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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 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)

August 22, 2011

QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

On June 20, 2011, the Court granted the petition for a writ of certiorari, limited to the following question:

In the absence of any claim that the alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company state the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

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INTRODUCTION

Article III requires a private plaintiff to demonstrate standing to sue, including an actual or threatened injury that was caused by the defendant's allegedly illegal conduct and that would be redressed by a decision in the plaintiff's favor. The obligation to demonstrate standing applies in litigation against private parties, not just against the government, and Congress cannot relieve a plaintiff of the obligation to establish standing by affording that plaintiff a right to sue, even if Congress provides a monetary recovery for victory in the suit. The Ninth Circuit's decision – which equated the existence of a statutory right of action with the injury required to establish standing – cannot be reconciled with these principles, which are firmly established in this Court's jurisprudence.

Edwards's complaint should therefore have been dismissed. She did not allege – as was her burden – any actual injury. Edwards claimed only a violation of § 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. § 2607(a), which prohibits referral fees or kickbacks. One complaining of an illegal kickback could plead injury if she received service at a higher price or of lower quality than was available elsewhere, but Edwards does not allege that those things happened to her. Nor did Edwards properly allege any "informational injury," both because the violation alleged was not a failure to disclose (as Edwards conceded below) and because she did not properly allege that she wanted information for any purpose or even for its own sake. Edwards insists, instead, that she suffered an invasion of her interest in obtaining a "referral" free of the "taint" of an unlawful kickback. But "taint" is

just another word for illegality: in the absence of an impact on the plaintiff, an alleged violation, standing alone, does not establish injury. Congress's power to make actionable *de facto* injuries that were not previously legally cognizable does not entail the power to deem a legal violation a "*per se*" injury – even in the absence of adverse effects on the plaintiff – and thereby relieve a plaintiff of her constitutional obligation to establish injury in fact.

The Constitution's standing requirement has a special practical importance in a putative class action like this one. The consequence of allowing individuals with no injury to be plaintiffs, and to sue for damages set by statute and not tied to any actual loss, is to allow the aggregation of large numbers of claims, giving rise to vast potential liability and undermining the just adjudication of claims. Standing doctrine is crucial in defining the proper sphere of judicial power and in preserving the separation of powers, concerns that are fully implicated in this case. For all these reasons, the Court should reverse the judgment and direct the dismissal of the complaint.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion to dismiss for lack of standing (App.[1] 1a-7a) is reported at 610 F.3d 514. The memorandum of the court of appeals addressing the district court's denial of respondent's motions for class certification (App. 8a-11a) is not reported (but is available at 2010 WL 2617588). The

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[1] "App. _a" refers to the appendix filed with the certiorari petition, and "JA_" refers to the Joint Appendix filed with this brief.

order of the district court denying petitioners' motion to dismiss (App. 12a-22a) is reported at 517 F. Supp. 2d 1199. The orders of the district court denying respondent's motions for class certification (App. 23a-30a, 31a-40a) are reported at 251 F.R.D. 449 and 251 F.R.D. 454.

JURISDICTION

The court of appeals entered judgment on June 21, 2010, and denied a petition for rehearing and rehearing en banc on August 30, 2010 (App. 41a). The certiorari petition was filed on November 23, 2010, and was granted, limited to the second question presented, on June 20, 2011 (JA165). This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724, codified as amended at 12 U.S.C. §§ 2601-2617, are reproduced in the Addendum, *infra*, at 1a-25a.

STATEMENT

A. Statutory and Regulatory Background

1. Congress passed RESPA in 1974, subjecting the settlement process for residential real estate transactions to federal regulation. RESPA's stated goals include, among other things, "more effective advance disclosure to home buyers and sellers of settlement costs" and "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(1)-(2). "Settlement services," for purposes of RESPA, encompass "any service provided in connection with a real estate settlement," including "title insurance." *Id.* § 2602(3).

RESPA creates numerous mandatory disclosure procedures for settlement services. These include standardized settlement forms, *see id.* § 2603; a requirement that lenders provide borrowers an advance estimate of costs, *see id.* § 2604(c); information booklets printed by the Secretary of Housing and Urban Development ("HUD"), which real estate lenders must distribute to borrowers, *see id.* § 2604(d); and disclosures by lenders about the ways in which loans can be and are assigned, sold, and transferred, *see id.* § 2605. A violation of RESPA § 6, 12 U.S.C. § 2605, is not a crime, but gives rise to a private action for actual damages, or statutory damages of up to $1,000 if there is a "pattern or practice of noncompliance"; in a class action, statutory damages are subject to an additional cap of $500,000 or one percent of the defendant's net value. *Id.* § 2605(f).

Section 8 of RESPA prohibits any "person" from giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). There are several safe-harbor exceptions to this bar. Among them are "the payment of a fee . . . by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance," *id.* § 2607(c)(1)(B); and "affiliated business arrangements" so long as (A) the arrangements are disclosed to the person who is referred, (B) that "person is not required to use any particular provider of settlement services," and (C) nothing of value is "received from the arrangement" except for "a return on [an] ownership interest or franchise relationship" and certain

other permitted payments, *id.* § 2607(c)(4); *see id.* § 2602(7) (defining "affiliated business arrangement").

A violation of § 8 is a crime punishable by imprisonment of up to one year or a fine of up to $10,000. *Id.* § 2607(d)(1). HUD, any state attorney general, and any state insurance commissioner may also bring actions to enjoin violations. *Id.* § 2607(d)(4). In addition, a private party who is "charged for the settlement service involved in [a] violation" may bring an action to recover "three times the amount of any charge paid for such settlement service," plus "reasonable attorneys fees." *Id.* § 2607(d)(2), (5). Unlike § 6(f), § 8(d)(2) imposes no cap on the damages that may be awarded in a class action.

2. Title insurance is also regulated under various state laws.[2] In this case, the relevant state is Ohio. Insurance rates in Ohio, including title insurance premium rates, must be "file[d] with the [state] superintendent of insurance." Ohio Rev. Code § 3935.04(A). Once a rate is filed, an Ohio insurer may not "make or issue a contract or policy except in accordance with the filings which are in effect for the insurer." *Id.* § 3935.04(H). An insurer may ask the superintendent for permission to use a different rate, but must make an application in writing before charging that rate. *See id.* § 3935.07.

An Ohio insurer may either file its own rate or become a member of a state-licensed rating bureau that files rates for all of its members. *See id.* §§ 3935.04(B), 3935.06. At the time relevant to this case, all licensed title insurers in Ohio were members of the Ohio Title Insurance Rating Bureau ("OTIRB").

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[2] *See generally* Joyce D. Palomar, *Title Insurance Law* ch. 18 (1999 & Supp. 2010); *see also* 15 U.S.C. §§ 1011-1015 (McCarran-Ferguson Act).

