

No. 19-15169

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

CITY OF OAKLAND, A MUNICIPAL CORPORATION,  
*Plaintiff-Appellee,*

v.

WELLS FARGO & CO., AND WELLS FARGO BANK, N.A.,  
*Defendants-Appellants.*

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**On Appeal from the United States District Court  
for the Northern District of California**

No. 1:15-cv-04321-EMC

Hon. Edward M. Chen, Judge

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**AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA IN  
SUPPORT OF PLAINTIFF-APPELLEE**

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## INTRODUCTION AND STATEMENT OF INTEREST

This case poses the question of what is sufficient to demonstrate proximate cause under the Fair Housing Act (FHA), 42 U.S.C. §§ 3601 *et seq.* Because the FHA was adopted not just to address harms to the individual, but also harms to the community, the district court properly denied defendants Wells Fargo & Company and Wells Fargo Bank, N.A.’s (collectively, “Wells Fargo”) motion to dismiss plaintiff City of Oakland’s first amended complaint, which alleged that Wells Fargo’s discriminatory mortgage lending practices harmed the City of Oakland by causing decreased property revenue and increased municipal expenditures, reducing resources available to the City to provide critical basic services.

It is the public policy of the State of California to protect its residents and communities against housing discrimination. *See* Cal. Gov’t Code § 12920. The California Attorney General and the Director of the California Department of Fair Employment and Housing (DFEH) share authority to enforce the state fair housing statute, the California Fair Employment and Housing Act (FEHA), Cal. Gov’t Code §§ 12900 *et seq.*, among other state statutes designed to protect California residents from unfair and discriminatory practices. The California Attorney General has a history of protecting fair housing rights and holding financial institutions accountable for unlawful practices on behalf of its residents and the State of California. It has done so through multi-state amicus coalitions defending

actions designed to combat housing discrimination,<sup>1</sup> defending DFEH's affirmative housing discrimination actions on appeal,<sup>2</sup> and in advancing its own actions.

For example, between 2006 and 2009, the California Attorney General's Office obtained settlements against nine companies that had constructed apartment complexes that failed to comply with state and federal accessibility laws designed to address disability discrimination.<sup>3</sup> The State of California also successfully brought an action against property owners who were discriminating against

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<sup>1</sup> See, e.g., Brief of Massachusetts et al. as Amici Curiae in Support of Respondent, *Texas Dep't of Hous. & Comm. Affairs v. Inclusive Communities Project, Inc.*, 747 F.3d 275 (5th Cir. 2014) (No. 13-1371), 2014 WL 7405727 (supporting the ability of housing discrimination victims to bring disparate impact claims); Brief of the States of Maryland et al. as Amici Curiae in Support of Plaintiffs' Renewed Motion for Preliminary Injunction and for Summary Judgment, *Nat'l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14 (D.D.C. 2018) (No. 18-cv-01076) (arguing HUD's decision to withdraw its Local Government Assessment Tool—a key component of its Affirmatively Furthering Fair Housing Rule—without first soliciting public comment, contravened the Administrative Procedure Act).

<sup>2</sup> See, e.g., *Dep't of Fair Emp. & Hous. v. 1105 Alta Loma Road Apts.*, 154 Cal.App.4th 1273 (2007) (upholding DFEH complaint against a landlord's alleged actions in failing to accommodate a tenant's disability); *Auburn Woods I Homeowners Ass'n v. Fair Emp. & Hous. Comm'n*, 121 Cal.App.4th 1578 (2004) (upholding DFEH Commission's decision that a homeowners association's refusal to grant an accommodation for its "no dogs" rule to a couple who required a companion animal for medical reasons violated FEHA).

<sup>3</sup> See, e.g., Judgment Pursuant to Stipulation, *People v. Woods*, No. SCRDCVC08-0162347-000 (Cal. Super. Ct., Mar. 28, 2008); Judgment Pursuant to Stipulation, *People v. Northside Dev. Co.*, No. CV034732 (Cal. Super. Ct., April 28, 2008).

prospective tenants on the basis of race, ethnicity, and national origin, in violation of FEHA.<sup>4</sup>

