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

BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STEVE GOTTHEIM
AMERICAN LAND TITLE ASSOCIATION
1828 L Street, N.W.
Washington, D.C. 20036
(202) 261-2943

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

Since 1907, the American Land Title Association ("ALTA") has been the national voice for the abstract and title insurance industry. ALTA's membership consists of more than 3,800 title agents, abstracters, and title insurance companies – businesses that search, review, and insure land titles to protect home buyers, real estate investors, and mortgage lenders who invest in real estate. ALTA also counts as associate members other real estate professionals (like attorneys, developers, builders, lenders, brokers, and surveyors) who work toward similar goals.

Title insurance protects homeowners, investors, and lenders from title defects by indemnifying policyholders "for losses caused by either on-record or off-record defects that are found in the title or interest in an insured property." BARLOW BURKE, LAW OF TITLE INSURANCE § 2.01, at 2-3 (3d ed. 2000). The list of defects indemnified by title insurance is extensive, ranging from undisclosed mortgages and judgments to unpaid street assessments and taxes.

As of 2010, the operating income of the title insurance industry was more than $9.6 billion. The industry has grown in large part because of the con-

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[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

fidence it provides to both homeowners and their lenders. Homebuyers can rest assured that they are indemnified for historical errors in title that they never could have imagined, peace of mind that is particularly important today, when so many purchase previously foreclosed properties. At the same time, lenders can do their job feeling secure about the validity, priority, and enforceability of their liens. That security has fueled investment in mortgages, led to the creation of a secondary mortgage market through which mortgages can be bought and sold, made mortgage loans on all types of real property the Nation's largest single category of institutional investment, and, most importantly, ensured the availability of mortgages to consumers seeking to own homes.

For a residential real estate transaction to close successfully, many moving parts must come together. Once a real estate broker assists a consumer in finding a home, the homebuyer generally requires mortgage financing. After financing is arranged, the buyer then engages a title-insurance professional who reviews public records, corrects any errors in title that are found, and issues insurance policies to protect the interests of the both the homebuyer and the homebuyer's lender. And of course, someone – a title company, escrow company, or lawyer – must close the transaction and help transfer the property. If any one of those providers does not do its job, the transaction will not close.

Although in some instances all of the service providers with whom a homebuyer interacts will be independent businesses, in others those providers may be related. For example, one service provider such as a title insurer may have an ownership interest, whole or partial, in another service provider such

as a closing company or real estate brokerage. Such procompetitive arrangements are known in economics and in antitrust law as "vertical integration" such as when an auto company buys a parts company, when a drug company buys a distributor, or when an oil refiner runs its own service stations. These relationships sometimes constitute "controlled" or "affiliated" business arrangements – a status that conveys safe harbor from certain types of liability – but not every relationship between service providers so qualifies. *See* 12 U.S.C. § 2607(c)(4).

This case threatens the title insurance industry with enormous, unforeseen liability for common and longstanding business arrangements, like shared-ownership entities and exclusive agency agreements. Even though state and federal authorities authorize and regulate these types of procompetitive arrangements, the decision below permits private parties to challenge their legality, even when those parties have suffered no personal harm. A buyer who has suffered no increase in the cost of her title insurance policy and no decrease in the quality of service associated with the policy may, according to the decision below, bring suit – even a massive class action – for the sole purpose of collecting an unwarranted bounty. If permitted to stand, the decision below will pointlessly raise the cost of doing business in the industry, hobbling small businesses and counterproductively raising the price of title insurance services for the everyday consumer the law seeks to protect.

SUMMARY OF ARGUMENT

This Court's cases "have established that the irreducible constitutional minimum of standing contains three elements," the first of which is "an injury in fact – an invasion of a legally protected interest

which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks, citations, and footnote omitted). To be considered concrete and particularized, an injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), and it "must affect the plaintiff in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 560 n.1. These longstanding, so-called "personal stake" requirements, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962), are central to ensuring that "'there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers* v. *Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (quoting *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)).

Respondent's purported "injuries" are neither concrete nor particularized. Her bare interest in collecting a bounty set by Congress, to remedy an ill she did not suffer, does not warrant the exercise of judicial review. She does not claim that she was overcharged for her title policy. Pet. 6. Nor does she claim that her experience with petitioner First American Title was in any way unsatisfactory. *Ibid*. Nor even does she claim that she was denied information that might have caused her to choose a different insurer. *Ibid*. And yet she brings suit nonetheless.

To vindicate what injury? The answer is not particularly clear. According to respondent, petitioners' partial ownership of the title company that conducted the closing on her home, and that title company's agreement to refer certain customers back to petitioners, amounted to a kickback, in violation of the Real Estate Settlement Procedures Act ("RESPA"). *See* 12 U.S.C. § 2607(a). That violation,

respondent contends, in turn denied her a "statutory right" to "conflict-free referral advice." Br. in Opp. 21. That alleged violation was of no actual consequence to respondent – again, she concedes it had no effect on the price or quality of the title services she purchased – yet in the aggregate, she alleges, such violations have "systemic effects . . . on pricing" that "thwart competition." *Id.* at 22.

