times more likely to receive a predatory loan than a white borrower with similar underwriting and borrower characteristics. *Id.* at 6a. Latino borrowers were 1.576 more likely to receive such loans. *Id.*

The Complaint also provided facts supporting allegations that these loan practices foreseeably resulted in foreclosures, did so more rapidly for African-American and Latino borrowers than whites, and that the foreclosures were caused by the discriminatory loan practices. Pet. App. 4a-5a. As a result of these practices, the Complaint alleged that

property values of the homes vacated and of other homes in the same neighborhoods diminished and caused a loss of tax revenues to the City. *Id.* at 8a; Compl. ¶¶ 156-170. Moreover, the Complaint alleged that a Hedonic regression analysis can calculate the City's loss attributable to the Bank's discriminatory lending practices and separate out other potential causes. Pet. App. 6a. In addition, the City suffered other economic damages beyond lost tax revenues because it has had to expend additional monies on municipal services to address problems of vagrancy, criminal activity, and threats to the public health and safety arising at these properties because of their foreclosed status, as well as to remediate newly blighted neighborhoods. *Id.* at 8a; Compl. ¶¶ 172, 189. To make concrete any generalized allegations, the City preliminarily identified 999 discriminatory loans issued by the Bank between 2004-2012 that resulted in foreclosure and, in the Complaint, provided sample addresses to 10 homes. Pet. App. 12a.

A second cause of action in the Complaint alleged that the Bank unjustly enriched itself by taking advantage of "benefits conferred by the City and, rather than engaging in lawful lending practices," engaged in racially discriminatory mortgage practices that "denied the City revenues it had properly expected through property and other tax payments and by costing the City additional monies for services it would not have had to provide in the neighborhoods affected by foreclosures due to predatory lending, absent the Defendants' unlawful activities." *Id.* at 4a; Compl. ¶ 194. The Bank filed a Motion to Dismiss on March 18, 2014. Pet. App. 81a.

On July 9, 2014, the District Court granted the Bank's motion to dismiss with prejudice with respect

to the allegations based on the FHA, while the cause of action premised on unjust enrichment was dismissed without prejudice.[1] *Id.* at 82a. The District Court reached its conclusion based on a reading of an Eleventh Circuit decision that no party had cited, *Nasser v. City of Homewood*, 671 F.2d 432 (11th Cir. 1982). *Id.* at 90a.

On July 21, 2014, the City timely moved for reconsideration, proffering a proposed First Amended Complaint to address issues raised in the dismissal order with respect to its FHA claims and to provide additional details deemed lacking by the court with respect to its unjust enrichment claim. *Id.* at 72a, 11a. It argued that the court had misconstrued *Nasser*. On September 9, 2014, the District Court denied the motion for reconsideration, while providing additional time to file a new complaint based on the claim for unjust enrichment alone. *Id.* at 73a. The City, choosing not to split its causes of action, declined to file a single-cause of action complaint. The City filed a timely notice of appeal October 7, 2014. *Id.* at 12a.

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[1] The District Court order referenced and incorporated its same-day order in a similar case brought by the City against Bank of America. Pet. App. 81a. In the subsequent appeal in the Eleventh Circuit, the cases against Bank of America and Wells Fargo, along with a third one against Citigroup, Inc., were argued together. Though separate opinions were issued in each, the Bank of America opinion was designated as the lead and most comprehensive opinion. *See* Pet. App. 12a; 20a-71a. Bank of America has filed a separate petition for certiorari. No. 15-1111. Wells Fargo has asked this Court to consider granting both petitions and consolidating the two cases. Pet. 6 n.2.

The Eleventh Circuit held the City had constitutional standing to pursue its FHA claims, that the City met the zone of interests requirement under the FHA, and that the allegations were sufficient to meet the FHA's proximate cause requirement. *Id.* at 13a-16a. It agreed with the City that the District Court had misread its decision in *Nasser*. *Id.* at 15a-16a. As to the other issues raised by the Bank or the District Court's opinion, the Eleventh Circuit remanded the case to allow the City to file an amended complaint. *Id.* at 17a. In doing so, the Eleventh Circuit noted that this Court had "handed down a decision that may materially affect the resolution of this case," *Id.* at 64a, namely, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). Thus, the Eleventh Circuit instructed the District Court to review the amended complaint in light of this Court's decision in *Inclusive Communities*, which discussed pleading requirements for an FHA disparate-impact complaint. *Id.* at 65a.