In 2012, California obtained broad-ranging mortgage fraud settlements from five major banks, including Wells Fargo, which provided for relief in the form of cash payments to homeowners who were wrongly foreclosed upon, new servicing standards that remained in place until 2015, loan modification relief, and the appointment of a monitor to oversee the banks to ensure compliance with the terms of settlement.<sup>5</sup> In December of 2018, California secured a \$148.7 million settlement from Wells Fargo as part of a \$575 million nationwide settlement wherein Wells Fargo admitted to opening millions of deposit, credit card, and other accounts, and conducting transfers of funds without customer authorization, over various periods from 2002 through 2017.<sup>6</sup>

In addition, the State has a substantial interest in ensuring that that the broad remedial purposes of the FHA and similar state laws are effectuated. The State has strong housing protections under FEHA and has an interest in ensuring that the FHA provides broad protections as intended by the statute. Both the FHA and

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<sup>4</sup> See Judgment Pursuant to Stipulation, *People v. Minh Dev. & Mgmt. LLC*, No. BC398666 (Cal. Super. Ct., June 17, 2010).

<sup>5</sup> See Cal. Dep't of Justice, *National Mortgage Settlement Frequently Asked Questions* (last visited Sept. 10, 2019), <https://tinyurl.com/OAG-Mort-FAQ>.

<sup>6</sup> Stipulated Judgment, *People v. Wells Fargo & Co.*, No. 18STCV09856 (Cal. Super. Ct., Dec. 28, 2018).

FEHA are important tools for the State and municipalities to fight for individuals' access to housing, free from deceptive and discriminatory practices that impact the larger community as a whole.

Discriminatory lending practices by financial institutions not only harm the individual homebuyer, but also have damaging effects on the State and local municipalities. It is therefore critical that cities and states are able to bring actions under the FHA to redress the broad, systemic, and pernicious effects of housing discrimination in our communities. As such, the State of California has an important interest in the Court's resolution of the questions before it and respectfully submits this brief as *amicus curiae*.

## **ARGUMENT**

### **I. CONGRESS ENVISIONED BROAD ENFORCEMENT OF THE FHA**

#### **A. The FHA was Enacted to Address the Type of Harms Alleged by the City of Oakland**

The proximate cause analysis is controlled by the nature of the statutory cause of action, which hinges upon the policy goals of the underlying statute. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 517 U.S. 118, 133 (2014) (“The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits.”). In *Bank of Am. Corp. v. City of Miami*, the Supreme Court instructed the lower courts to define “the contours of proximate cause under the FHA and decide how that standard applies to the City’s

claims for lost property-tax revenue and increased municipal expenses.” 137 S.Ct. 1296, 1306 (2017).

Defining the contours of proximate cause under the FHA requires an examination of the history and purpose of the FHA and must be viewed in light of the broad remedial aim of the statute. The FHA was enacted in the midst of protests that had erupted in cities nationwide in the late 1960’s, decrying inequities in policing, economic opportunity, and housing policy, amongst other societal injustices.<sup>7</sup> Then-President Lyndon Johnson convened the National Advisory Commission on Civil Disorders, otherwise known as the Kerner Commission, in July of 1967 to examine the reasons for the protests and propose possible solutions. Exec. Order No. 11,365, 3 C.F.R. § 674 (1966-1970 Comp.). Released in February 1968, the Kerner Commission’s report concluded that housing discrimination, residential segregation, and economic inequality were the leading causes of divisions in society, and recommended that Congress “[e]nact a comprehensive and enforceable open housing law.” *Report of the National Advisory Commission on Civil Disorders* (Kerner Commission Report) 1, 13 (1968). The report highlighted the need for strong housing enforcement to prevent “further deterioration” of “municipal tax bases,” *id.* at 10, and “the ruin brought on by

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<sup>7</sup> See John C. Boger, *Race and the American City: The Kerner Commission in Retrospect – An Introduction*, 71 N.C. L. Rev. 1289, 1294 n.19 (1993).

absentee ownership of property,” 114 Cong. Rec. 2993 (1968) (statement of Sen. Mondale). The Commission emphasized the harm of housing discrimination to America’s cities, which provided basic services such as sanitation and education, but found themselves woefully underfunded due to a declining tax base. *See* Kerner Commission Report at 133-41.

Two months later, Congress passed the FHA “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. Senator Mondale, one of the drafters of the FHA, stated that its necessity was driven by the “[d]eclining tax base, poor sanitation, loss of jobs, inadequate educational opportunity, and urban squalor,” which would persist if discrimination continued, and described the legislation as intended to have “teeth and meaning.” 114 Cong. Rec. 2274-75. Senator Hart read a letter from President Johnson recounting that “city administrations are burdened with rising social costs and falling tax revenues.” *Id.* at 3358. And Senator Brooke further stated that the “tax base on which adequate public services, and especially adequate public education, subsists has fled the city, leaving poverty and despair as the general condition,” and contemplated the FHA would be “essential” in preventing these conditions. *Id.* at 2280.

