No. 10-708

IN THE
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO
THE FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their opening brief, and there are no amendments to that Statement.

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Edwards has alleged no "personal injury fairly traceable to the . . . allegedly unlawful conduct" identified in her complaint. *Allen v. Wright*, 468 U.S. 737, 751 (1984). She has alleged no economic harm in the form of excessive charges or poor service or of any other kind; she has alleged no physical, emotional, psychological, reputational, or dignitary injury; she has alleged no deprivation of property; she has alleged no denial of the opportunity to participate in the political process.

Edwards argues, instead, that she need not allege any such adverse effect because (1) historically, no allegation of actual injury beyond the violation of a duty owed to the plaintiff was required for a claim like hers; and (2) irrespective of history, Congress has the power to define the violation of a statutory duty owed to the plaintiff as an injury *per se*. Those arguments provide no basis to expand the jurisdiction of Article III courts beyond its traditional limit of redressing claims by plaintiffs who have suffered or are threatened by an injury-in-fact.

First, the common-law cases Edwards cites provide no support for her claim that the violation of RESPA's conduct-governing duty establishes injury in the absence of any invasion of antecedent interests the duty protects. Where a trust beneficiary seeks redress for a trustee's self-interested dealings with trust property, or a principal seeks redress for an agent's breach of the duty of loyalty, the law provides a remedy for the invasion of concrete interests rooted in established property and contract rights. Edwards does not seek to vindicate any personal interest independent of the alleged statutory duty. Moreover, even if the betrayal of a relationship of trust could alone provide the requisite injury, RESPA's obliga-

tion to provide "services free from kickbacks" (Resp. Br. 1) was not, in this case, based on any special relationship of trust that affected, or could have affected, Edwards personally.

Second, Article III is not satisfied merely by "limiting [a] right of action to persons having a sufficient nexus to [a statutory] violation to be reasonably regarded as its victims." U.S. Br. 27. Instead, Article III requires a district court to satisfy itself that the plaintiff has alleged the constitutionally required injury-in-fact, which means, at a minimum, some adverse effect on the plaintiff. Congress can define legal rights and thus give legal recognition to injuries that go beyond any that would have been recognized at common law. RESPA itself does so. But, if a "nexus" to a statutory violation satisfies Article III's injury requirement, that requirement disappears in statutory litigation between private parties. That result is inconsistent with this Court's decisions, which have never recognized the existence of a statutory *violation* as constituting *injury* without more. Edwards's failure to allege any adverse effect on herself – indeed, her careful avoidance of any claim of individualized harm, the better to certify a class – means that she has no standing to invoke the remedial power of the courts.

ARGUMENT

I. THIS CASE DOES NOT RESEMBLE TRADITIONAL COMMON-LAW ACTIONS

Edwards, supported by groups of law professors,[1] argues that the breach of certain conduct-governing duties – in particular, fiduciary duties of loyalty – gives rise to a *de facto* injury even in the absence of any consequential harm from the breach. Resp. Br. 16, 18-31. But common-law remedies for self-dealing and breaches of duties of loyalty do not exist in the abstract; rather, they are available to provide redress when the violation of a duty leads to an invasion of concrete proprietary or economic interests. Moreover, even if the common law permitted a plaintiff to sue for the betrayal of a duty of loyalty in the absence of any other claim of injury, RESPA creates no such duty of loyalty, and Edwards alleged no such betrayal.[2]

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[1] *See* Restatement Reporter & Advisers Br.; Trust Law & ERISA Law Professors Br.

[2] Edwards errs in describing the role history has played in this Court's Article III precedents. When this Court has found history "well nigh conclusive" on the question of Article III standing, *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 777 (2000), it has relied on history *not* to supplant the requirement that a plaintiff identify an injury-in-fact, but for insight into when a plaintiff may pursue redress for *another's* (undisputed) injury. *See id.* at 771, 773, 777-78; *Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008).