This Petition was filed March 4, 2016. Since that filing, the District Court, on March 17, 2016, dismissed the City's Second Amended Complaint without prejudice. Order, *City of Miami v. Wells Fargo & Co.*, No. 13-24508 (S.D. Fla.), ECF No. 77. The City filed a Third Amended Complaint on April 29, 2016. Third Am. Compl., ECF No. 80. The Bank has a deadline to answer the new complaint or file a motion to dismiss by May 24 2016.

REASONS FOR DENYING THE PETITION

I. This Case Provides a Poor Vehicle for the Exercise of this Court's Discretion.

This case may be rendered moot if the District Court grants the Bank's expected motion to dismiss. That court has shown a disposition to grant such motions, having done so twice before, including once after the Eleventh Circuit reversed its decision. The possibility that a dismissal is in the offing underscores the wisdom of awaiting a final disposition. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J.). *See also Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (holding the case "not yet ripe for review by this Court" because it was remanded to the District Court for further proceedings).

Nothing extraordinary is alleged to justify early review of the decision below, nor could it be alleged. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree" and the absence of finality "of itself" may be "sufficient ground for the denial of the application").

This case currently stands in an even weaker posture for consideration of certiorari than a dismissal motion stands for an ordinary appeal. Longstanding precedent holds that "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin v. United States*, 324 U.S. 229, 236 (1945). In the *Catlin* situation, the case goes on to its next phase. Here, the

City anticipates, much like Bank of America's motion filed May 16, that the Bank will argue three overlapping grounds for dismissal: an alleged failure to meet the statute of limitations, an alleged failure to identify a timely injury, and an alleged failure to meet this Court's requirements stated in *Inclusive Communities*. *See* Mot. to Dismiss, *City of Miami v. Bank of America*, No. 1:13-cv-24506, ECF No. 103.

In its decision below, the Eleventh Circuit instructed the District Court that:

> Any newly pled complaint must take into account the evolving law on disparate impact in the FHA context. Without the new pleadings before us, we have no occasion to pass judgment on how *Inclusive Communities* will impact this case, but we flag the issue both for the parties and for the district court on remand.

Pet. App. 65a.

The anticipated motion to dismiss will likely test whether the City has met that direction. Because this case is still being litigated at the motion to dismiss stage, and a ruling adverse to the City will provide a basis for a return to the Eleventh Circuit, there is no warrant to exercise the unusual discretion the Bank asks of this Court to review the Eleventh Circuit's earlier decision in this case and depart from the general practice of awaiting final judgment. Instead, the situation seems more akin to an appeal of the denial of a preliminary injunction, which is mooted by a district court's decision on the permanent injunction. *See Grupo Mexicano de Desarrollo, S.A. v.*

Alliance Bond Fund, Inc., 527 U.S. 308, 314 (1999) ("Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter.").

II. The Absence of a Conflict in the Circuits Further Advises Against Review in this Court.

A. If a proper question, the issue presented is likely to be reviewed in other circuits.

The Bank does not assert that a conflict exists between the circuits on the issue of municipal standing to bring an FHA claim of this kind. Pet. 10-11. Instead, it speculates that there is "little chance" of diverse opinions being issued on the first Question Presented because of existing precedents. Pet. 11. Even as it denies that any circuit is likely to issue a decision conflicting with the decision of the Eleventh Circuit, it contradicts the claim by asserting that the "two sets of decisions [from this Court interpreting "aggrieved" in different statutes] cannot be reconciled" and that "this Court has already staked out both sides of the issue," forcing each circuit "to only pick which set of this Court's decisions to follow."[2] Pet. 10, 11. Rather than cause circuit stagnation, the examination of the supposedly conflicting precedents and the rationale for following one or the other

[2] The claim of two separate sets of precedents on the same issue ignores the fact that the precedents address two separate statutes, Title VII and the FHA. Each statute, however, has been treated consistently by this Court.

provides precisely the opportunity for percolation that this Court favors.