As this record makes clear, the FHA was adopted not just to address harms to the individual, but also harms to the community. As another senator supporting the

legislation stated, “The person on the landlord’s blacklist is not the only victim of discriminatory housing practices; it is . . . ‘the whole community.’” *Trafficante v. Metro. Life Ins. Co.* 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 2706 (statement of Senator Javits)); *see also* 114 Cong. Rec. 9559 (statement of Rep. Celler) (describing housing discrimination as “deeply corrosive both for the individual and for his community”). Thus, the standard for proximate cause must take into account the broad nature of the statute and the harms beyond that of an individual that the FHA was intended to remedy.

In light of the broad legislative purpose of the statute, courts have consistently taken an expansive view of who is harmed by—and may seek legal redress from—discriminatory housing practices. For instance, the FHA is intended to remedy injuries not only to individual homeowners but also to others who may have been injured from the prohibited conduct. *See, e.g., Trafficante*, 409 U.S. at 210 (finding that tenants residing in the same apartment building as non-White tenants who were targets of discrimination had standing for purposes of the FHA, as “the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered”); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n.9 (1979) (“The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804 [which prohibits discrimination in the sale or rental of housing] but

whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights, and thus are entitled to seek redress of that harm under § 812.”) (emphasis in original).

*Gladstone* is particularly illustrative here. In *Gladstone*, the Village of Bellwood alleged that the realtors' discriminatory conduct (in this case, racial steering) affected the village's racial composition, which could reduce its attractiveness to home buyers, which would depress prices, thereby reducing property values and corresponding property tax revenues and injuring the city's ability to fund municipal services. 441 U.S. at 110-11. The Court found that “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 111. Injuries to the city, including harm to a municipality's tax base, were directly identified in the promulgation of the FHA, notwithstanding the multiple links in the causal chain.

**B. The Proximate Cause Standard Should Enable Cities and States to Redress Harms to Communities**

In its analysis of proximate cause, the district court concluded that the City of Oakland had sufficiently demonstrated proximate cause with respect to certain of its claims alleging injuries due to decreased property tax revenue. ER3. The district court also denied Wells Fargo's motion to dismiss the City of Oakland's

claims based on municipal-expenditure injuries to the extent they seek injunctive and declaratory relief. *Id.* Practices leading to injuries like the ones alleged by the City of Oakland (such as discrimination in the terms and conditions of sale or rental of a dwelling) are prohibited by statute, and financial institutions should not be permitted to evade liability for their actions. *See* 42 U.S.C. § 3604.

Wells Fargo requests that this Court reverse the district court's decision because Oakland's injury is "several steps removed" from the asserted statutory violation. *See* Appellants' Br. 1. Wells Fargo argues that in order to demonstrate proximate cause on a motion to dismiss, a plaintiff must instead allege an injury that is the immediate result of an alleged statutory violation, "except in the rare circumstances where the most directly affected party cannot sue, or where a plaintiff alleges a harm at the second step that is as 'surely attributable' to the alleged statutory violation as the harm within the first step." *See id.* at 2 (citation omitted). As the City of Oakland ably argues, Wells Fargo's rigid interpretation of proximate cause "misconceives the citywide nature of the discriminatory housing practices alleged," and "conflates the City's unique claims and role in vindicating the FHA with the claims of individual victims of isolated discriminatory loans." *See* Appellee's Br. 26. Harms to cities were squarely contemplated in the enactment of the FHA. City and state actions are critical to ensuring that the underlying goals of anti-discrimination statutes like the FHA are achieved,

notwithstanding that such injuries often involve several links in the causal chain. They are especially important as individual homeowners shouldering high-cost, high-risk loans (the individual victims of racially discriminatory housing practices) may lack the resources to “generally be counted on to vindicate the law as private attorneys general.” *Holmes v. Sec. Inv’r Prot. Corp.*, 503 U.S. 258, 269-70 (1992).