A. Actions Against Fiduciaries Vindicate Concrete Interests

1. Actions Against Self-Dealing Trustees Provide Redress for Invasions of Property Interests

An action by a trust beneficiary against a trustee who has engaged in self-dealing with trust property represents an ordinary case where a defendant's violation of a duty owed to the plaintiff has caused harm to a concrete proprietary interest for which that plaintiff seeks redress. For example, in *Michoud v. Girod*, 45 U.S. (4 How.) 503 (1846), this Court "set[ ] aside . . . purchases by which [a pair of executors] became the possessors of their testator's entire estate." *Id.* at 552. In so doing, the Court applied the equitable "doctrine . . . of the incapability of trustees and agents to purchase particular property, for the sale of which they act representatively, or in whom the title may be for another." *Id.* at 554. There, and in many other cases and authorities Edwards cites,[3] the key point is that, when a trustee or selling agent sells property to itself, the beneficiary or the principal may bring a suit to unwind the sale or recover any profits earned by the fiduciary, and the defendant cannot avoid that remedy by arguing that the terms of sale were fair or reasonable.

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[3] Challenges to sales, leases, and loans of property in which the plaintiff had an equitable or beneficial interest account for the vast majority of the historical cases Edwards cites at pages 21-25 and in notes 4-5. *Woods v. City National Bank & Trust Co. of Chicago*, 312 U.S. 262, 263-64 (1941), one of the few exceptions, involved a dispute over payment of a trustee's expenses out of a bankruptcy estate, which certainly implicates the estate's concrete interest.

That principle does not support Edwards's claim that the law recognized an action for breach of a duty in the absence of injury. To the contrary, the aggrieved beneficiaries in *Michoud* and similar cases were protecting substantive legal entitlements – rights to particular property or other concrete economic assets. *See*, *e.g.*, *Davoue v. Fanning*, 2 Johns. Ch. 252, 256 (N.Y. Ch. 1816) (discussing plaintiff's "interest . . . that the property should be sold to the best advantage" so as to increase "the dividend of the residuary estate"). Because the trustees' judgment in disposing of trust property had not been impartial, the courts gave the beneficiaries "the choice . . . to judge for themselves whether they w[ould] take back the property." *Whelpdale v. Cookson*, 28 Eng. Rep. 440, 441 (Ch. 1747).[4] The remedy thus redressed an injury to an underlying substantive entitlement that was no mere "'byproduct' of the suit itself," *Vermont Agency*, 529 U.S. at 773; neither the duty nor the remedy existed "*in vacuo*," *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

The allegation that defendants' conduct caused harm to any underlying interest that RESPA protects is missing from Edwards's complaint. RESPA *does* protect (at a minimum) pecuniary interests, and, when those interests are invaded, a plaintiff would have standing to sue. For example, RESPA protects homebuyers against excessive charges for

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[4] This rule was, moreover, consistent with the longstanding principle that a property right conveys "an entitlement that another person cannot exploit without the owner's consent." Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 Tex. L. Rev. 1927, 1934 (2001). Because a conflicted trustee does not have valid consent, requiring the trustee to return the property or give up any profits could "be justified . . . as an aspect of the [property] entitlement itself." *Id.*

settlement services: the economic loss entailed by such charges, if causally related to a violation, would constitute injury. But, as this case demonstrates, economic injury is not inherent in the alleged violation. Edwards has alleged none and has not undertaken to prove any. *See* Resp. Br. 35 (arguing that the "purported absence of economic harm . . . is irrelevant").

Edwards argues that it is "sufficient that she suffered an invasion of a right *designed to* protect her concrete interests." *Id.* at 34 (emphasis added); *see id.* at 41. But the common law did not provide a remedy for the violation of a right "designed" to protect a concrete interest, but for an actual invasion of concrete interests. Such an invasion – which is necessary and sufficient to create an injury for Article III purposes – is lacking here.

2. Actions Against Corrupt Agents Provide Redress for the Deprivation of Honest Services

Similarly, where a principal sues to recover compensation paid to (or the ill-gotten gain received by) a corrupt agent, the harm suffered is the deprivation of the bargained-for services of the agent, and often also the misappropriation of an opportunity that belonged to the principal. Thus, in *United States v. Carter*, 217 U.S. 286 (1910), the government sued an army captain who had used "discretionary powers" to help certain military contractors "realize[]" an "abnormal profit . . . of which, approximately, $500,000 ultimately found its way into his possession." *Id.* at 310. From those facts it is hard to escape "the conclusion that the government had been defrauded, and had suffered great loss." *Id.* at 300 (describing lower-court findings).

Edwards relies on this Court's statement that a showing of a separate loss from Carter's fraud was not necessary for the government to recover. *See id.* at 305-06; Resp. Br. 26. As in the case of a self-dealing trustee, however, that is because the harm to a conventional economic interest – that is, the right to services that the plaintiff paid for – is present irrespective of the existence of further consequential harms. *See Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (describing honest-services fraud as a "fraudulent scheme[] to deprive another of honest services through bribes or kickbacks supplied by a third party").