The first Question Presented is currently before the Ninth Circuit in a case in which the Bank is a party. In *City of Los Angeles v. Wells Fargo & Co.*, No. 15-56157 (9th Cir.), the District Court dismissed Los Angeles's FHA action against the Bank on summary judgment on statute-of-limitations and related grounds. *City of Los Angeles v. Wells Fargo & Co.*, No. 2:13-cv-9007, 2015 WL 4398858, at *14 (C.D. Cal. July 17, 2015). In response to the City's appeal, the Bank has asserted, *inter alia*, that the judgment in its favor may be affirmed because Los Angeles falls outside the FHA's zone of interests and therefore lacks standing to bring the action. Appellee Wells Fargo Br. at 49-56, *City of Los Angeles v. Wells Fargo & Co.*, No. 15-56157, 2016 WL 1003381 (9th Cir. Mar. 11, 2015). A second pending Ninth Circuit case also raises the same question. Los Angeles also brought a similar action against Bank of America, which was also dismissed at summary judgment on statute of limitations grounds. *City of Los Angeles v. Bank of America*, No. CV-13-9046, 2015 WL 4889511, at *6 (C.D. Cal. May 11, 2015). On appeal, Bank of America also asserts summary judgment may be affirmed on the alternative grounds that Los Angeles is outside the FHA's zone of interests. Appellee Bank of America Br. at 54-59, *City of Los Angeles v. Bank of America Corp.*, No. 15-5589, 2016 WL 281342 (9th Cir. Jan. 19, 2016).

The issue further appears likely to arise in the Seventh Circuit. The Northern District of Illinois has issued conflicting rulings that requires resolution by the Seventh Circuit, taking the polar opposite positions that the Bank speculates would never occur absent a decision by this Court. In *County of Cook v.*

Wells Fargo & Co., 115 F. Supp. 3d 909 (N.D. Ill. 2015), the county's lawsuit was dismissed as outside the zone of interests protected by the FHA because the county was not denied a home loan or offered unfavorable terms. *Id.* at 919. The court further stated, *id.* at 915-20, that, in *Thompson v. North American Stainless, LP*, 562 U.S. 170 (2011), this Court effectively overruled and made "kaput" *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979), which had recognized municipal standing under the FHA for claims similar to those of the City in this case. The decision is at odds with the Bank's claim that no conflict can be possible. *Thompson* is relied upon by the Bank so heavily in its Petition that it earns a *passim* designation in its Table of Authorities.

Despite that ruling, two months later, another judge in the same court rejected that rationale. He specifically "decline[d] to adopt such a sweeping view of *Thompson*," and "[i]nstead, this Court agrees with another court in this district that found statutory standing under similar circumstances." *Cnty. of Cook v. HSBC N. Am. Holdings Inc.*, 136 F. Supp. 3d 952, 2015 WL 5768575, at *8 (N.D. Ill. Sept. 30, 2015) (citing *Cnty. of Cook v. Bank of Am. Corp.*, No. 14-C-2280, 2015 WL 1303313, at *4-5 (N.D. Ill. Mar. 19, 2015)) (examining *Thompson* and holding "the County's claims falls within the FHA's zone of interests"). With that conflict between district court decisions plainly joined, the Seventh Circuit is likely to weigh in on the first Question Presented.

Thus, this Court is likely to have the benefit of additional decisions from the Ninth and Seventh Circuits. Though the Bank denies that the issue will percolate, Pet. 11, it plainly will as at least two other

circuits appear likely to weigh in on the issue. If the first Question Presented is a proper one, it is one that would benefit from further ventilation based on additional exploration in appellate decisions.

B. The alleged conflict with this Court's recent jurisprudence does not exist.

The Bank's claim that this Court has adopted a new approach to the zone of interests analysis that needs preemptive application to the FHA through a grant of certiorari does not stand up to scrutiny. The argument is built on two recent precedents that reaffirmed preexisting law. As such, there is no warrant for this Court's intervention in the absence of a circuit conflict.