These "injuries," if they can be called that, do not pass muster under this Court's precedents. A party is not injured by another's mere (alleged) nonobservance of the law. Rather, the injury-in-fact inquiry is concerned with the *tangible consequences* of another's illegal acts, and here there were none. *See Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) (a putative plaintiff must identify a "personal injury suffered . . . *as a consequence* of the alleged" violation).

Respondent cannot make this problem disappear by asserting that she was denied a non-existent right to conflict-free "advice" that was, in any event, entirely immaterial to her. "Standing . . . is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of *perceptible harm*." *Summers*, 129 S. Ct. at 1152 (emphasis added and internal quotation marks omitted).

Nor is it sufficient that respondent alleges certain "systemic" injuries caused by petitioners' conduct. "[A] plaintiff's complaint must establish [not only] that [s]he has a 'personal stake' in the alleged dispute," but also "that the alleged injury suffered is *particularized as to h[er]*." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (emphasis added). That is facially not true of respondent's pricing allegations.

That Congress may have chosen to afford respondent a statutory cause of action under RESPA does not change the analysis. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines*, 521 U.S. at 820 n.3. Although "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,'" *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007) (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)), this Court has repeatedly held that, even in those situations, the putative plaintiff must still allege (and ultimately prove) the deprivation of a concrete and particularized interest that exists independently from the procedural right granted by Congress. *E.g.*, *Summers*, 129 S. Ct. at 1151 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."). Respondent has utterly failed to allege the deprivation of any concrete and particularized interest independent of the procedural right (allegedly) granted by Congress.

Nor did Congress attempt here to define such a stand-alone interest in "conflict-free referral advice," let alone take constitutionally sufficient steps to ensure that private parties who suffered no injury can sue. When Congress seeks to assist a plaintiff in meeting Article III's requirements, it "must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). The text of RESPA and its legislative

history make clear that the "injuries" Congress was concerned about are precisely those *not* alleged here: high premiums and low-quality service. To hold respondent to be a member of the category of persons constitutionally entitled to bring suit would therefore turn both congressional intent and this Court's precedents on their heads.

Because of the devastating effect that suits like this one would have on the title insurance industry and consumers alike, this Court should be especially wary of engaging in the kind of ingenious exercise in the conceivable that would be necessary to rule for respondent. The business arrangements that respondent alleges violate RESPA are decades old, widespread, and exceedingly popular. If they are found illegal even where they do not harm consumers at all, let alone in any tangible way, the primary effect will be to raise costs and lower quality industry-wide, counterproductively causing precisely the effects Congress intended to prevent with RESPA.

ARGUMENT

I. RESPONDENT DOES NOT ALLEGE A CONCRETE AND PARTICULARIZED INJURY-IN-FACT

To state a case or controversy under Article III, a plaintiff must first establish standing. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). In *Lujan* v. *Defenders of Wildlife*, this Court explained that constitutional standing incorporates three core elements – (1) injury-in-fact, (2) causation, and (3) redressability – each of which serves a different, critical purpose. 504 U.S. at 560-561.

Injury-in-fact – a plaintiff's ability to identify a "[c]oncrete injury, whether actual or threatened [–] is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger*, 418 U.S. at 220-221. It is the "foremost" element of the inquiry, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 103 (1998), the one that "adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful," *Schlesinger*, 418 U.S. at 221. In doing so it ensures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472 (1982).

Though injury-in-fact "incorporates concepts concededly not susceptible of precise definition," *Allen*, 468 U.S. at 751, this Court has gone to great lengths to ensure that the requirement is not rendered "meaningless" or "mere talk." *United States* v. *Richardson*, 418 U.S. 166, 194 n.16 (1974) (Powell, J., concurring). *See also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1223 (1993) ("Although it is easier to define injury in some cases than in others, the occasional difficulty of the enterprise is hardly reason to abandon it altogether."). Thus, "the complaining party [is] required to allege a *specific* invasion of th[e] right suffered by him." *Schlesinger*, 418 U.S. at 224 n.14 (emphasis added). That invasion must be "actual," "distinct," "palpable," and "concrete," and not "conjectural" or "hypothetical." *Allen*, 468 U.S. at 750-751, 756, 760 (internal quotation marks omitted). "Although [this Court has] packaged the requirements . . . somewhat

differently in the past 25 years . . . the point has always been the same: whether a plaintiff 'personally would benefit *in a tangible way* from the court's intervention.'" *Steel Co.*, 523 U.S. at 103 n.5 (emphasis added) (quoting *Warth*, 422 U.S. at 508). This "is not an ingenious academic exercise in the conceivable . . . [but] requires . . . a factual showing of *perceptible harm*." *Summers*, 129 S. Ct. at 1152 (emphasis added and internal quotation marks omitted). "Abstract injury is not enough." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

These general "concepts have gained considerable definition from developing case law." *Allen*, 468 U.S. at 751. The Court has articulated a number of guidelines that, together, leave no doubt that respondent has not alleged the requisite injury-in-fact.