Edwards argues that she stands in a position comparable to a principal who has been deprived of the conflict-free services she "paid for." Resp. Br. 33 n.6. That injury *could* be present in a RESPA case – for example, an attorney or broker may be a fiduciary who receives compensation and owes honest services in return. But the facts alleged here present no similar harm. Tower City was acting as the agent of the title insurance underwriter, not Edwards's agent. *See* Pet'r Br. 6. Because Edwards did not pay Tower City to act on her behalf in that transaction, Edwards suffered no deprivation when Tower City acted as First American's agent, not hers.

Furthermore, where an agent receives a bribe or kickback with respect to a particular transaction, the principal may allege the harm of not obtaining the best possible terms – which likely could have been made better at least by the amount of the bribe. *See* 2 Dan B. Dobbs, *Law of Remedies* 698 (2d ed. 1993) ("[I]f the seller of goods to the employer would kickback a percentage to the disloyal purchasing agent, it would presumably also discount the price to the

employer directly."). Here, by contrast, no comparable harm can be alleged, because Edwards paid the state-authorized rate for her First American policy, which was the only rate available. Tower City, unlike a disloyal fiduciary, was entitled to compensation from First American for the services it provided. In short, Edwards offers no allegation or anything other than speculation that the challenged payment by First American to its agent caused her to pay more for title insurance. *See* Pet'r Br. 27-29.[5]

3. Edwards Cannot Rely on a Relationship of Trust and Confidence

Edwards's reliance on historical analogies fails for the additional reason that the cases she cites are grounded in the special duty of trust and confidence inherent in the relationship between, for example, a trustee and a trust beneficiary or an agent and principal. *See*, *e.g.*, *Magruder v. Drury*, 235 U.S. 106, 120 (1914) ("It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself."); *Carter*, 217 U.S. at 306 ("The disability results not from the subject-matter, but from the fiduciary character of the one against whom it is applied."). That kind of relationship does not exist here, either by virtue of the underlying state-law relationship between Edwards and Tower City or by virtue of RESPA itself.

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[5] Edwards objects to the characterization of price inflation as "speculative," saying that "it is no different from arguments routinely made in antitrust cases." Resp. Br. 37. But antitrust plaintiffs must allege and prove market effects and injury to themselves; Edwards argues (and the Ninth Circuit held) that she need not do either.

Edwards does not say that Tower City was her fiduciary under state law or otherwise was in a special relationship of trust and confidence with her with respect to her title insurance transaction. To the contrary, Edwards effectively concedes (at 9) Tower City could have been acting as a fiduciary only in its possible capacity as escrow agent for the homebuyer. And she concedes RESPA does not create a fiduciary relationship. *See id.* at 31 (describing RESPA's prohibition as a "more modest duty" than an actual fiduciary duty).

Edwards argues (*id.*) that, because Congress *could* create a fiduciary relationship, it may also impose a lesser kickback-avoidance duty on settlement-service providers. But the issue is not whether Congress could require all settlement-service providers to avoid referral fees. Rather, the question is whether the violation of such a duty (which we assume existed here) *entails* a cognizable injury to any consumer whose transaction has a connection to the allegedly prohibited conduct. Even if the common law recognized an intangible injury caused by "betrayal of . . . trust" and "breach of confidence," *Carter*, 217 U.S. at 306 – rather than tangible injury to underlying economic interests – the required relationship is absent here.

Edwards relies on legislative history for the proposition that "homebuyers trust real estate professionals," so that, "[w]hether or not the professionals are fiduciaries under state law, homebuyers generally 'perceive or assume [them] to be in a fiduciary relationship.'" Resp. Br. 27 (emphasis omitted; second alteration in original). The legislative history provides no support for the claim that title insurance buyers consider *title insurance agents* to be their

fiduciaries. Nor could they reasonably do so, when the title insurance agents are acting as the agent of the underwriter. Edwards relies instead on portions of the legislative history discussing homebuyers' relationships with their real estate brokers and attorneys, individuals who may owe their clients some duty of loyalty and who may have actual relationships of trust with them.[6]

This Court need not consider whether betrayal in an actual relationship of trust might support standing without out-of-pocket pecuniary injury – for example, because of some emotional or psychological impact on the plaintiff. No such relationship existed here, and Edwards has not alleged that she suffered