1. Lexmark *did not narrow this Court's approach to the zone of interests.*

First, the Bank asserts that the decision below is in tension with *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). The contention is based on an erroneous assertion that *Lexmark* announced a new, more stringent application of the zone of interests. Pet. 18. In contrast, the Eleventh Circuit expressly held that the FHA's zone of interests "encompasses the City's allegations in this case . . . because the City has specifically alleged that its injury is the result of a Bank policy either expressly motivated by racial discrimination or resulting in a disparate impact on minorities." Pet. App. 47a.

Lexmark, applying the Lanham Act, stated that the zone-of-interests test applies to all statutorily

created causes of action, but that Congress may expand the zone of interests. 134 S. Ct. at 1388 ("a court . . . cannot limit a cause of action that Congress has created merely because 'prudence' dictates"). Indeed, in *Lexmark*, this Court held that a third-party whose trademark was not affected and who was not a direct competitor of the defendant but whose product was adversely affected by Lexmark's anticompetitive false advertising was within the Lanham Act's zone of interests. The breadth of zone-of-interest coverage in that statute, permitting a case of third-party liability, demonstrates that there is no inherent prudential limit that would require a city be the discriminated-against party to vindicate its own interests under the FHA.

The zone-of-interests test is not a new test and "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)). In fact, this Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id*. Thus, the "test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id*. (quoting *Clarke*, 479 U.S. at 399).

To make the "zone" determination, a court applies Congress's "evident intent" and emphatically does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id*. (quoting *Clarke*, 479 U.S. at 399-400). Here, with respect to the FHA, congressional intent is very broad and plainly covers the City's action, as the FHA is "a

comprehensive open housing law." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Unlike other civil rights statutes, the FHA's "'potential for effectiveness . . . is probably much greater than [§ 1982] because of the sanctions and the remedies that it provides.'" *Id.* at 416 n.19. Its purpose, as expressed by Congress, is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. This Court recently elaborated on that, holding that the FHA's "central purpose" is "to eradicate discriminatory practices within a sector of our Nation's economy." *Inclusive Communities*, 135 S. Ct. at 2521. Consistent with that broad purpose, the FHA provides for both private and governmental rights of action. *See* 42 U.S.C. §§ 3612-3614.

Lexmark acknowledges that "our analysis of certain statutes will show that they protect a more-than-usually 'expan[sive]' range of interests." *Lexmark*, 134 S. Ct. at 1388 (ellipses in original). That statement accords with the recognition in *Gladstone* that "Congress may, by legislation, expand standing to the full extent permitted by Art. III." *Gladstone*, 441 U.S. at 100. Thus, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), relying on *Gladstone*'s statement, held "courts accordingly lack the authority to create prudential barriers to standing in suits brought under [FHA Section 812]." *Id.* at 372. Nothing in *Lexmark* alters this conclusion.

2. Thompson *did not redefine standing under the FHA.*

The other precedent the Bank asserts limits the parties who may make a claim under the FHA and is in tension with the decision below is *Thompson*. However, *Thompson* was not an FHA case, does not

discuss discriminatory impact within the context of the FHA, and patently did not make any holding with respect to that statute. *See* 562 U.S. at 176 ("it is Title VII rather than Title VIII that is before us here").

Thompson reiterated previous holdings of this Court that a person need not have been the object of discriminatory practices to have standing. *Id*. at 177-78 (quoting *Clarke*, 479 U.S. at 399-400). *Thompson* also held that the term 'aggrieved' in Title VII covers "any plaintiff with an interest 'arguably [sought] to be protected' by the statutes." *Id*. at 178 (citation omitted). The only plaintiffs this Court held excluded were those "whose interests are unrelated to the statutory prohibitions in Title VII." *Id*. Although the Bank submits that Thompson reinterpreted who a person "aggrieved" is in a manner logically applicable to the FHA as well, *Thompson* expressly recognized that *Gladstone*, which upheld municipal standing to bring an FHA case over lost tax revenues, is "compatible with the 'zone of interests' limitation that we discuss" here.[3] 562 U.S. at 176.