JA38. Accordingly, the rates for title insurance filed for every title insurer in Ohio were identical. *See* App. 14a (noting that Edwards "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price").

B. Nature and History of the Action

1. First American[3] is among the largest title insurance underwriters in the country. Its policies are often issued through title insurance agents who act on behalf of First American. Some agents may issue those policies exclusively or preferentially.[4] First American owns an interest in some, but not all, of the title insurance agents with which it does business. JA99-100. The fact that First American and other title insurance underwriters own interests in some of their respective title insurance agents is disclosed in public filings available to state insurance regulators, state attorneys general, and HUD. JA99.

In November 1998, First American acquired a 17.5% ownership share in Tower City Title Agency LLC ("Tower City"), a title agent in Ohio. JA62, 70. At the time of the acquisition, Tower City agreed to issue policies for First American as its agent. Tower City's agency was nominally "exclusive[]," but was

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[3] In this brief, "First American" refers to petitioner First American Title Insurance Company, except where it refers to actions taken in the litigation, in which case it refers generically to petitioners First American Financial Corp. (as successor in interest to The First American Corp.) and First American Title Insurance Company.

[4] A "preferential" arrangement, as we use the term, is one in which an agent agrees to issue policies for First American not exclusively, but under certain specified circumstances – for example, to do so unless the customer requests another underwriter.

subject to "exception[s]." JA72. In particular, Tower City could issue policies for Stewart Title Guaranty Co. as necessary to maintain its relationship with that competitor of First American. *Id.* And, more broadly, Tower City was permitted to fulfill any customer "require[ments]" for policies issued by other underwriters. *Id.*

2. On or about September 29, 2006, respondent Denise P. Edwards purchased a home in Cleveland, Ohio. *See* App. 50a, 53a (Compl. ¶¶ 6, 22). Edwards obtained title insurance for her home purchase through Tower City, which issued policies on behalf of First American. *See* App. 53a-54a (Compl. ¶¶ 24-25). Edwards paid $455.43 towards the purchase of the policies (one for her lender and one for herself); the seller of her home paid $273.42. *See* App. 54a (Compl. ¶ 24) (alleging that this amount was paid as "premiums for title insurance"); JA89 (HUD-1 form, line 1108). Edwards has never contested that the amount she paid was compliant with the applicable rate of the OTIRB then on file with the Ohio superintendent of insurance. At the time of her closing, Edwards received and initialed a privacy policy notice that disclosed an affiliation between Tower City and First American. JA106-08.[5]

3. On June 12, 2007, Edwards filed a putative class-action complaint in the Central District of California, claiming, as its only count, a violation of RESPA § 8(a). Her original complaint remains the operative complaint in the case. Edwards alleged that First American had paid a "kickback" to Tower

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[5] The policy stated that "Tower City Title Agency, LLC . . . consists of Tower City Title Agency, Inc. and First American Title Insurance Company, a subsidiary of its parent Corporation, First American Corporation." JA106.

City to obtain an exclusive agency relationship. The alleged kickback consisted of: (1) an excessive price for First American's share of Tower City, paid in 1998; and (2) an additional cash payment from First American to Tower City in 2004. *See* App. 51a-52a (Compl. ¶¶ 15-16). Edwards further alleged, on information and belief, that First American had other, similar arrangements around the country. *See* App. 53a (Compl. ¶ 21).

Edwards alleged that First American's "referral agreements have . . . injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated – to quote Congress's words from 1974 – 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)). Similarly, she alleged that the challenged practices had "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market." App. 52a (Compl. ¶ 17). She did not, however, claim that the exclusive agency agreements in fact caused her, or anyone else, (1) to pay more for title insurance; (2) to receive lower-quality services; or (3) to incur any other kind of economic, physical, or psychological harm.

4. First American moved to dismiss the complaint for lack of subject matter jurisdiction, contending that Edwards had failed to plead any injury as required by Article III, and also that Edwards had failed to state a cause of action and lacked statutory standing. The district court denied the motion. Although it recognized – and Edwards did not dispute – "that the cost of title insurance in Ohio is regulated so that all insurance providers charge the

same price," App. 14a, it nevertheless found standing. It held that, in enacting RESPA, "Congress created a right to be free from referral-tainted settlement services" and that First American's alleged violation of this right amounted to a "statutory injury" sufficient to support standing. App. 19a.

After the district court's order, the parties engaged in discovery relevant to class certification. Edwards was deposed about her RESPA claim and testified that the only reason she would have cared about which title insurer she used was if another would have "cost [her] a little less." JA157.[6] She also testified, however, that she did not know whether the alleged kickback scheme would have "cost [her] one penny more for title insurance than [she] would have paid" otherwise. JA146. She also denied having any "complaints" about "the work that Tower City did and the policy that it provided to [her] . . . in October of 2006." JA159.[7]

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[6] *See also* JA157 ("Q: . . . [I]f [you] had [been] told . . . it's going to cost you the same whether you go to First American or Stewart or Commonwealth or Fidelity because they all have the same rates for title insurance, then would it have mattered to you which company you got a policy from? A: No.").

[7] At the certiorari stage, the Solicitor General contended that Edwards's admissions were not properly before the Court because the Court should limit its consideration of the facts to those alleged in the complaint. *See* U.S. Inv. Br. 19-20. This Court can and should decide the case on the basis that Edwards has not even *alleged* that she paid more for or was otherwise dissatisfied with her title insurance policy. Nevertheless, to avoid any implication that Edwards is the victim of a technical pleading mistake, it is fair to add that Edwards could not – according to her own testimony – truthfully allege any such harm.

In two orders on December 10, 2007, and June 6, 2008, the district court denied certification of a nationwide class of all persons who bought title insurance from First American and a narrower class of all persons who bought title insurance from First American through Tower City. *See* App. 23a-40a. The court also denied Edwards's motion for reconsideration of the denial of certification of the nationwide class.

5. The Ninth Circuit accepted review under Federal Rule of Civil Procedure 23(f) (not 28 U.S.C. § 1292(b) as stated in the court's opinion). *See* App. 2a; JA14, 24. In a published opinion, it addressed both the statutory question whether RESPA authorized Edwards's suit, given that she had allegedly been referred to a title insurer in violation of § 8(a), but had not paid any more as a result of that alleged violation; and the constitutional question whether she had appropriately pleaded the injury in fact required by Article III.

The court of appeals held that RESPA did authorize Edwards to sue, relying primarily on the language in § 8(d)(2) that permits recovery of "three times the amount of any charge paid" for a settlement service that was "involved in [a] violation." App. 5a (quoting 12 U.S.C. § 2607(d)(2)) (emphasis and internal quotation marks omitted). The court reasoned that Congress's "use of the term 'any' demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.*; *see also* App. 5a-7a (discussing RESPA's statutory history).