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[6] *See, e.g.*, *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 92d Cong. 2 (1972) (Washington Post article) (addressing referrals by "developers, lenders, real estate brokers, and builders"); *id.* at 21-22 (testimony of HUD Secretary) (addressing referrals to title companies by "attorneys, brokers, and lenders"), 738-39 (1972 HUD-VA report) (home buyer "usually depends upon advice of the [real estate] broker, escrow agent, seller, or settlement attorney"); *Real Estate Settlement Procedures Act – Controlled Business: Hearings Before the Subcomm. on Housing & Urban Dev. of the H. Comm. on Banking, Finance & Urban Affairs*, 97th Cong. 152-53 (1981) (testimony of ALTA President) (expressing concerns about "real estate brokers, mortgage lenders, builders, and attorneys" that "have become title insurance agents or have established, acquired, or purchased stock in title insurance agencies"); *id.* at 247-48 (1977 DOJ report) (expressing concern about real estate brokers owning title companies); H.R. Rep. No. 97-532, at 53 (1982) (referring to "four categories of persons who are in a position to refer the settlement business of consumers in residential real estate transactions – real estate brokers and agents, mortgage lenders, real estate builders and developers, and attorneys").

such impact. To the contrary, Edwards has avoided any such individualized allegation altogether: her apparent concern is not with her own claim but instead with her ability to represent a large class.[7]

B. Edwards's Other Historical Arguments Also Fail

Edwards offers a variety of other analogies to support her pursuit of a monetary recovery for conduct that made her no worse off. None establishes that Edwards's case should be able to proceed in the absence of *de facto* injury to herself.

1. Presumed Damages Do Not Substitute for a Showing of Injury

Edwards argues (at 47-49) that "RESPA closely tracks the longstanding remedy of presumed damages." *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the principal case on which she relies, shows why that is not so. As *Stachura* explains, the purpose of presumed damages is "roughly [to] approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311. That is, the remedy presupposes the existence of *harm*, which Edwards has not alleged. A RESPA plaintiff might suffer a difficult-to-measure harm, such as "low quality or substandard title insurance services." NAILTA Br. 5. In such a case, RESPA's statutory damages would relieve that plaintiff of the burden of quantification. But, here, Edwards's alleged harm is not

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[7] Discussing Edwards's subjective concerns about this case is, of course, a mere figure of speech. Edwards – the actual person – testified (in another proceeding) that she believed that the lawyers who recruited her had found another class representative and that she did not know whether the case was proceeding. *See* Dist. Ct. Docket 253-1, at 9 (citing testimony).

hard to quantify; it is non-existent. And none of the cases Edwards cites suggests that Article III permits injury-in-fact to be presumed rather than proved "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

2. Unjust Enrichment Requires That the Defendant Be Enriched at the Plaintiff's Expense

Edwards argues (at 49-50) that her claim is further supported by "principles of unjust enrichment." But the unjust enrichment long recognized by courts is "unjust enrichment by the defendant *at the expense of the plaintiff*," *Stone v. White*, 301 U.S. 532, 534 (1937) (emphasis added). While that need not entail any loss to the plaintiff in the sense that the transaction put the plaintiff in a worse position than she was beforehand, it does entail putting the plaintiff in a worse position than if the wrong had not been committed – which is also injury (if not "loss"). All the cases thus involve harm to the plaintiff in the conventional sense that the plaintiff is deprived of compensation for a benefit conferred (as in cases of quasi contract) or because the defendant's conduct has invaded the plaintiff's substantive interest (as in the cases Edwards cites involving invasion of property interests by trespassers, infringers, and

self-dealing trustees).[8] Edwards alleges no such invasion.[9]

3. Nominal Damages Was a Remedy Awarded To Protect Concrete Interests

Edwards argues (at 44) that the historical availability of suits for nominal damages supports her position that "a violation of personal legal rights,

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[8] Edwards cites the Restatement (First) of Restitution §§ 138(2), 197 & comment c (1937), which address the same type of breach of fiduciary duty discussed in Part I of Edwards's brief and above at pages 4-8. In that circumstance, restitution is simply a remedy available to redress the invasion of the underlying property interest.