Moreover, as the Eleventh Circuit held on remand in *City of Miami v. Wells Fargo & Co.*, “[t]he injury to the City’s tax base is uniquely felt in the City treasury, and there is no risk that duplicative injuries could be pled by another plaintiff or that the apportionment of damages amongst different groups of plaintiffs would be a problem.” 923 F.3d 1260, 1264 (11th Cir. 2019). The same is true here: the City of Oakland has suffered an injury distinct from any individual homeowner’s, and is in a distinct position to redress it. *See id.* at 1281 (“Since the City’s injuries are unique to its treasury, no other plaintiff will plead the same injuries, or attempt to recover the same funds. The City is in the best position to allege and litigate this peculiar kind of injury, to deter future violations and, theoretically, to actually remedy its distinctive injury.”).

## **II. CALIFORNIA’S COMMUNITIES EXPERIENCE ECONOMIC AND SOCIAL HARMS DUE TO DISCRIMINATORY LENDING PRACTICES PROHIBITED BY THE FHA**

The importance of actions brought under the FHA is underscored by the enduring harms experienced by the State and its local communities as a result of

discriminatory lending practices. Discriminatory practices by financial institutions such as Wells Fargo have led to housing and wealth loss across California communities. California's neighborhoods and cities have faced the most extreme levels of lost equity.<sup>8</sup> A troubling percentage of California families own homes that are "underwater," i.e., they owe more on their mortgages than their homes are worth and are vulnerable to foreclosure.<sup>9</sup>

California has been acutely affected by these practices. California is home to eighteen of the top 100 cities hardest hit by foreclosures and related economic crises in the nation, the most of any state.<sup>10</sup> Almost all of the hardest hit zip codes in California have African American and Latino populations significantly higher than their representation in the nation as a whole or in their metropolitan areas, greater than in the hardest hit cities.<sup>11</sup> The harmful effects of modern-day housing discrimination is not unique to California, but have been particularly devastating to the State and its communities of color.

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<sup>8</sup> Peter Drier et al., *Underwater America: How the So-Called Housing Recovery is Bypassing American Communities*, Haas Inst. for a Fair & Inclusive Soc'y 19-20 (May 2014), <https://tinyurl.com/y3akqcxu>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 12-14.

<sup>11</sup> *Id.* at 18.

The concentration of foreclosures in particular neighborhoods has led to dramatic declines in property values surrounding these foreclosures and increased municipal and state spending to maintain quality of life in these neighborhoods.<sup>12</sup> Overall, including in communities in California, this crisis has led to a decline in property values, loss of consumer confidence, abandoned homes, increased risk of vandalism, theft, crime, drugs and fire, increases in homelessness, increased maintenance costs for municipalities, deterioration of schools, unemployment, and neighborhood destabilization.<sup>13</sup>

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<sup>12</sup> *See id.* at 7; *see also* Richard Rothstein, *A Comment on Countrywide/Bank of America's Discriminatory Mortgage Lending and Its Implication for Racial Segregation*, Econ. Pol'y Inst. (Jan. 23, 2012), <https://tinyurl.com/y5yj6dxp>.

<sup>13</sup> Rothstein, *supra* note 12; *see also* Lisa Rice, *An Examination of Civil Rights Issues with Respect to the Mortgage Crisis: The Effects of Predatory Lending on the Mortgage Crisis*, Nat'l Fair Hous. All. (Mar. 20, 2009), <https://tinyurl.com/yymfxuej>; John R. Hipp & Alyssa W. Chamberlain, *Foreclosures and Crime: A City-level Analysis in Southern California of a Dynamic Process*, 51 Soc. Sci. Res. 219 (2015), <https://tinyurl.com/y5gxlpr7> (study of 128 cities in Southern California found that one-month and cumulative three-month, six-month, and twelve-month lags of foreclosures are found to increase city level crime for all crimes except motor vehicle theft); Daniel Immergluck, *Foreclosures and Neighborhoods: The Shape and Impacts of the U.S. Mortgage Crisis*, Urb. Stud. Inst. (2016), <https://tinyurl.com/y5mdw24n> (detailing foreclosure crisis effects, including vacant and dilapidated properties, depressed property values, equity loss, and increased crime); Debbie Gruenstein Bocian et al., *Dreams Deferred: Impacts and Characteristics of the California Foreclosure Crisis*, Ctr. for Responsible Lending 4 (Aug. 2010), <https://tinyurl.com/y683qg37> (finding that foreclosures caused depreciated home values and lost tax revenue as well as non-financial harm due to abandoned properties and blight).