Respondent's primary theory of injury, for example, is that she was denied a statutory right to "conflict-free referral advice." Br. in Opp. 21. As we explain below, she would lack standing *even if* such a right actually existed in the statute, but it does not. The right respondent claims is merely a mischaracterization of RESPA's anti-kickback provision, 12 U.S.C. § 2607(a).

Respondent claims that "RESPA gives homebuyer[s] a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement)." Br. in Opp. 21. But it is hard to see whence such a right arises, and respondent has not told us. Section 2607(a) bans service providers from the exchange of "any fee, kickback, or thing of value" in return for a referral. Even if it is fair to recharacterize that prohibition on service providers as granting homebuyers a right to title insurance premiums not inflated by kickbacks, the cited section

makes no mention of homebuyers' right to "advice," let alone "conflict-free" advice. Of course, respondent does not even purport to have purchased "advice" from petitioners; she purchased a title insurance policy that she concedes is perfectly acceptable in both price and quality.

Nor is it clear where in the statute respondent believes homebuyers are given the additional "right" of "timely disclosure" about affiliated business arrangements. No such right exists either. Title 12 U.S.C. § 2607(c)(4) merely creates a safe harbor whereby affiliated businesses that meet certain requirements can insulate themselves from claims under § 2607. One of those requirements is disclosure. *Id.* § 2607(c)(4)(A). But a service provider's decision not to avail itself of the safe harbor – as is the case here – is not *ipso facto* a violation of § 2607.

In any event, even if petitioners violated the law, respondent lacks constitutional standing. As this Court has repeatedly clarified, one party does not suffer an injury-in-fact *merely* because another violates the law (which, in any event, petitioners did not). *See Schlesinger*, 418 U.S. at 223 n.13 (denying standing for a claim of "the abstract injury in nonobservance of the Constitution"); *Allen*, 468 U.S. at 754 (same). A desire to seek "vindication of the rule of law . . . . does not suffice" to establish standing. *Steel Co.*, 523 U.S. at 106.

As this Court explained in *Valley Forge*, a putative plaintiff must identify a "personal injury suffered . . . *as a consequence* of the alleged" violation. 454 U.S. at 485-486. Bald assertions that petitioners' conduct "tainted" her title policy (Br. in Opp. 20) are not enough. *See Valley Forge*, 454 U.S. at 485 ("the psychological consequence presumably pro-

duced by observation of conduct with which one disagrees" is insufficient to confer standing). Respondent needs to point to some personal, "perceptible harm" that arose as a consequence of petitioners' alleged violation. *Summers*, 129 S. Ct. at 1152 (internal quotation marks omitted). She has not done so.

Nor can respondent establish standing through her theory that, in the aggregate, the kind of arrangement entered into by petitioners has "systemic effects . . . on pricing" that "thwart competition." Br. in Opp. 22. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be *himself* among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (emphasis added) (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)). The fact that respondent participated in the larger business of the industry – or that her policy was purchased "incident to" an allegedly prohibited arrangement, 12 U.S.C. § 2607(a) – is not enough because the "key" point is "that a plaintiff's complaint must establish [not only] that [s]he has a 'personal stake' in the alleged dispute," but also "that the alleged injury suffered is *particularized as to h[er].*" *Raines* v. *Byrd*, 521 U.S. at 819 (emphasis added). Whatever ill effect petitioners' business arrangements supposedly (and contrary to economic theory, *see infra* pp. 20-21 & n.6) may have on pricing or service on a "systemic" level, respondent has not alleged that they affected *her*.

Finally, the fact that respondent will benefit if her suit is successful does not suffice to create the type of interest whose deprivation constitutes injury-in-fact: An interest "that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont*

Agency of Natural Res. v. *United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

Even liberally construed, none of respondent's allegations amounts to anything that resembles the type of injury-in-fact previously recognized by this Court. If RESPA prohibits certain aspects of petitioners' business arrangement, then the responsibility for "[v]indicating the public interest . . . is the function of Congress and the Chief Executive." *Defenders of Wildlife*, 504 U.S. at 576 (emphasis deleted). It is not – under the Constitution, it *cannot* be – the responsibility of individual plaintiffs who lack their own concrete and particularized injury.