[9] *Amici* Reporter & Advisers suggest that common-law unjust enrichment has broader scope, but their argument is undermined because it depends on statements from the recent Third Restatement (published this year) that represent important changes from the First Restatement (which itself was a self-conscious innovation). For example, they quote Third Restatement § 3 – "'A person is not permitted to profit by his own wrong'" – and claim that § 3 "closely track[s] its predecessors." Reporter & Advisers Br. 5. But First Restatement § 3 reads: "A person is not permitted to profit by his own wrong *at the expense of another*." (Emphasis added.) And, indeed, comment a to First Restatement § 3 explained that this principle refers to "cases [in which] a person who receives property as the result of a tort committed by him against another has a duty of compensating the other *for the loss suffered*, at least to the extent of the benefit received." (Emphasis added.)

Amici further assert that "'"at the expense of another" can also mean "in violation of the other's legally protected rights,"'" Reporter & Advisers Br. 5 (quoting Third Restatement § 1 cmt. a), without noting that this language, too, is new, and without explaining in what circumstances such a violation would be sufficient (which rights?) and without asserting (much less showing) that a plaintiff can make a claim in such circumstances without showing that she was placed in a worse position than she would otherwise have enjoyed by virtue of the violation or the benefit conferred.

with no other ensuing harm, is sufficient to permit a suit." This mistakes the function of nominal damages, which "serve essentially the same function as declaratory judgments" and were "originally . . . a means of obtaining declaratory relief before passage of declaratory judgment statutes." *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1265 (10th Cir. 2004) (McConnell, J., concurring). Thus, the purpose of nominal damages was not to take up judicial resources with suits where there had been no harm to the plaintiff in the past and would be none in the future. It was instead "to obtain an authoritative judicial determination of the parties' legal rights" in a context where that determination resolved a live controversy and had real value to the parties, such as a trespass suit between "neighboring landowners" that settled a "disputed boundary" by the award of a dollar, or a libel suit that allowed a plaintiff to vindicate her reputation by proving that "the supposed libel was a falsehood." *Id.* at 1264.

Webb v. Portland Manufacturing Co., 29 F. Cas. 506 (C.C.D. Me. 1838) (No. 17,322), on which Edwards relies, makes this function of a nominal-damages award clear. There, the dispute concerned water rights: the defendants had drawn off water above the dam at which the plaintiff owned a mill, but not so much as to cause any actual damages. *See id.* at 507. In holding that the plaintiff could sue, Justice Story found it "most material to the present case, that if a commoner might not maintain an action for an injury, however small, to his right, a mere wrong-doer might, by repeated torts, in the course of time establish evidence of a right of common." *Id.* at 509. Thus, the plaintiff's ability to sue was grounded not only in a common-law property

interest, but a threat to that interest that required judicial clarification for its protection.[10] Edwards's attempt to liken her pursuit of a statutory bounty to the use of nominal-damages awards to obtain needed clarification of legal rights in no way strengthens her case.

4. Statutory Damages Do Not Substitute for a Concrete Injury

Edwards also argues (at 46) that "[c]ourts have also long vindicated invasions of legal rights through statutory damages." But, as this Court explained in *Vermont Agency*, the mere availability of a statutory "bounty" will not support standing if the monetary recovery authorized by statute is "unrelated to injury in fact." 529 U.S. at 772. Accordingly, a plaintiff may invoke federal jurisdiction to recover statutory damages only if those damages serve as "compensation for" (*id.*) the alleged violation of that plaintiff's rights. Otherwise, the federal courts lack jurisdiction to award them. *See* Pet'r Br. 24-25; *see also infra* pp. 19-20.

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[10] *Carey v. Piphus*, 435 U.S. 247 (1978), awarded nominal damages for a procedural due process violation after denying compensatory damages that had been sought through the pendency of the litigation. *See id.* at 266. The plaintiffs were students who had been suspended without appropriate procedural protections. Their standing was clear because they had been deprived of a property interest under *Goss v. Lopez*, 419 U.S. 565 (1975). *See Carey*, 435 U.S. at 249 n.1 (citing *Goss*).

II. VIOLATION OF A STATUTORY DUTY OWED TO THE PLAINTIFF DOES NOT AUTOMATICALLY CONFER ARTICLE III STANDING

Edwards's mistaken reliance on history aside, she argues that a plaintiff need not allege any "*de facto* injur[y]," *Lujan*, 504 U.S. at 578, because Congress's power to "define" injuries by establishing statutory rights, *id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment), entails the power to confer standing in the absence of injury-in-fact – which is what *de facto* injury means. To adopt that misreading of the *Lujan* concurrence would ignore this Court's clear and repeated statements that Article III standing requires an injury *in fact*, not a fictitious injury. It also would represent the first time that this Court has permitted a case to proceed – whether against the government or a private party – in the absence of a *de facto* injury. The Court should decline Edwards's invitation.