The court of appeals further held that the fact that RESPA created a cause of action for First American's

alleged conduct sufficed, without more, to create a statutory injury that gave Edwards constitutional standing to sue. *See* App. 5a ("Because the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III."), 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."). To support this reasoning, it relied mainly on *Warth v. Seldin*, 422 U.S. 490 (1975). It believed that, under *Warth*, the appropriate question to ask was "whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500, *quoted in* App. 4a.

In an unpublished memorandum, the Ninth Circuit reversed most of the district court's orders denying respondent's motion for class certification and effort to undertake nationwide discovery. *See* App. 8a-11a. It held that the district court should have certified a class of persons in Ohio who purchased First American title insurance from Tower City. It also concluded that the court should have permitted respondent to conduct nationwide discovery to support her effort to obtain certification of a nationwide class of purchasers of title insurance from First American under arrangements resembling those alleged in the complaint.

First American sought rehearing and rehearing en banc, which the Ninth Circuit denied on August 30, 2010. *See* App. 41a.

6. First American petitioned for a writ of certiorari, which this Court granted, limited to the constitutional question whether "a private purchaser of

real estate settlement services" who, like Edwards, does not "claim that [an] alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided" has "standing to sue under Article III." *See supra* p. i.[8]

SUMMARY OF ARGUMENT

I. The Ninth Circuit's conclusion that, "[b]ecause RESPA gives Plaintiff a statutory cause of action, . . . Plaintiff has standing," App. 7a, conflicts with the principle, repeatedly reaffirmed by this Court, that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Article III standing requires injury in fact, causation, and redressability, as set forth in cases such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998); and *Summers v. Earth Island Institute*. That requirement applies in suits against private parties, *see*, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Steel Co.*; it applies in cases when Congress has authorized the plaintiff to sue, *see*, *e.g.*, *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Friends of the Earth*; *Steel Co.*; *Lujan*, and it is not restricted to "citizen suits" but applies as well to statutory claims that, in many applications, resemble traditional tort causes of action, *see*, *e.g.*, *Sprint Communications Co. v. APCC Servs., Inc.*, 554 U.S. 269 (2008); *Gollust v. Mendell*, 501 U.S. 115 (1991); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Because Article III

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[8] After this Court granted certiorari, the district court stayed further proceedings.

is a *constitutional* limit on jurisdiction, its requirements are not met merely because a statute provides a plaintiff a cause of action.

The Ninth Circuit's contrary holding was based on its misreading of *Warth v. Seldin*, 422 U.S. 490 (1975). *Warth* did not hold that, in cases involving statutory rights, standing can be determined solely by asking whether Congress meant to authorize a suit. If it had, *Warth* could not be reconciled with this Court's later holdings in *Lujan* and *Steel Co.*, which make clear that the Constitution does not allow Congress to authorize suit without injury in fact. Indeed, *Warth* itself clarified that, even after Congress has authorized suit, "Art[icle] III's requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself." 422 U.S. at 501. This Court has never held – in *Warth* or elsewhere – that a congressional authorization to sue relieves federal courts of their obligation to ensure that every plaintiff properly alleges injury in fact.

The fact that RESPA authorizes recovery of settlement fees (trebled) does not create an injury in fact. This Court has rejected the notion that a plaintiff's interest in receiving a recovery authorized for successful litigants suffices to create standing; rather, a concrete interest apart from that created by the suit itself must be at stake. *See Vermont Agency*, 529 U.S. at 772. The basis for standing in *qui tam* suits is the assignment by the United States to the relator of a part of its claim for concrete, pre-suit injury. By contrast, § 8(d)(2) does not address any pecuniary injury to the United States, and thus cannot relieve plaintiff of the obligation to demonstrate a concrete, pre-suit injury to herself.

II. Edwards has failed to allege an injury in fact.

A. Edwards alleged that "all members of the proposed plaintiff class" were "injured . . . in precisely the same way" – that is, by being "den[ied] . . . critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)). Despite the complaint's references to both "cost" and "information," Edwards did not allege either a pecuniary injury or an "informational" injury sufficient to establish standing under Article III.

1. Edwards did not plead that, as a result of the alleged violation of § 8(a), she was charged a higher price for title insurance than otherwise would have been available. Any such allegation would in any event fail because, under the state regulatory regime in place in Ohio, she had no lower-priced insurance option. All title insurers in Ohio, as members of OTIRB, charged identical rates. Moreover, Edwards did not allege that she received poor service or lower-quality insurance at all, much less as a result of the alleged conduct.

Edwards's complaint cannot survive because of the supposed "systemic" effects of the practice alleged in the complaint on the title insurance industry as a whole. The potential for an undefined, non-specific "systemic" effect is precisely the type of "conjectural" claim of harm that cannot support Article III standing. *Id.* Edwards does not allege any increase in title insurance costs or explain how such an increase would be "fairly traceable" to the conduct challenged here. *Friends of the Earth*, 528 U.S. at 180.

2. Edwards likewise cannot allege any "informational" injury. This is not a case, like *FEC v. Akins*,

524 U.S. 11 (1998), or *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), in which the plaintiff's injury is the denial of information that Congress has required the government to provide to protect citizens' ability to participate in the process of democratic governance. Nor is this case like *Havens Realty*, in which the claimed violation is based on the provision of false information, and the resulting injury includes racial insult and stigma. Edwards does not allege anything like that here: the sole purpose for which she claims she wanted the information was to avoid the potential for financial injury, which she did not suffer.

3. Nor did Edwards allege any injury comparable to that which would support a claim for breach of a duty of loyalty or (as the government has argued) a violation of conflict-of-interest rules. Edwards did not allege that she was betrayed by a trusted advisor or her agent, and, in any event, the law does not recognize an abstract claim for breach of a duty of loyalty in the absence of pecuniary harm. And a violation of a procedural right, like the right to an unbiased adjudicator, supports standing only when the deprivation of the procedural right impairs a separate, concrete interest.

B. The argument that Edwards suffered an invasion of her right to settlement services free of the "taint" of unlawful conduct does not identify any impact on Edwards apart from the alleged violation. Congress can create legal rights, the invasion of which can give rise to a legally cognizable injury, *see Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), but it does so by "elevating to the status of legally cogniza-

ble injuries concrete, *de facto* injuries that were previously inadequate in law," *Lujan*, 504 U.S. at 578. Congress cannot eliminate the injury-in-fact requirement by designating the experience of a legal violation a "*per se*" injury, irrespective of its effect on any individual plaintiff. To recognize such fictitious injuries would effectively eliminate the "hard floor" requirement that Article III imposes and would allow Congress to evade the separation-of-powers limits that Article III protects. *Summers*, 129 S. Ct. at 1151; *cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Moreover, notwithstanding the fact that the statute broadly confers a cause of action on any person whose settlement services were "involved in the violation" of § 8(a), the statute does not "'define'" any new "'injur[y]'" or "'articulate'" any new "'chain[] of causation,'" *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)), that would give rise to a case or controversy in the absence of actual injury to the plaintiff. To the contrary, the text and history of the statute indicate that the interests protected by the prohibition on referral fees are economic interests, not any other intangible interest. This conclusion underscores the constitutional inadequacy of the supposed injury alleged.