II. EVEN IF RESPA CONFERS A STATUTORY CAUSE OF ACTION, IT DOES NOT CONFER CONSTITUTIONAL STANDING

The lower court held that, "[b]ecause RESPA gives Plaintiff a statutory cause of action, . . . Plaintiff has standing to pursue her claims against Defendants." Pet. App. 7a. *See also* Br. in Opp. 18 n.10 (asserting that "injury in fact is established here by the invasion of an individual statutory right."). We assume for the sake of argument that RESPA does give respondent a statutory cause of action.[2] The existence of a statutory cause of action, however, does not suffice to answer the independent question whether a particular plaintiff bringing suit under RESPA has standing to do so under the Constitution. *See Raines*, 521 U.S. at 820 n.3 ("It is settled that Congress cannot erase Article III's standing re-

[2] Although it is *amicus's* position that the lower court's holding on this question was incorrect, *amicus* assumes the correctness of that holding here because this Court granted certiorari only on the question of constitutional standing.

quirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.") (citing *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979)). Congress has the power to relax *some* of the constitutional requirements of Article III standing, but that power *does not* extend to the requirement that a plaintiff's injuries be concrete and particularized. Furthermore, because Congress did not seek to articulate a free-standing, abstract interest in so-called "conflict-free referral advice," respondent's claim would fail *even if* Congress could do away with the requirement of a concrete and particularized injury.

A. Congress Cannot Eliminate The Constitutional Requirement That Injury-In-Fact Be Concrete And Particularized

This Court has held that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts* v. *EPA*, 549 U.S. at 516 (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)). That holding is grounded in a recognition that, by statute, Congress not only can dispense with prudential limitations on standing,[3] but also can relax certain aspects of the three core constitutional elements of standing, as well. For example, "a litigant to whom Congress has 'accorded a procedural right to protect his concrete interests' . . . 'can assert that right without meeting all the normal

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[3] *See Gladstone*, 441 U.S. at 100 ("Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise would be barred by prudential standing rules.") (internal quotation marks omitted).

standards for redressability and immediacy.'" *Massachusetts*, 549 U.S. at 517-518 (quoting *Defenders of Wildlife*, 504 U.S. at 572 n.7). Central to this case, however, the requirement that injury-in-fact be concrete and particularized is *not* one such element that can be relaxed or eliminated by Congress. As this Court observed in both *Defenders of Wildlife* and *Massachusetts* v. *EPA*, Congress can relax constitutional standards only where a plaintiff seeks "to protect his *concrete* interests." *Ibid.* (emphasis added).

"[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing." *Summers*, 129 S. Ct. at 1151 "Congress . . . . can loosen the strictures of the redressability prong of our standing inquiry. . . . Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Ibid.*; *see also Gladstone*, 441 U.S. at 100 ("In no event, however, may Congress abrogate the Art. III minima: A plaintiff must *always* have suffered a distinct and palpable injury to himself.") (emphasis added) (internal quotation marks omitted).

In *Massachusetts* v. *EPA*, for example, the Court did not base standing on the mere fact that Congress had conferred a cause of action on Massachusetts or had defined the effects of global warming to be an injury. Rather, it recognized standing based on the potential *factual* injury that global warming could cause flooding of Massachusetts land. 549 U.S. at 522. Even as the Court arguably relaxed requirements that the alleged injury-in-fact be imminent and not conjectural, *see id.* at 541-542 (Roberts, C.J., dissenting), it continued to emphasize the need for the plaintiff State to "allege[] a particularized injury

in its capacity as a landowner," 549 U.S. at 522 (majority opinion).

Indeed, far from permitting suit simply because Congress had conferred on plaintiffs a procedural right to bring suit, "[t]he procedural injury must impair a *separate concrete* interest." *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (internal quotation marks omitted and emphasis added). This Court has taken care to identify those concrete and particularized interests to drive home the point.

Public Citizen v. *United States Department of Justice*, 491 U.S. 440 (1989), is illustrative. There, the Court held that plaintiffs had standing to challenge the denial of information sought under the Federal Advisory Committee Act about advice given by the American Bar Association (ABA) to the Department of Justice concerning potential judicial nominees. The Court recognized standing *not* because the statute created a private right of action, but because of the "distinct injury" resulting from the Department's "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows." *Id.* at 449.

So too in *Federal Election Commission* v. *Akins*, 524 U.S. 11 (1998), the Court recognized standing for plaintiffs seeking relief under the Federal Election Campaign Act of 1971, which requires certain groups to disclose information about campaign involvement and which creates a private cause of action for "'[a]ny person who believes a violation of th[e] Act . . . has occurred,'" *id.* at 19 (quoting 2 U.S.C. § 437(g)(a)(1)). As in *Public Citizen,* the Court did not find standing simply because a statutory right had been violated. Rather, the Court looked for and found the requisite concrete and particularized injury in the *conse-*

quences of the statutory violation. Indeed, the Court expressly stated that a factual injury was a precondition for standing, *see Akins*, 524 U.S. at 20, and that Congress was simply enabling remediation of that particular injury, *see id.* at 24-25 ("the informational injury at issue here . . . is sufficiently concrete and specific"). The Court was *not*, as respondent seems to believe, creating a new type of injury out of thin air. Unlike the plaintiffs in *Akins*, respondent here has not articulated a concrete and particularized injury that exists separately from (or even is the consequence of) the statutory violation. And the mere alleged violation itself is not enough.