If the narrowed approach of conveying standing only to direct victims of discrimination that the Bank asserts applies to Title VII and should apply to the

[3] *Gladstone* recognized that "[i]f [defendants'] steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward." 441 U.S. at 110. Then, with language applicable here, this Court authoritatively held that a "significant reduction in property values *directly* injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." *Id.* at 110-11 (emphasis added).

FHA were valid, *Thompson* would not have stated that "if that is what Congress intended, it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'" *Id.* at 177. This Court rejected this "artificially narrow" reading because it "contradicts the very holding of *Trafficante* [*v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)], which was that residents of an apartment complex were 'person[s] aggrieved' by discrimination against prospective tenants." *Id.*

Thompson clearly recognized that the zone of interests protected by Title VII is broad. *Id.* To satisfy it, plaintiffs interests just need to relate to the statutory prohibitions in Title VII. *Id.* That conclusion concerning Title VII, however, does not dictate a standard applicable to the FHA because the City's injuries flow from the Bank's racially discriminatory violations of the FHA and adversely affect the City's efforts to promote and seek to maintain a diverse, stable, and integrated community through various programs and numerous city agencies and departments, as the City has contended all along. App 1-a-6a.

While *Thompson* called some of *Trafficante's* dictum respecting Title VII "ill-considered," Pet. 10 (quoting *Thompson*, 562 U.S. at 176), the Bank eschews the care that this Court itself took in making the statement. The rejected *Trafficante* dictum concerned the scope of Title VII, not the FHA. *See id.* Nevertheless, *Thompson* found no error in the statement that FHA standing was as broad as Article III, specifically approving those statements as it appeared in *Gladstone*, 441 U.S. at 109, for its correct understanding of "the 'zone of interests' limitation" applicable to the FHA. 562 U.S. at 176. It further

emphasized that *Thompson* concerned "Title VII rather than Title VIII [FHA]," a wholly different statute. *Id*. *Thompson* does not require a reevaluation of FHA precedent by this Court, particularly in the complete absence of a circuit conflict.

3. The Bank's petition does little more than ask for correction of a claimed error.

Here, as the Eleventh Circuit held, the City's interests were well aligned with the statutory prohibitions found in the FHA. It specifically ruled that "to the extent a zone of interests analysis applies to the FHA, it encompasses the City's allegations in this case." Pet. App. 47a. Thus, the Bank's real complaint is not that the Eleventh Circuit failed to undertake the zone of interests analysis, but that it erred in its conclusion after reviewing the applicable precedent. In fact, the Bank calls the Eleventh Circuit's decision "plainly wrong." Pet. 12. However, this Court does not sit as a court of error to review and correct potentially erroneous rulings by lower courts.

After all, at least since the Judiciary Act of 1925, this Court has not sat as a court of last resort, concerned primarily with correcting errors and vindicating the rights of particular litigants, but instead resolves conflicts among the circuits and articulates legal rules and principles in cases with broad legal or social significance. *Cf. Stack v. Boyle*, 342 U.S. 1, 13 (1951) (Jackson, J., concurring) (certiorari granted for only general and important problems). There is no warrant to depart from that approach here. This Court has emphasized:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70, 74 (1955) (internal citations omitted).

Rather, as Supreme Court Rule 10 makes clear, certiorari should rarely, if ever, be granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Thus, "'it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.'" *Id.* at 79 (quoting *Layne & Bowler Corp. v. W. Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The Petition constitutes of little more than an attempt to appeal a claimed error and should be denied.

III. The Second Question Presented Seeks an Advisory Opinion.

Suggesting that it would promote efficiency, Pet. 16, the Bank asks this Court to determine whether the City is an aggrieved person for purposes of the FHA, as its second Question Presented. Even if this Court were to grant the first question, no purpose would be served in addressing the second. The record in the case before the Eleventh Circuit consisted of a complaint and briefing on the motion to dismiss. Since

then, the complaint has gone through two iterations, including new paragraphs that add further detail to the alignment of the City's interests with the purposes and thrust of the FHA. For example, absent from the original complaint but detailed in the second are the efforts of the City's Department of Community and Economic Development to operate the City's fair housing program, reduce illegal housing discrimination, monitor and investigate fair housing complaints, support fair housing litigation, and conduct research to identify and address fair housing impediments in order to improve the overall quality of life in the city. Third Am. Compl. at ¶ 20, *City of Miami v. Wells Fargo & Co.*, No. 1:13-cv-24508 (S.D. Fla. Apr. 29, 2016), ECF No. 80.