III. Enforcement of the Article III standing requirement serves interests that are critical to the administration of justice and separation of powers. The class-action context of this case underscores the importance of requiring the allegation (and, eventually, proof) of a well-defined injury in fact. Edwards's experienced class counsel may well have calculated that RESPA can provide access to a wind-

fall recovery for a large plaintiff class if they can persuade the courts to accept a cause of action that does not depend on any concrete, individualized injury. That could explain the decision to plead a complaint that relies solely on a generic statutory injury that has nothing to do with any conduct that has made anyone worse off. Recognition of such a suit as legitimate threatens vast liability, with the *in terrorem* effect forcing settlement of even unmeritorious suits. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

The exercise of "judicial power" on behalf of litigants may "profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). It is emphatically the role of the judiciary to provide a forum for a private plaintiff to "obtain[] compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73. Where, as here, a plaintiff has suffered no actual injury, the judicial role is not implicated, and the plaintiff may not invoke the jurisdiction of the federal courts.

ARGUMENT

The Ninth Circuit held that (1) § 8(d)(2) of RESPA authorizes suit by any person who purchased a settlement service "involved in [a] violation" of § 8 of RESPA, irrespective of whether the plaintiff suffered any pecuniary harm; and (2) any plaintiff who pleads a cause of action under § 8(d)(2) has standing under Article III, simply by virtue of stating a "statutory cause of action." App. 7a. The Court granted certiorari to review the latter holding, and it should reverse.

I. THE NINTH CIRCUIT'S DECISION DISREGARDS THE CONSTITUTIONAL NATURE OF THE STANDING REQUIREMENT UNDER ARTICLE III

The Ninth Circuit concluded that, because Edwards stated a cause of action under RESPA, she had established an injury "sufficient to satisfy Article III." App. 5a. The Ninth Circuit's understanding that the existence of a statutory right of action, without more, establishes a constitutionally sufficient injury conflicts with this Court's precedent.

A. Article III of the Constitution provides that the "judicial Power" of the United States extends only to deciding "Cases" and "Controversies." Those words refer specifically to cases and controversies "that [are], in James Madison's words, 'of a Judiciary Nature,'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed., rev. 1966)), because they are "of the sort traditionally amenable to, and resolved by, the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998).

"[P]erhaps the most important" way in which this Court has enforced Article III's "fundamental limits on federal judicial power in our system of government" is the "require[ment] [that] a litigant . . . have 'standing' to invoke the power of a federal court." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The elements of Article III standing are "familiar: 'A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief.'" *DaimlerChrysler*, 547 U.S. at 342 (quoting *Allen*, 468 U.S. at 751); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Many of this Court's standing cases involve actions against the federal government, but the standing requirement applies as well in suits against private defendants. The need to prove Article III standing "does not depend on the defendant's status as a governmental entity." *Steel Co.*, 523 U.S. at 103 n.5; *see id.* (noting that there is "no conceivable reason" for drawing that distinction); *see also*, *e.g.*, *Friends of the Earth*, 528 U.S. at 175, 180.

In this case, the principal question is whether Edwards has adequately alleged an "'injury in fact' – a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). Because "the requirement of injury in fact is a hard floor of Article III jurisdiction," it "cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Injury in fact is part of the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), a "core component" of

standing that is "derived directly from the Constitution," *Allen*, 468 U.S. at 751. This "outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in Article III." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment).

The fact that Congress has authorized a plaintiff to sue by granting a right of action against the defendant therefore does not, without more, satisfy the requirement of injury in fact. *See Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("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."); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."). Thus, in *Steel Co.*, the Emergency Planning and Community Right-To-Know Act of 1986 authorized suit by "any person" against the owner of a hazardous waste facility that failed to comply with the statute; notwithstanding that authorization, the Court held that the respondent lacked injury in fact and could not proceed with its suit. *See* 523 U.S. at 104-09. And, in *Lujan*, the Endangered Species Act of 1973 contained a "citizen suit" provision authorizing "any person" to "commence a civil suit on his own behalf" against the government; the Court nevertheless held that the standing requirement was not satisfied. *See* 504 U.S. at 571-73; *see also Vermont Agency*, 529 U.S. at 771-78 (assessing plaintiff's standing despite existence of express statutory right of action).

The standing inquiry is not limited to cases involving provisions that allow literally any citizen to sue to challenge unlawful conduct, but applies also in cases involving causes of action that may, in many applications, provide recovery for individuals' ordinary pecuniary losses. For example, in *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008), the respondents sued pursuant to the private right of action under the Communications Act of 1934; while the Court did not question that the plaintiffs had been assigned causes of action, it nevertheless determined that they were required to establish standing under Article III. *See id.* at 273-74. In *Gollust v. Mendell*, 501 U.S. 115 (1991), the Court concluded that Congress intended that a plaintiff "would maintain some continuing financial stake in the litigation," *id.* at 125, in order to maintain an action under § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b); its conclusion explicitly rested on the constitutional concern that would arise on a contrary reading of the statute. In reasoning that Article III requires a plaintiff to "'allege a distinct and palpable injury to himself'" to establish standing, 501 U.S. at 126 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), the Court not only reaffirmed that Article III places a limit on Congress's ability to create standing by authorizing suit but also made clear that the limitation applies in suits under statutes that provide tort-like causes of action in situations involving individual pecuniary harm. Likewise, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), while the Court found that each plaintiff who had stated a cause of action had standing to sue, the Court made clear that Article III imposed an independent injury-in-fact requirement. *See id.* at 373-74 (finding that plaintiff had demon-

strated "specific injury" and therefore satisfied Article III).

It is the responsibility of the "federal courts to satisfy *themselves*," *Summers*, 129 S. Ct. at 1149 (emphasis added) – even in the face of legislation that grants a broad right to sue – that the party seeking judicial relief in a particular case has shown an injury. For Article III, as for other constitutional provisions that define and limit the powers of the federal government, "Congress' discretion is not unlimited, . . . and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). The Ninth Circuit's conclusion that the existence of a statutory right of action, without more, establishes an injury in fact fails to give effect to the constitutional nature of the standing requirement.