The Court has for decades emphasized the difference between the violation of a statutory right (which does not *ipso facto* confer Article III standing) and the violation of a statutory right that results in a concrete and particularized injury-in-fact (which *can* result in standing). *Compare Sierra Club* v. *Morton*, 405 U.S. 727 (1972), *with Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972) (noting that "injury in fact to petitioners, the ingredient found missing in *Sierra Club* . . . is alleged here"). Thus, when the Court in *Warth* observed that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing," 422 U.S. at 500 (internal quotation marks omitted), it was merely observing that a statutory violation can precipitate a concrete and particularized injury-in-fact. The Court was not suggesting, as the Ninth Circuit concluded (Pet. App. 7a), that a statutory violation *substitutes* for such an injury.

Respondent (Br. in Opp. 21) cites *Akins* – as well as *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 374 (1982) – for the proposition that the invasion of a

"statutorily created right to truthful . . . information" suffices to establish "injury in fact." But they stand for no such principle. As the Court explained in *Defenders of Wildlife*, 504 U.S. at 578, the concrete and particularized injury in cases like *Havens* and *Akins* does not exist by virtue of statute but rather by virtue of the underlying "*de facto*" injuries that arise as a *consequence* of the violation of the rights created by Congress. In *Akins*, the *de facto* injury identified by the Court was the inability to make informed voting decisions caused by the denial of access to certain information guaranteed by statute. *See* 524 U.S. at 21. In *Havens*, the Court explained that petitioner's race-based "misinformation . . . concerning the availability of apartments . . . *caused* [respondent's] 'specific injury,'" which was a resulting stigmatization. 455 U.S. at 369 (emphasis added). *See also Allen*, 468 U.S. at 755 (racial discrimination is a "stigmatizing injury" of "serious consequence[]"). Here, even if RESPA creates some right to information about conflicted referrals – which, as explained above, it does not – respondent does not allege that the denial was of any consequence. "Statutory broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." *Defenders of Wildlife*, 504 U.S. at 578 (internal punctuation and quotations marks omitted).

B. RESPA Does Not Create An Interest In "Conflict-Free Referral Advice"

Even if Congress *could* define a sufficiently concrete and particularized injury where (as here) there exists no underlying *de facto* injury, respondent would lack standing. Congress "must at the very least identify the injury it seeks to vindicate and re-

late the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).[4]

Congress did not do so here. Indeed, the statutory text of RESPA and its legislative history contain no evidence that Congress intended to create a standalone right to "conflict-free referral advice," Br. in Opp. 21, let alone that it intended private parties who suffered no injury to the cost or quality of their title insurance to be able to bring suit against allegedly impermissible business arrangements. Rather, for nearly forty years, Congress has been exceedingly clear in text (and committees and Members have been exceedingly clear in legislative history) that Congress's and its Members' concerns were precisely and exclusively those injuries that respondent concedes she has *not* suffered: high costs and low quality. It would therefore turn Congress's intent on its head to construe RESPA as somehow conferring constitutional standing on a plaintiff who has not suffered those injuries.

RESPA, codified in full at 12 U.S.C.§§ 2601-2617, was enacted in 1974 with the explicit objective of reducing the excessive cost of real estate settlements.

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[4] *See also Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring) (respondents had no standing because "[n]othing in the statute at issue here . . . indicates Congress intended to identify or confer some interest separate and apart from a procedural right"); Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. at 1227 ("[H]olding that Congress may override the injury limitation of Article III would have been both remarkable and particularly unfortunate in *Defenders*, because there is no indication that Congress embarked on such an ambitious undertaking when it enacted the Endangered Species Act.").

See 12 U.S.C. § 2601 ("Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers . . . are protected from unnecessarily high settlement charges."). The purpose of RESPA is to "ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated." S. REP. NO. 93-866, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548.

Before RESPA's enactment, Congress briefly considered direct price regulation. The Emergency Home Finance Act of 1970 empowered the Department of Housing and Urban Development ("HUD") to prescribe standards concerning the amount of settlement costs allowable in connection with federally insured housing transactions and report to Congress concerning legislative and administrative measures that should be taken to standardize and reduce mortgage settlement costs. Pub. L. No. 91-351, 84 Stat. 450, 464 (1970). In 1972, HUD proposed maximum allowable charges for six settlement items in six metropolitan areas, with an intention of later rolling out equivalent rates nationally. *See Mutual Mortgage Insurance and Insured Home Improvement Loans*, 37 Fed. Reg. 13185 (July 4, 1972). But Congress ultimately did not directly regulate the cost of settlement services. Congress instead chose to address the problem indirectly, by "regulat[ing] the underlying business relationships and procedures of which the costs are a function." H.R. REP. NO. 93-1117 ["1974 House Report"], at 4 (1974).[5]

It did so in three ways. The first and "most important feature of the legislation from the standpoint

[5] In all pertinent respects, the Senate reached similar conclusions for similar reasons. *See* S. REP. NO. 93-866, at 3-6.

of making significant reductions in . . . settlement charges" was its provisions mandating a "simplification of the land recordation process." 1974 House Report at 4; *see also* 12 U.S.C. § 2601(b)(4). Second, Congress required "that home buyers be [presented] with greater information on the nature of the settlement process," with a hope that "many unnecessary or unreasonably high settlement charges will be reduced or eliminated" as a result of those disclosures. 1974 House Report at 4. Third and finally, Congress prohibited "kickbacks, unearned fees, and unreasonable escrow account requirements" to ensure that costs were not "unreasonably or unnecessarily inflated." *Ibid.* Importantly, Congress did not express an interest in any of these issues in the abstract; they mattered only to the extent that they "tend[ed] to increase the cost of settlement services without providing any benefits to the home buyer." *Id.* at 7.