A. Standing Requires a Concrete, *De Facto* Injury

1. As this Court recognized in *Lujan*, Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S. at 578. RESPA itself does so: before RESPA, the allegation that, as a result of a referral, an individual paid more for a particular settlement service than the price available from some other provider would not, in general, have stated any legally cognizable injury. No court could have granted relief on that basis: it would have been like an allegation that one paid "too much" for a pair of shoes because they were available for less at another shoe store across town. After RESPA,

a price difference *does* create a legally cognizable injury if the larger payment is the result of a now-prohibited referral. With RESPA, Congress thus exercised its power to "define" new injuries and related those injuries to a class of persons entitled to bring suit – that is, those subjected to a prohibited referral.

That principle does not help Edwards, however, because she has not alleged any *actual* settlement-service-related injury. Nor does she claim she has. Each time her brief refers to the alleged violation's purported effect on her personally, it does so with artfully crafted language. Did the payments of which she complains increase the amount she paid? No, but they would have "*tend[ed]* to increase" that amount. Resp. Br. 41, 44, 49 (emphasis added). Did they cause her to receive lower-quality services? No, but, again, "kickbacks *tend* to . . . impair quality," generally speaking. *Id.* at 49 (same). Was the transaction against her interests in any way? No, but there were "*incentives* to disregard *her* best interests." *Id.* at 42 (first emphasis added). None of this satisfies the "Article III requirement that remains" even after Congress authorizes a suit; Edwards has not "allege[d] a distinct and palpable injury to h[er]self." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

The government contends that, "*if* unlawful kickbacks are pervasive in a particular market, the standard rate *may* be inflated to reflect that systemic illegal practice." U.S. Br. 25 (emphases added). But no actual price inflation has been alleged here, and Edwards affirmatively disclaims (at 35-38) any intention to prove it. *See also supra* pp. 7-8. No one disputes that Congress has the authority to prohibit certain conduct that may, in particular cases, cause

no harm (or even bring benefits). But Congress does not have the power to authorize private suits in the absence of harm to the plaintiff.

2. Edwards can identify no case that permitted a plaintiff to substitute an allegation of statutory violation for an allegation of actual injury. Her claim (which the government supports) that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is such a case misreads *Havens*. *See* Resp. Br. 39-40; U.S. Br. 18-19.

The Court in *Havens* found standing based on an "injury to [a] statutorily created right to truthful housing information" in the context of a plaintiff who did not intend to buy or rent a home. 455 U.S. at 374. The type of violation at issue in *Havens* was a denial of truthful information and, moreover, a denial of information that – as the Court recognized[11] – *also* constituted discriminatory treatment on the basis of race, a well-recognized injury-in-fact. *See* Pet'r Br. 30-31. Accordingly, even if the tester plaintiff in *Havens* had no personal use for the information guaranteed by the statute, she still suffered the concrete injury of invidious, race-based discrimination.

The claim that Edwards was deprived of "taint-free" settlement services is not comparable to the deprivation suffered by the tester in *Havens*. That tester was entitled to truthful information, and she received false information on the basis of her race. That was not an injury *merely* because Congress said it was: rather, it was "injury in precisely the form

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[11] *See* 455 U.S. at 374 (stating that "Congress [had] . . . banned *discriminatory* representations" in 42 U.S.C. § 3604(d) (1982)) (emphasis added); *id.* at 375 (explaining that only a "victim of a *discriminatory* misrepresentation" has a cause of action) (same).

the statute was intended to guard against," 455 U.S. at 373 – a *de facto* injury for which the statute provided a remedy. Because the requisite factual injury was plainly apparent from the record before the *Havens* Court, its decision did not and could not hold that such injury was not constitutionally required. Edwards, by contrast, alleges no difference *in fact* between the title insurance policy she received and to which she was entitled. Her complaint is not that First American's conduct had any bad effect on her, but simply that First American violated RESPA; her characterization of the services she received as "tainted" means *only* that. Because Article III requires more than a play on words to establish standing, Edwards has not met this Court's settled test.