B. To support its view that the determination that Edwards stated a cause of action was sufficient to establish that she suffered an injury in fact, the court of appeals quoted this Court's statement in *Warth* that the "injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing,'" 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).[9] *Warth* itself, however, clarified that, even after Congress has authorized suit, "Art[icle] III's requirement remains[, and] the plaintiff still must allege a distinct and palpable

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[9] The statement was dictum because the result in *Warth* was that none of the plaintiffs in that case had standing. *See* 422 U.S. at 517-18. It also was dictum in the footnote from *Linda R.S.* that *Warth* quoted; *Linda R.S.* also denied standing. *See* 410 U.S. at 619.

injury to himself." *Id.* at 501. This Court emphasized the need for a plaintiff to "allege specific, concrete facts demonstrating that the challenged practices harm *him*." *Id.* at 508. *Warth* thus did not hold – and this Court has never held – that a congressional authorization to sue relieves the courts of their obligation to ensure that every plaintiff properly alleges injury in fact.[10]

Warth is consistent with this Court's recognition in many later cases – including *Lujan*, *Steel Co.*, and *Summers* – that the doctrine of Article III standing imposes constitutional constraints on Congress's ability to authorize statutory actions. The statement that Article III injury "may exist solely by virtue of statutes," *Warth*, 422 U.S. at 500 (internal quotation marks omitted), does not mean that Article III injury is a solely statutory question.[11] That statement

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[10] The Court in *Warth* then went on to explain that "the source of the plaintiff's claim to relief assumes critical importance with respect to the *prudential* rules of standing" and that "the standing question *in such cases* is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." 422 U.S. at 500 (emphases added). The Ninth Circuit deepened its error by omitting *Warth*'s reference to "prudential rules of standing" and quoting this Court's reference to "'such cases'" as though it meant cases about the limits imposed by Article III. *See* App. 4a (quoting *Warth*, 422 U.S. at 500). What *Warth* clearly meant, in context, was that, if a constitutional or statutory provision is properly read as granting a particular plaintiff a right to judicial relief, that plaintiff faces no problem of prudential standing.

[11] Critics of this Court's standing cases have taken the position apparently adopted by the Ninth Circuit, arguing that the standing inquiry should be reduced to the question whether the plaintiff has stated a claim. *See, e.g.*, William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 290-91 (1988). As explained in text, that approach has already been rejected by

instead refers to the principle that, where Congress has "'identif[ied] [an] injury it seeks to vindicate and relate[d] th[at] injury to [a] class of persons entitled to bring suit,'" its action may "'give rise to a case or controversy where none existed before.'" *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). As discussed below, *see infra* Part II.B, that principle cannot help Edwards here. She did not plead any "concrete, *de facto* injur[y]," *Lujan*, 504 U.S. at 578, and Congress could not and did not establish that she suffered injury simply by virtue of the existence of an alleged violation of RESPA that did not adversely affect her.

C. The fact that § 8(d)(2) renders a statutory violator liable to the "person or persons charged for the settlement service" for "three times the amount of any charge paid for such settlement service" does not mean that a plaintiff suing under that provision automatically satisfies the constitutional injury requirement. It is true that the possibility of such a recovery constitutes a "'concrete private interest.'" *Vermont Agency*, 529 U.S. at 772 (quoting *Lujan*, 504 U.S. at 573). The hope for that windfall recovery, however, cannot satisfy Article III because it is a mere "bounty" that is "unrelated to injury in fact." *Id.* It is not "*compensation* for . . . the violation of a legally protected right," because, in such a case, the plaintiff has suffered no injury to compensate; and it will not help her to "prevent[]" injury in the future, because she has not alleged that she is threatened with any. *Id.* at 772-73 (emphasis added); *see also*

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this Court – and rightly so, because to accept it would undermine the separation-of-powers function of the standing requirement.

U.S. Inv. Br. 12-13 n.8 (conceding that "a statutory bounty standing alone may not be sufficient to confer standing").

Edwards does not stand in the same position as the *qui tam* relator in *Vermont Agency*. The Court explained in that case that the False Claims Act's provision granting a successful relator a portion of the government's recovery is sufficient to give the relator standing because the statute "can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the relator, such that "the United States' injury in fact suffices to confer standing." 529 U.S. at 773-74; *see also Sprint*, 554 U.S. at 285 (holding, based on "history and precedent," that an assignee for collection has standing).[12] Here, by contrast, Edwards has not alleged that *anyone* has suffered a pecuniary injury by virtue of the challenged transaction, much less that she brings her claim as an assignee or the functional equivalent.

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[12] The action authorized by § 8(d)(2) does not resemble the informer statutes enacted by the First Congress either. *See Vermont Agency*, 529 U.S. at 776-77 & n.6 (listing statutes). Such statutes shared with an informer some of the debt or fine owed to the United States as a result of a legal violation. In each such case, the United States has a pecuniary interest and the plaintiff can be understood to have been assigned a portion of it – the very rationale that was the principal basis for upholding the False Claims Act in *Vermont Agency*. Here, by contrast, the United States has no pecuniary interest to assign. *See also* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 726-27 (2004); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1221 n.20 (1993) (noting that "[p]ractice prior to the framing of the Constitution – and perhaps constitutionally dubious remnants persisting thereafter – . . . is not an infallible guide to the scope of judicial power under Article III").

II. EDWARDS FAILED TO ALLEGE INJURY

A. Edwards Alleged No Concrete Injury

The allegations of injury in Edwards's complaint are narrowly circumscribed, apparently to maximize the chances of class certification, and the complaint carefully avoids any allegation of adverse effect on Edwards personally. The complaint thus alleges that petitioners' conduct "injured all members of the proposed plaintiff class in precisely the same way: by denying them critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance." App. 49a (Compl. ¶ 5) (quoting 12 U.S.C. § 2601(b)(2)); *see also* App. 52a (Compl. ¶ 17) (violation "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market"). But, references to "cost," "prices," and "information," notwithstanding, Edwards has not alleged either a pecuniary injury or an "informational" injury that constitutes the requisite injury for purposes of Article III. Nor has she alleged any other concrete injury that is sufficient to establish standing to sue.

1. Edwards Alleged No Pecuniary Injury

Plaintiff has not alleged that the conduct at issue made her worse off economically in any way.

a. Plaintiff cannot allege that she was deprived of lower-cost title insurance available for purchase in Ohio. The complaint implies that, if some unspecified information that was not provided had been provided, plaintiff would have (or, at least, might have) paid less for title insurance. But that allegation is legally untenable – and therefore cannot be the basis for standing, even at the pleading stage – because the only title insurance available in Ohio at the time

of Edwards's closing was offered at the same price under the state regulatory scheme. *See supra* pp. 5-6. That conclusion was accepted by the courts below. *See* App. 4a ("Plaintiff does not and cannot make th[e] allegation [that she suffered an overcharge] because Ohio law mandates that all title insurers charge the same price."), 14a ("Edwards admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"). And, in opposing the petition for certiorari, though she disputed that "the absence of an 'overcharge'" is the same as "the absence of economic injury," Edwards did *not* claim that any overcharge occurred. Br. in Opp. 22; *see also* Sup. Ct. R. 15.2.