When RESPA was enacted, affiliated or "[c]ontrolled business arrangements" – which can include the shared-ownership and exclusive-agency agreements at issue here – "were not anticipated, and thus, were not mentioned." *Hearings on Real Estate Settlement Procedures Act – Controlled Business Before the H. Subcomm. on Housing and Community Development*, 97th Cong., 1st Sess., at 4 (1981) [hereinafter "House CBA Hearings"] (statement of Dr. E.S. Savas, Ass't Sec. Pol'y Dev. & Res., U.S. Dept. Housing & Urban Dev.). Thus, as such arrangements became more prevalent in the late 1970s, it was simply not clear – even to HUD, the agency tasked with enforcing the Act – whether, or in what circumstances, they were prohibited.[6] Rather than

[6] During the same period, partly as a result of this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36

rush to judgment, in July 1980 HUD issued an interpretive rule stating that "controlled business relationships *may* be a violation" of RESPA's anti-kickback provisions, 45 Fed. Reg. 49360-02 (July 24, 1980), but left the issue open pending a study of whether or when the arrangements undermined RESPA's core purpose of bringing down settlement prices.[7]

The results of the HUD study were presented to Congress in September 1981. Far from finding that controlled-business arrangements were a type of abusive practice that tended to raise prices for consumers, HUD found "that a controlled business arrangement may be the cheapest and most efficient provider of [title services]." House CBA Hearings at 4. Indeed, "referral to a controlled business saves the consumer time and money in searching [and] . . . . may lower the total package price to the consumer." *Ibid.*

HUD's conclusion that controlled business arrangements did not necessarily raise costs, and may often lower them, was shared by the other federal

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(1977), antitrust scholars and courts were rethinking their traditional hostility to vertical relationships and arrangements. *See, e.g.*, Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); ROBERT H. BORK, THE ANTITRUST PARADOX 225-245 (1978).

[7] Notably, HUD was not even concerned with the particular arrangement at issue here, an insurance underwriter with an interest in its agent. HUD's focus was arrangements across *different* types of services, "typically a real estate broker, mortgage lender, attorney, etc. [who] has an ownership interest in a settlement service." 45 Fed. Reg. 49360-02.

agencies that appeared before Congress in 1981. The General Counsel of the Federal Home Loan Bank, for example, "found no support in the legislative history" of RESPA to indicate that controlled-business arrangements fell with the Act's anti-kickback provisions and argued that prohibiting those arrangements actually "conflict[ed] with RESPA's purpose of protecting consumers from unnecessarily high settlement charges," because of the positive effect they often have on prices. House CBA Hearings at 47 (statement of Thomas P. Vartanian); *see also id.* at 48 ("Prohibiting controlled business will not by itself assure fair prices nor high quality in title work, or other settlement services."). Analysts from the Federal Trade Commission expressed similar views. *See id.* at 64 (statement of Thomas H. Stanton and John P. Brown) ("[C]ompetition from controlled businesses is likely to decrease settlement costs, and therefore should be encouraged.").

In 1982, HUD withdrew its earlier interpretive ruling (the one that had said controlled-business relationships "may" violate RESPA). 47 Fed. Reg. 21304-01 (May 18, 1982). In doing so, HUD noted – in a comment that belies respondent's claims that RESPA reflects a concern for "conflict-free" advice or with the relationship between title-service providers – that its previous ruling had incorrectly been "perceived as indicating[] that the *mere* fact of a controlled business relationship between two firms, and the referral of settlement services business by one to the other, constituted a [RESPA] violation." *Ibid.* (emphasis added). That perception was wrong, as Congress's concern was with prices and it "did not consciously address the desirability of controlled business relationships in settlement services industries when enacting [RESPA] or subsequently." *Ibid.*

It was against this backdrop that Congress, in 1983, amended RESPA to *legalize* controlled-business arrangements explicitly. Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181 § 461(b), 97 Stat. 1153 (1983). While clarifying that "controlled business arrangements . . . are a permissible method of doing business," H.R. REP. NO. 98-123, at 75 (1983) ["1983 House Report"], however, Congress nevertheless acknowledged that such arrangements could, *in some instances*, still result in the type of injuries RESPA was always meant to prevent. Specifically, Congress expressed a concern that consumers might "pay unreasonably high premiums" – a concern that had long been the focus of RESPA – or might receive "poor service" or "faulty title examinations," as well. H.R. REP. NO. 97-532, at 51 (1982) ["1982 House Report"].