3. The government gives examples of other statutes that, it claims, authorize "private suits . . . by classes of persons whom the proscribed conduct has a natural tendency to injure," without "requir[ing] proof that the feared tangible harms have actually materialized in a particular case." U.S. Br. 25-27; *see also* Resp. Br. 39-40 & n.10 (similar). None of the government's examples casts any doubt on the correct result here.

Some are statutes that provide damages for harms, such as copyright infringement, that are (unlike Edwards's claim) traditionally recognized as invasions of concrete property interests. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998) (explaining that copyright protection historically derived from the recognition that a copyrighted work "was as much the author's property as the material on which it was written"). Others provide damages for acts that are easy to classify as

injuries-in-fact, such as willfully refusing to provide "a free credit report as required by statute." U.S. Br. 26 (citing 15 U.S.C. § 1681c-1(a)(2)). A person who wants a free credit report and is refused one has suffered a tangible injury in a way that Edwards has not.

The government does offer examples where a private suit on the basis of a statutory violation without an additional showing of harm would be dubious, such as a suit for "printing a receipt with more than the last five digits of a credit card." *Id.* (citing 15 U.S.C. § 1681c(g)). It is not a defect in our position that it would require a court faced with a private action under § 1681c(g) to ask the plaintiff to show some actual injury. That requirement not only is mandated by Article III, but also would prevent the judicial system from being used as a tool for such abuses as a class action seeking "between $290 million and $2.9 billion" for incorrectly printed receipts with no showing of any harm done. Experian Br. 16 (giving this example and explaining that the "low end of [this damages range] was more than 600% of the . . . net worth" of the toy-seller defendant).

B. The Requirement of a *De Facto* Injury Protects the Judicial Function

The prohibition on suits by plaintiffs who have not suffered a factual injury is a rule of judicial restraint, important to ensuring that "[t]he courts . . . stay within their constitutionally prescribed sphere of action" "derive[d] from Article III and not Article II." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998). Accordingly, plaintiffs who lack standing cannot sue even though their suit could be harmonized with Article II's directive that the execu-

tive branch "take Care that the Laws be faithfully executed." *See id.*

That said, it is telling that Edwards's *amici* rely on assertions that this lawsuit is necessary not to vindicate the concrete interests of Edwards and her putative class, but to protect *all* purchasers of title insurance. Though Edwards's counsel protests that "RESPA is not a private attorney general statute," Resp. Br. 54, her *amici* disagree, arguing that "private enforcement" is "required to ensure compliance with RESPA[]," NAILTA Br. 38; that no-injury actions of this kind are the "means of enforcement chosen by Congress" for RESPA and other consumer-protection statutes, AARP Br. 19; and that the cause of action serves "Congress's goal of penalizing and deterring wrongdoers through strong enforcement," Lawyers' Committee Br. 22. Even the government argues that Edwards should be permitted to sue without showing harm to herself personally because violations of RESPA "cause substantial aggregate harm." U.S. Br. 25.

These arguments are based on the idea that Congress should have the power to calibrate private enforcement by adjusting the size of the bounty to be paid to successful plaintiffs. But neither a "generalized interest in deterrence," *Steel Co.*, 523 U.S. at 108-09, nor the possibility of recovery of a "bounty," *Vermont Agency*, 529 U.S. at 772, suffices to establish Article III standing. An appropriate respect for the "profound[] [e]ffect[s] [on] lives, liberty, and property" caused by "[t]he exercise of judicial power" requires that the courts demand a real "show[ing] [of] 'injury in fact'" before hearing actions based on generalities about deterrence. *Valley Forge Christian*

College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

Edwards insists that this case has nothing to do with the class-action context, but that is not so. Where an individual suffers harm as the result of unlawful private conduct, hardly anything is easier than pleading that injury. We may assume that there are some potential RESPA plaintiffs who could plead in good faith some dissatisfaction with the services of any given title insurer or agent. If Edwards had done so, and if she succeeded in proving her case, the statute authorizes a generous recovery, including attorneys' fees. But Edwards defends – must defend – the proposition that such individualized harm is unnecessary, because she cannot show such harm for each member of the massive class she seeks to certify. This is not a case about keeping the courthouse door open to plaintiffs who seek "compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73. It is, instead, about keeping a route open to a class-action windfall. The Court should not distort Article III for that purpose.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

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MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
GREGORY G. RAPAWY
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)