Any determination of whether the City has alleged a sufficiently cogent connection between the harms it has suffered and the purposes and authorizations of the FHA should not be determined on the basis of the original complaint, a pleading no longer operative in this case. Instead, such a determination of the adequacy of the original complaint's allegations to determine whether the City is aggrieved would constitute little more than an advisory opinion, as there is no present case or controversy regarding those allegations. Moreover, it is not the practice of this Court to examine the record developed subsequent to the appeal in the first instance. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 772 (2008) (recognizing the "ordinary course" is to remand for consideration "in the first instance."). After all, "factfinding is the basic responsibility of district courts, rather than appellate courts," and appellate courts should not resolve "in the first instance this factual dispute which had not been

considered by the District Court." *DeMarco v. United States*, 415 U.S. 449, 450 (1974).

Even so, the Bank quotes and paraphrases the FHA to the effect that an "aggrieved person" is a "person who claims to have been (or believes he will be) injured by a 'discriminatory housing practice.'" Pet. 19 (quoting 42 U.S.C. § 3602(i)) (parenthetical in original). If the City's original pleading somehow did not meet that standard, which both the City and the Eleventh Circuit thought it did, Pet. App. 47a, the City's Third Amended Complaint adds more detail that should be considered, if the question remains unanswered. It provides the necessary connection between the City's injury and the FHA's language more explicitly than the original complaint, demonstrating that its government efforts to secure fair and equal housing are similar to that of the nonprofit corporation in *Havens*, which the Bank concedes "had an interest in nondiscrimination as an end in itself." Pet. 19. In *Havens*, the nonprofit alleged that it was "frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." 455 U.S. at 379. This Court held, if the allegation is true, the organization unquestionably suffered a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources" sufficient to confer standing under the FHA. *Id.*

Miami's allegations in its current pleading are no less within the embrace of the FHA. The Petition provides no basis for a review of allegations that have

not been reviewed by either the District Court nor the Eleventh Circuit and should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Date: May 20, 2016 Respectfully submitted,

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 6th Street, N.W., Suite 250
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Victoria Méndez
CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130
(305) 416-1800

Erwin Chemerinsky
UNIV. OF CALIFORNIA, IRVINE
401 East Peltason Drive
Educ. 1095
Irvine, CA 92697
(949) 824-7722

Joel Liberson
Howard Liberson
TRIAL & APPELLATE RESOURCES
400 Continental Blvd., 6th Floor
El Segundo, CA 90245
(310) 426-2361

Rachel Geman
LIEFF CABRASER HEIMANN &
BERNSTEIN, L.L.P.
250 Hudson Street, 8th Floor
New York, NY 10013
(212) 355-9500

Attorneys for Respondent

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APPENDIX A:

Plaintiff's Motion for Reconsideration, Exhibit A (Proffered First Amended Complaint) (filed July 21, 2014), ECF No. 50-1

Excerpt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 13-cv-24508-DIMITROULEAS/SNOW

DEMAND FOR JURY TRIAL

CITY OF MIAMI, a Florida municipal corporation,
Plaintiff,

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

FIRST AMENDED COMPLAINT FOR VIOLATIONS OF THE FEDERAL FAIR HOUSING ACT

* * *

1. It is axiomatic that banks should not make discriminatory loans. Banks must extend credit to minorities on equal terms as they do to other similarly situated borrowers. Banks should not target minority neighborhoods for loans that discriminate nor make loans to minorities on terms that are worse than those offered to whites with similar credit characteristics. When Banks engage

in such discriminatory conduct, it has profound non-economic and economic consequences for the cities in which mortgaged properties exist, and Banks should be responsible for those consequences. Wells Fargo's conduct has harmed the residents of Miami and impaired the City's strong, longstanding and active commitment to open, integrated residential housing patterns and its attendant benefits of creating a stable community that increases social and professional opportunities and the quality of life in the City. Additionally, Wells Fargo's conduct has caused the City to lose property tax revenues and required the City to pay the costs of repairing and maintaining properties that go into foreclosure due to discriminatory lending. This lawsuit arises because Wells Fargo breached these legally mandated obligations and foreseeably injured the City of Miami.