Edwards likewise does not allege that First American's actions caused her to receive less value for her money than she otherwise would have received. Hypothetically, some title insurers might provide better service than others; even without price competition, an insured might therefore be injured if denied that superior service. Edwards, however, does not allege that she suffered any such injury.

b. Edwards has argued that she suffered an economic injury based on the "systemic effects" of "reverse competition" on pricing, Br. in Opp. 22, but the complaint does not allege that the price that *she* paid actually was higher (or quality lower) because of the conduct challenged in this case.[13] What the insurance market would have looked like in Ohio had First American's relationship with Tower City been different is entirely speculative. *Cf. id.* at 6 n.3

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[13] Edwards also does not allege that she is likely to pay more for title insurance in the future or to receive lower-quality services, which would be necessary for standing to seek injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

(arguing that, as a result of *industry concentration*, not preferential agency relationships, "the practical effect of the state rate-setting scheme is to allow the dominant insurers to set prices at monopoly levels"). A plaintiff who alleges only a "remote possibility, unsubstantiated by allegations of fact, that [her] situation might have been better had [the defendants] acted otherwise," has not established standing. *Warth*, 422 U.S. at 507; *see also ASARCO Inc. v. Kadish*, 490 U.S. 605, 614 (1989) (plurality) (holding insufficient to establish standing "allegations of economic harm [that] rest on . . . hypothetical assumptions"); *Allen v. Wright*, 468 U.S. 737, 757 (1984) (declining to find standing based on an injury that was "highly indirect and 'result[ed] from the independent action[s] of some third part[ies] not before the court'") (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42 (1976)).

Nor does it help Edwards to compare her case to an antitrust claim involving "a market that has been monopolized or subject to illegal pricing agreements." Br. in Opp. 22. In such cases, to establish standing under Article III, a plaintiff must allege precisely what Edwards did not allege here – that, absent the unlawful conduct, the price plaintiff paid would have been lower (or quality higher) such that the plaintiff has suffered a concrete economic harm. *See*, *e.g.*, *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253, 1256 (9th Cir. 2008) (affirming dismissal of antitrust claim for lack of Article III standing where plaintiff "failed to satisfy his burden to establish a genuine issue as to whether he suffered an injury-in-fact"). That is so even though no one would seriously dispute that unreasonable restraints of trade are unlawful because they tend to harm consumers. *Cf. Texaco Inc. v.*

Dagher, 547 U.S. 1, 5 (2006) (noting that "horizontal price-fixing agreements" are "*per se* unlawful" because they are among the class of agreements that are "plainly anticompetitive") (internal quotation marks omitted).

Here, Edwards did not allege any way in which the arrangement between First American and Tower City has led to higher prices. The bare assertion that Ohio's title insurance market would have been more favorable to plaintiff in 2006 had First American not invested in Tower City in 1998 is precisely the sort of "conjectural" injury that cannot give rise to standing under Article III; moreover, it fails to provide a plausible basis from which to infer the causation that Article III requires. *See Friends of the Earth*, 528 U.S. at 180 (injury must be "concrete and particularized," "not conjectural or hypothetical," and must be "fairly traceable to the challenged action of the defendant").

2. Edwards Alleged No "Informational" Injury

Edwards's claim that "all members of the proposed class" were denied "critical information" does not establish standing to sue under Article III because the mere fact that a plaintiff allegedly did not receive information, without more, is not a concrete injury. Rather, the "inability to obtain information," *FEC v. Akins*, 524 U.S. 11, 21 (1998), has been treated as a cognizable injury in fact only when the denial of information causes a distinct injury to some other legally protected interest.

For example, in *Akins*, the respondents – voters seeking information about a political committee – challenged the determination of the Federal Election Commission ("FEC") that AIPAC was not a "political committee" subject to statutory disclosure require-

ments. The Court noted that there was "no reason to doubt" that the information that would be made available if the FEC's determination were reversed "would help [the respondents] (and others to whom they would communicate it) to evaluate candidates for public office." *Id.* "Respondents' injury consequently seems concrete and particular." *Id.* Likewise, in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), the appellants sought access to the meetings and records of a private organization – the American Bar Association's Standing Committee on Federal Judiciary – "in order to monitor its workings and participate more effectively in the judicial selection process." *Id.* at 449. The individual who has sought information in such circumstances has suffered a "concrete and particular[ized]" harm, *Akins*, 524 U.S. at 21, but only because the individual sought and was denied specific information. *Cf.* Roberts, 42 Duke L.J. at 1228 n.60 (explaining that an "individual who has not made a disclosure request, and therefore has not suffered a wrongful denial [of government documents], has not been injured and does not have standing to sue").

Havens Realty dealt with a violation of § 804(d) of the Fair Housing Act, which made it unlawful to "represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available . . . when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1982). In that case, the petitioner falsely told a black "tester" – who did not intend to buy or rent a home – that no apartment was available. When a direct lie to one's face is the means by which one has been "personally denied equal treatment solely because of . . . membership in a disfavored group," it can inflict "serious noneconomic injur[y]." *Heckler v. Mathews,* 465 U.S.

728, 739-40 (1984). The injury inflicted in that situation is the sort of concrete and individualized, though non-pecuniary, injury that this Court has recognized can give rise to standing. *See Allen*, 468 U.S. at 755 (noting the "serious consequences" of the "stigmatizing injury often caused by racial discrimination").

Edwards has alleged nothing like those injuries here. Section 8(a) of RESPA – unlike the statutes at issue in *Akins* and *Public Citizen* – does not create any right to information; nor does it prohibit – as the Fair Housing Act does – the provision of incorrect information on the basis of race. Rather, a violation of § 8(a) depends on the transfer of a thing of value pursuant to an agreement to refer settlement-service business. Neither misrepresentation nor a failure to disclose is part of the statutory offense. One possible *defense* to a § 8(a) claim involves, in part, appropriate disclosure of an "affiliated business arrangement[]." 12 U.S.C. § 2607(c)(4).[14] But Edwards has not explained how unspecified information of which she was allegedly deprived affected, in any way, the impact on her of the settlement services transaction; to the contrary, Edwards has gone so far as to argue affirmatively to the district court that "disclosure is . . . irrelevant" to this case. JA115.[15]

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[14] The fact that disclosure may be relevant to a defense does not transform the failure to disclose into an injury, any more than the existence of a valid defense would eliminate, for standing purposes, an actual injury that a plaintiff did allegedly suffer. *See*, *e.g.*, *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1004 (8th Cir. 2007) ("[t]he existence of a defense to a cause of action does not deprive the plaintiff of standing").