To balance its decision to legalize controlled-business arrangements with its ongoing interest in the price and quality of title services, Congress decided to leave the anti-kickback provisions in place, but to create a safe harbor for controlled-business arrangements that meet certain basic requirements, of which one is disclosure.[8] The safe harbor is entirely

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[8] *See* 12 U.S.C. § 2607(c)(4). In November 1992, HUD issued its first regulation implementing these requirements. *See Regulation X*, 57 Fed. Reg. 49600 (Nov. 2, 1992), *codified at* 24 C.F.R. § 3500.15. That rule provided that a controlled-business arrangement was not a violation of RESPA and allowed referrals of business to an affiliated settlement service provider so long as: (1) The consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the ar-

optional, however; contrary to respondent's claims, the plain text of the statute demonstrates that Congress did *not* make the disclosure of a controlled-business arrangement a freestanding, statutory right.[9]

Nor did Congress or any component of Congress suggest that the safe-harbor requirements reflect some stand-alone concern about the advice given to consumers. The requirements were simply considered an additional method to "protect consumers from [certain] abuses" – specifically, unreasonably high premiums, poor service, and faulty title examinations – "that can arise from such referrals." 1982 House Report at 52. Indeed, precisely those referral mechanisms that respondent seems to allege are inherently "conflicted" – exclusive agency agreements, for example – are explicitly *permitted* under the 1983

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rangement, other than payments for services rendered, is a return on ownership interest.

[9] HUD has made this point explicitly: "[I]t is HUD's view that there is little legal or factual justification for viewing a controlled business arrangement which fails to meet all elements of the new exemption as a *per se* [§ 2607] violation (*i.e.*, legal only if the elements of the new exemption are satisfied). . . . *If Congress wanted this result it could easily have modified Section [2607(a)] or otherwise stated directly that some or all controlled business arrangements were always illegal without regard to Section [2607(a)]. The RESPA amendments passed in 1983 do not compel this reading.*" 53 Fed. Reg. 17424, 17425 (May 16, 1988) (emphasis added). HUD later abandoned even the proposed presumption of a RESPA violation. *See* 57 Fed. Reg. at 49601 (rather than declare that the mere existence of a controlled business arrangement raises a presumption of a § 2607(a) violation, HUD's final rule stated simply that such arrangement do not violate § 2607(a) if the exemption is met).

amendments so long as (like any other agreement) they don't unnecessarily raise settlement prices. *See id.* at 54-55.

An early draft of the 1983 amendments would have imposed a percentage limitation on the amount of controlled business that could be transacted by a controlled title company, out of concern that preferred or exclusive referrals "will enable these companies to be insulated to a great degree from having to compete on the merits of their prices and services." 1982 House Report at 55. Although Congress ultimately found such a restriction unnecessary, 1983 House Report at 78, it is nevertheless additional evidence that Congress was concerned with price and quality, and not with such arrangements in the abstract.

III. PERMITTING SUITS BY PLAINTIFFS WHO HAVE NOT SUFFERED AN INJURY-IN-FACT WOULD BE DEVASTATING TO THE TITLE INSURANCE INDUSTRY

The principle advanced by respondent – that there is no constitutional barrier to an uninjured plaintiff availing herself of a statutory remedy – threatens common business arrangements in the title industry that have been accepted for decades.

In 2010, for example, nearly a quarter of all title premiums – totaling nearly $2.3 billion – were written through affiliated entities. *See* Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* at 7 (2010). Indeed, the nation's 500 largest residential real estate brokerage firms conducted 358,172 title closings through companies that were affiliated with each other in ways much like petitioners here. *See Mortgage Origination: The Impact of Recent Changes*

on Homeowners and Business: Hearings Before the H. Subcomm. on Ins., Housing & Community Opportunity, at 2 (July 13, 2011) (statement of Tim Wilson, Long and Foster Co.) [hereinafter *Mortgage Origination Hearings*].[10] If respondent prevails, every one of these closings could become the basis for a lawsuit, potential damages in which would be three times the total cost of the services provided, plus attorneys' fees. 12 U.S.C. § 2607(d)(2).

The liability does not end there. Most real-estate businesses with shared ownership involve not only title companies and their agents, but mortgage lenders, realtors, builders and attorneys, as well. *See Mortgage Origination Hearings* at 2 (affiliated entities closed 150,962 mortgage loans in 2010). Under respondent's theory, *each* step in the mortgage process that involves a new affiliated entity – each "settlement service involved in the violation" under 12 U.S.C. § 2607(d)(2) – is a separate basis for liability. Each of those affiliated entities would be liable for three times what they charged, plus attorneys' fees. The total potential liability would be widespread and staggering.