Research has found the negative impacts of the foreclosure crisis extend to social systems as well. For example, home-based child care providers had to shutter their doors due to high-cost loans or lack of compensation from parents facing financial strain from their mortgages, further diminishing the supply of child care in neighborhoods, and posing challenges for working parents—thereby affecting both the economy and the need for social services provided by the city and state.<sup>14</sup>

The public health system was also impacted by the foreclosure crisis, as prolonged stress on individual homeowners increased their risk of strained mental health and physical health.<sup>15</sup> Seniors and near-seniors, in particular, experienced adverse effects, including health deterioration.<sup>16</sup> In addition, across the nation, advocates and service providers saw an increase in homeless foreclosure victims seeking services.<sup>17</sup> California certainly has felt the brunt of an escalating housing

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<sup>14</sup> Anne J. Martin, *After Foreclosure: The Displacement Crisis and the Social and Spatial Reproduction of Inequality*, Inst. for the Study of Soc. Change 13-18 (Dec. 9, 2010), <https://tinyurl.com/yxjv4toq>; see also Rothstein, *supra* note 12.

<sup>15</sup> Martin, *supra* note 14, at 16; see also Immergluck, *supra* note 13.

<sup>16</sup> Immergluck, *supra* note 13.

<sup>17</sup> Martin, *supra* note 14, at 16.

crisis; the State currently accounts for 25 percent of the nation's homeless population.<sup>18</sup>

Homeownership is a primary source of economic mobility and financial security in California.<sup>19</sup> Because homeownership constitutes 92 percent of the net worth for African Americans and 67 percent for Latinos, the impact of foreclosures on wealth loss on these communities was particularly detrimental.<sup>20</sup> For example, between 2005 and 2009, overall wealth among African Americans and Latinos declined by 53 percent and 66 percent, respectively, compared to 16 percent for whites.<sup>21</sup> One study focused on the effect of foreclosure on Latino families with children. Researchers interviewed 25 households in five regions of the country, including California's Central Valley, and found that the impact of foreclosure on

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<sup>18</sup> Victoria Cabales, *A Deeper Dive Into California's Housing and Homelessness Crisis*, KPBS (Aug. 28, 2018), <https://tinyurl.com/y4qlj9wm>.

<sup>19</sup> See Bocian et al., *supra* note 13, at 4.

<sup>20</sup> Rebecca Tippet et al., *Beyond Broke: Why Closing the Racial Wealth Gap is a Priority for National Economic Security: Executive Summary*, Ctr. for Glob. Pol'y Sols. 4 (2014), <https://tinyurl.com/yxpdmnoq>.

<sup>21</sup> Paul Taylor et al., *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics*, Pew Res. Ctr. 1 (July 26, 2011), <https://tinyurl.com/y32lsgm9>.

families was profound.<sup>22</sup> Stress from foreclosure had a significant negative impact on marital and familial relationships and on the well-being of children.<sup>23</sup> More than half of the families who faced foreclosure secured financial help through federal and state-funded public assistance such as Medicaid, although all but one family was left with no savings or financial cushion.<sup>24</sup> Children also experienced declined academic performance and social problems.<sup>25</sup>

In sum, the harms inflicted by discriminatory and predatory lending practices in the housing context are far-reaching and malignant. If not properly redressed by challenges brought on behalf of communities under the FHA, the detrimental impacts on families, neighborhoods, cities, and the State will continue to affect our communities for generations.

## CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

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<sup>22</sup> Janis Bowdler et al., *The Foreclosure Generation: The Long-Term Impact of the Housing Crisis on Latino Children and Families*, Nat'l Council of La Raza 25-27 (2010), <https://tinyurl.com/y2fohbq6>.

<sup>23</sup> *Id.* at 6; *see also* Immergluck, *supra* note 13.

<sup>24</sup> Bowdler et al., *supra* note 22, at 11-12.

<sup>25</sup> *Id.*; *see also* Immergluck, *supra* note 13 (a study of San Diego school system found that the math test scores and attendance rates of children in owner-occupied homes declined after mortgage default and effects persisted).

Dated: September 11, 2019

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### **STATEMENT OF RELATED CASES**

The State are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court and are not already consolidated here.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated \_\_\_\_\_.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** s/Shubhra Shivpuri **Date** September 11, 2019

(use "s/[typed name]" to sign electronically-filed documents)

### **CERTIFICATE OF SERVICE**

I certify that on September 11, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 11, 2019

s/ Shubhra Shivpuri