[15] In contrast to § 8(a), other parts of RESPA *do* create disclosure obligations. For example, § 4 requires a person conducting a settlement to provide a "standard form for the statement of settlement costs," 12 U.S.C. § 2603(a) – commonly known as a

Edwards also did not allege that she was denied information that she, personally, wanted for its own sake (assuming, for the sake of argument, that such a desire would be enough). Indeed, any claim that Edwards, herself, wanted information without regard to its practical value would be inconsistent with the claim that "all members of the proposed plaintiff class" were injured in the same way, App. 49a (Compl. ¶ 5); there would be no basis for attributing that idiosyncratic desire to absent class members.

3. Edwards Alleged No Other Injury Sufficient To Establish Standing To Sue

Edwards contends that the payment and acceptance of a referral fee is like the breach of a duty of loyalty owed by an agent to a principal, arguing that suits for breach of that duty may be maintained without further injury. *See* Br. in Opp. 21-22. The government compares the duty imposed by § 8(a) to a due process right to a conflict-free adjudicator. *See* U.S. Inv. Br. 12. Neither argument identifies an injury that satisfies Article III.

a. Edwards's complaint does not plead an injury based on a breach of special confidence and trust she had reposed in her settlement service provider. Even if she had, however, that would not, without more, satisfy Article III.

HUD-1. JA88-90. Similarly, § 5(c) requires a lender to furnish an advance "good faith estimate" of settlement costs, 12 U.S.C. § 2604(c), and § 5(d) obligates a lender to provide a preprinted booklet prepared by HUD, *id.* § 2604(d). These provisions carry out Congress's intent to require "more effective advance disclosure . . . of settlement costs," *id.* § 2601(b)(1), which was one purpose of RESPA. They could be characterized as giving rise to a right to receive information under the statute. Section 8, by contrast, does not create such a right.

First, § 8(a) prohibits the payment of certain referral fees; it does not establish an agency relationship or fiduciary duty running from settlement service providers to customers. This is particularly clear with respect to First American, which is not alleged to have had any contact with Edwards except through its agent, Tower City. Tower City, moreover, had no obligation under § 8(a) to give Edwards careful, disinterested advice about the purchase of title insurance; it was subject to a narrow prohibition on the acceptance of certain payments. Tower City's statutory obligation to Edwards thus bore no relationship to the "rule of undivided loyalty" that the common law has long recognized as "relentless and supreme." *Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928) (Cardozo, J.).

More broadly, the argument that Tower City is the equivalent of Edwards's agent – simply because Tower City had a statutory duty that runs toward purchasers of settlement services – would render the standing requirement illusory in a broad range of cases. For example, a shareholder (or former shareholder) would not need to allege any loss due to a misstatement in a securities filing, just that she felt betrayed by the falsehood, *but cf. Gollust*, 501 U.S. at 126; the purchaser of a product from a company that had entered into an allegedly unlawful agreement would have standing based on the violation of the duty to sell products free of such "taint," *but cf. Gerlinger*, 526 F.3d at 1256. In substance, this argument is no different from the argument that the allegation of a statutory violation with respect to Edwards's transaction, without more, confers standing – a proposition that is incorrect. *See infra* Part II.B.

Second, even the allegation of a breach of an express fiduciary obligation does not, in any event, allow a plaintiff to sue in the absence of a distinct injury. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") creates express fiduciary obligations owed to plan beneficiaries, *see* 29 U.S.C. § 1104(a); renders "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries" liable for "any losses to the plan," *id.* § 1109(a); and authorizes a "civil action . . . by a participant [or] beneficiary . . . for appropriate relief under section 1109," *id.* § 1132(a)(2). *See generally LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008).

Applying Article III in the context of these provisions, the courts of appeals have uniformly ruled that a beneficiary lacks standing to sue for a past breach of fiduciary duty in the absence of evidence of an actual financial injury to the plaintiff. *See*, *e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting the argument that "deprivation of [an] entitlement to [a] fiduciary duty . . . constitutes an injury-in-fact sufficient for constitutional standing"); *Loren v. Blue Cross & Blue Shield of Michigan*, 505 F.3d 598, 608-09 (6th Cir. 2007); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) (allowing plan beneficiary to sue based on injury to plan would "fatally undermin[e] any limitation the requirement of concrete injury places on constitutional standing"); *cf. McCullough v. AEGON USA, Inc.*, 585 F.3d 1082, 1084-85 (8th Cir. 2009) (holding, in light of Article III concerns, that participants who "'have suffered *no* injury in fact'"

may not "bring an action 'to enforce ERISA fiduciary duties'") (quoting *Harley v. Minnesota Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002)); *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (holding that beneficiary could not maintain suit for restitution and disgorgement in the absence of "individual loss").[16] Those cases refute Edwards's suggestion that the alleged violation of a fiduciary duty is injury in itself.[17]

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[16] *Horvath* also held that a plaintiff could sue to enjoin future breaches of the defendant health plan's obligation to disclose information relating to physician incentives without "demonstrat[ing] actual harm." 333 F.3d at 456. But that statement refers to *past* harm, not threatened future harm; the plaintiff in that case *did* allege that information that the defendant failed to disclose had "the potential to impact healthcare decisions made by its physicians and thus decrease the overall level of care provided." *Id.* at 453. To read the court's statement to indicate that the statutory breach had been an injury sufficient to confer standing would be inconsistent with the court's holding that the alleged violation did not constitute an injury in fact sufficient to allow the plaintiff's claim for restitution and disgorgement to proceed. *See also Loren*, 505 F.3d at 609-10.

[17] In her brief in opposition (at 22), Edwards cited *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996), along with the Restatement of Agency, but those authorities do not support the proposition that a suit for breach of a fiduciary duty can proceed in the absence of distinct harm. In *Hendry*, the D.C. Circuit made clear that "forfeiture [of attorney's fees charged by a faithless fiduciary] reflects . . . the decreased value of the representation itself," *id.* at 402 – that is, an actual injury in fact. The Restatement is to the same effect. *See* Restatement (Second) of Agency § 469 (1958) (agent is entitled to "no *compensation* for conduct which is disobedient or which is a breach of his duty of loyalty") (emphasis added); Restatement (Third) of Agency § 8.01 cmt. d(2) (2006) (same). Edwards did not allege an injury of this kind, because she did not claim that she paid First American or Tower City for advice about title insurance or that she did not get what she paid for.

b. The government argued at the certiorari stage that Edwards's interest in obtaining "conflict-free" advice is analogous to a procedural right to a conflict-free judge.[18] But that contention undermines, rather than supports, Edwards's claim that she has standing. "[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; *see also id.* at 1153 (Kennedy, J., concurring). In a case about procedural rights, it is the "impairment" of the underlying "concrete interest[]" that satisfies the "requirement of injury in fact." *Id.* at 1151; *see also Lujan*, 504 U.S. at 573 n.8 (explaining that a plaintiff "assuredly" can "enforce procedural rights . . . so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing," but not otherwise).