* * *

24. Plaintiff City of Miami is a Florida municipal corporation. The City has maintained an active and longstanding interest in the quality of life and the professional opportunities that attend an integrated community. One way that the City has furthered these interests is through its Department of Community and Economic Development, which is charged with responsibility for operating the City's fair housing program, reducing illegal housing discrimination, monitoring and investigating fair housing complaints, supporting fair housing litigation, and conducting research and studies to identify and address fair housing impediments as a means of improving the

overall quality of life in the city. The City is authorized by the City Commission to institute suit to recover damages suffered by the City as described herein.

* * *

156. The Bank's predatory lending conduct frustrates the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community, which is the purpose and mission of the Miami's Department of Community & Economic Development. The Department, which has responsibility for operating the City's fair housing program, is designed to "affirmatively further fair housing objectives of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, as amended, and other relevant federal, state, and local housing laws." In discharging that responsibility, the Department "actively works to reduce illegal housing discrimination. The City promotes equal housing opportunity through education and training, monitoring and investigating fair housing complaints utilizing techniques to support fair housing litigation, and conducts research and studies to identify and address fair housing impediments."[1] The Bank's discriminatory lending practices directly interfere with the City's ability to achieve these important objectives.

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[1] http://www.miamigov.com/communitydevelopment/pages/housing/FairHousing.asp.

APPENDIX B:

Plaintiff's Third Amended Complaint (filed Apr. 29, 2016), ECF No. 80

Excerpt

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 13-cv-24508-DIMITROULEAS

DEMAND FOR JURY TRIAL

CITY OF MIAMI, a Florida municipal corporation,
Plaintiff,

v.

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

THIRD AMENDED COMPLAINT FOR VIOLATIONS OF THE FEDERAL FAIR HOUSING ACT

* * *

1. Plaintiff City of Miami ("Miami" or the "City") brings this action against Wells Fargo & Co., Inc. and Wells Fargo, N.A. (hereafter "Wells Fargo" or the "Bank") for the economic impact of its longstanding, unbroken policy and practice of both intentionally steering minority borrowers in Miami into "discriminatory" mortgage loans (defined herein as loans that have higher costs and risk

features than more favorable and less expensive loans issued to similarly situated white borrowers) and engaging in facially neutral business policies and practices that created an "artificial, arbitrary, and unnecessary" barrier to fair housing opportunities for minority home purchasers and owners. Additionally, Wells Fargo maintained a policy of refusing to extend credit to minority borrowers who desired to refinance the more expensive loans they previously received when such credit was extended to white borrowers.

* * *

20. Plaintiff City of Miami is a Florida municipal corporation. The City has maintained an active and longstanding interest in the quality of life and the professional opportunities that attend an integrated community. One way that the City has furthered these interests is through its Department of Community and Economic Development, which is charged with responsibility for operating the City's fair housing program, reducing illegal housing discrimination, monitoring and investigating fair housing complaints, supporting fair housing litigation, and conducting research and studies to identify and address fair housing impediments as a means of improving the overall quality of life in the city. The City is authorized by the City Commission to institute suit to recover damages suffered by the City as described herein.

* * *

98. The Bank's discriminatory lending practices have adversely affected the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community, which is the purpose and mission of the Miami's Department of Community & Economic Development. The Department, which has responsibility for operating the City's fair housing program, is designed to "affirmatively further fair housing objectives of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, as amended, and other relevant federal, state, and local housing laws." In discharging that responsibility, the Department "actively works to reduce illegal housing discrimination. The City promotes equal housing opportunity through education and training, monitoring and investigating fair housing complaints utilizing techniques to support fair housing litigation, and conducts research and studies to identify and address fair housing impediments."[2] The Bank's discriminatory lending practices directly interfere with the City's ability to achieve these important objectives.

***

[2] City of Miami, Community & Economic Development Department, *Fair Housing*, http://www.miamigov.com/communitydevelopment/pages/housing/FairHousing.asp.