"This uncertainty and excessive litigation can have ripple effects." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994). The most obvious is that the increased litigation risk incurred by affiliated entities will raise the cost of business in the industry, resulting in higher premiums for every homebuyer that needs ti-

[10] In this case, respondent complains of a title insurance company owning part of the title agency that issued her policies, as well as the applicable agency agreement between them. In the title insurance industry, this type of insurer-owned agent is exceedingly common.

tle services (which is to say, nearly every homebuyer). Prices will rise not because service providers have necessarily violated any law, but because the "extensive discovery and the potential for uncertainty and disruption in . . . lawsuit[s like this one could] allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). Indeed, the primary effect of permitting the type of no-harm lawsuit at issue here will be to raise title insurance premiums – *precisely* the outcome RESPA tries to work against. Respondent's position would also deny consumers the choice of working with integrated-service providers, counterproductively working against RESPA's goal of promoting high-quality title service, as well.

Not only does respondent's position threaten existing business arrangements with enormous liability, but it also has a profound effect on small businesses that may wish to enter into such arrangements in the future. Nearly a third of title-service providers have only one or two employees, and nearly sixty percent have five or fewer. *See* Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey*, at 9 (May 2011). A majority have gross annual revenues of less than $500,000. *See id.* at 7. Because these companies typically operate with small cash reserves, they are particularly vulnerable to changing market conditions. When they need access to additional funding, a common source is other title-service providers, particularly when – as is the case today – commercial banks are hesitant to extend credit. Thus, to raise the money necessary to pay employees in bad times or expand operations in good ones, a small title agent or closing company might invite a title insurer to take a position in the busi-

ness in exchange for the necessary infusion of cash. If permitted, no-harm lawsuits will deter such collaborative arrangements and, in the process, severely limit small title-service providers' access to capital.

The effects of that limitation will be disproportionately felt by the many small title-service providers that are family-owned and operated. When the inevitable life-cycle event – a death or divorce, for example – strikes these businesses, the remaining family members often find themselves forced to liquidate a portion of their company. If larger-service providers, the most likely buyers of these partial interests, are foreclosed from doing so, it is necessarily the case that the value of these small businesses will be diminished.

None of this is necessary to ensure that RESPA is properly enforced or that consumers are adequately protected from the "systemic" issues about which respondent complains. Br. in Opp. 22. To the contrary, the title insurance industry is already highly regulated by federal and state authorities. RESPA, for example, expressly authorizes HUD to make rules that implement the statute, *see* 12 U.S.C. § 2617, a power the agency has frequently exercised, *see, e.g.*, 24 C.F.R. § 3500.14 (2006) (HUD regulation governing kickbacks and unearned fees).[11] HUD also has the discretion to bring actions to enjoin violations, *see* 12 U.S.C. § 2607(d), which some courts

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[11] Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061-1062, 124 Stat. 1376, 2039-40 (2010), responsibility for implementing and enforcing RESPA moved from HUD to the newly formed Consumer Financial Protection Bureau on July 21, 2011. *See also* 75 Fed. Reg. 57252 (Sept. 20, 2010) (designating transfer date).

have held it can do "even if such [violations] cause no actual injury to consumers." *Moore* v. *Radian Group, Inc.*, 233 F. Supp. 2d 819, 824 (E.D. Tex. 2002), *aff'd*, 69 F. App'x 659 (5th Cir. 2003).

In addition, virtually every State regulates title insurance, as well. Some do it through supervisory agencies with broad administrative powers, including the power to set the rates that title insurance companies can charge. *See, e.g.*, TEX. INS. CODE § 2551.003. Others require that title insurance companies submit rates for official approval. In this case, for example, petitioners charged respondent the rate mandated by an approved schedule of rates in Ohio. *See* OHIO REV. CODE § 3935.07. Many States also have laws directed specifically at the type of business arrangements respondent challenges here. *See, e.g.*, COLO. REV. STAT. § 12-61-113.2; KAN. STAT. ANN. § 40-2404. Moreover, state attorneys general have the power to enforce all of their own laws, and the authority to bring actions to enforce both RESPA and HUD's regulations as well. 12 US.C. § 2607(d).

This is not an area of law lacking either in regulation or in parties able to prosecute actions for the public good. This is not one of those actions, however. To the contrary, permitting the type of no-harm lawsuit brought here will open the floodgates for a few enterprising plaintiffs and their attorneys to arrogate for themselves a bounty whose cost will be entirely externalized on the public at large. *See Durr* v. *Intercounty Title Co. of Illinois*, 826 F. Supp. 259, 264 (N.D. Ill. 1993) (observing that there is "no *public* benefit in converting RESPA into some type of Attorneys' Relief Act where the public weal is really not being served at all – or if it is, is being served minimally at best"), *aff'd*, 14 F.3d 1183 (7th Cir.

1994). That is neither what Congress intended nor what the Constitution permits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROY T. ENGLERT, JR.
Counsel of Record
ARIEL N. LAVINBUK
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

STEVE GOTTHEIM
AMERICAN LAND TITLE ASSOCIATION
1828 L Street, N.W.
Washington, D.C. 20036
(202) 261-2943

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