Accordingly, when the liberty of a defendant is at stake, a violation of a procedural right suffices to establish standing without any showing that the outcome would have been different *not* because a showing of injury is unnecessary – the injury is the conviction and the deprivation of liberty that entails – but because a "procedural right . . . can loosen the strictures of the *redressability* prong of our standing inquiry." *Summers*, 129 S. Ct. at 1151 (emphasis added). The injury-in-fact requirement cannot be "loosen[ed]" in this way.

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[18] *See* U.S. Inv. Br. 12 (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and *Tumey v. Ohio*, 273 U.S. 510 (1927)).

B. Edwards Cannot Establish Standing Based Merely on the Allegation That First American Violated RESPA in Connection with Her Settlement Transaction

Edwards argued in opposition to certiorari that she suffered an invasion of her "right to conflict-free referral advice" and that the "invasion of that statutory right is an injury conferring standing." Br. in Opp. 21; *accord* U.S. Inv. Br. 11 (RESPA confers a "legal right to a real estate settlement untainted by kickbacks, improper referrals, and unearned fees"). That argument, however, is simply another way of asserting that First American's alleged conduct violates the statute; it does not identify any distinct, concrete impact on Edwards. And the bare allegation that one has been subjected to a statutory violation, without more, does not establish injury sufficient for Article III.

1. To avoid "draining th[e] requirements of [Article III] of meaning," this Court has declared certain types of interests categorically insufficient to support standing. *Valley Forge Christian College*, 454 U.S. at 483. One categorically insufficient interest is "the interest in seeing that the law is obeyed," *Akins*, 524 U.S. at 24, even when perceiving disobedience has the "psychological consequence presumably produced by observation of conduct with which one disagrees," *Valley Forge Community College*, 454 U.S. at 485; *see ASARCO* 490 U.S. at 616 (plurality); *Steel Co.*, 523 U.S. at 107 (explaining that an interest in seeing "that a wrongdoer gets his just deserts" or "that the Nation's laws are faithfully enforced" is "not . . . a cognizable Article III injury"). Equating such interests with cognizable injuries would effectively authorize "citizen suits to vindicate the public's non-

concrete interest in the proper administration of the laws," an outcome this Court has decisively rejected. *Massachusetts v. EPA*, 549 U.S. at 516-17 (internal quotation marks omitted).

Here, Edwards pleaded a sort of particularized connection to the alleged violation: she purchased title insurance from a specific First American agent, and most of the U.S. population did not. But, to establish standing, a plaintiff cannot rely on an injury "of an abstract and indefinite nature" – whether or not the injury is "widely shared." *Akins*, 524 U.S. at 23. It is true that Edwards bought title insurance, but that fact does not materially distinguish her from any bystander to the transaction unless the violation had an adverse effect on the purchase – which is precisely what Edwards did not and could not allege. *Cf. Doe v. Chao*, 540 U.S. 614, 624-25 (2004) (only a plaintiff "subjected to an adverse effect has injury enough to open the courthouse door"). Edwards alleged a connection to the challenged conduct that may have made her *potentially* vulnerable to an injury, but that, by itself, made her no more than a member of "a subclass of citizens who suffer no distinctive concrete harm." *Lujan*, 504 U.S. at 576-77. The mere purchase of title insurance that Edwards needed, at the state-approved rate, with no complaint about service, quality, coverage, or any other aspect of her policy, is not a cognizable injury.[19]

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[19] There is no paradox in saying that a consumer who suffers an overcharge of $1 has suffered an injury – one that entitles her to pursue a cause of action that may authorize many hundreds of dollars in damages – while a consumer who suffers no injury cannot sue. *Cf. Sprint*, 554 U.S. at 289; *id.* at 315 (Roberts, C.J., dissenting). A statute authorizing recovery vastly in excess of any actual harm suffered by the plaintiff might

Congress may "broaden[] the categories of injury that may be alleged in support of standing," *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972), that is, it may "'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 *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). It does so, however, not by declaring that experiencing a statutory violation constitutes *per se* injury, but by "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law," *Lujan*, 504 U.S. at 578; *see also Massachusetts v. EPA*, 549 U.S. at 516 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

Given Edwards's failure to allege any distinct adverse effect, her asserted right to settlement services free of the "taint" of prohibited kickbacks is "abstract, self-contained, [and] noninstrumental." *Lujan*, 504 U.S. at 573. Congress cannot legislate away Article III's requirement of *particular* and *concrete* injury by purporting to convey such a right. *See Summers*, 129 S. Ct. at 1151.[20] Any other under-

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raise issues under the Due Process Clause. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (describing the due process analysis for punitive damages in which courts consider, among other things, the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"). But there would be no issue concerning the plaintiff's standing to sue.

[20] As one commentator explained this Court's decisions:

> Congress can "create" standing where none had existed before, if it identifies an injury (or chain of causation, or means of redress) that, while already sufficient to confer Article III standing, had not previously been legally action-

standing would undermine the fundamental principle that the courts exist "to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Id.* at 1148; *see also Vermont Agency*, 529 U.S. at 772-73 ("The interest must consist of obtaining *compensation for*, or *preventing*, the violation of a legally protected right.") (emphases added).

2. Not only does Congress lack the power to deem a legal violation a *per se* injury; RESPA is not properly read as attempting to do so. Notwithstanding the broad wording of § 8(d)(2), RESPA does not "'define [an] injur[y]'" or "'articulate [a] chain[] of causation'" that could give rise to a case or controversy in the absence of adverse economic impact on the plaintiff. *Massachusetts v. EPA*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)). To the contrary, the statute indicates that the prohibition at issue protects consumers' *pecuniary* interests.

Congress enacted RESPA to protect "consumers throughout the Nation . . . from *unnecessarily high settlement charges* caused by certain abusive practices." 12 U.S.C. § 2601(a) (emphasis added). Congress intended "to effect certain changes in the settlement process for residential real estate" that would, among other things, "eliminat[e] . . . kickbacks or referral fees that *tend to increase unnecessarily the costs* of certain settlement services."

> able. At the same time, however, Congress cannot redefine what injuries, chains of causation, or means of redress are sufficient to confer Article III standing: that is the Court's job.

Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 193 (2011).

Id. § 2601(b)(2) (emphasis added). That language does not suggest that a "tainted referral" is a concrete wrong in itself. Rather, the statute expressly speaks to the economic *effects* of such referrals – that is, the financial injury caused when a settlement service provider takes advantage of an unwitting customer unlawfully referred.[21]

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[21] The Senate committee report explained that the provision that became § 8(a) "is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." S. Rep. No. 93-866, at 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6551. The report described some of the prohibited arrangements (none of which resembles the semi-exclusive agency arrangement alleged here) and concluded that, "[i]n *all* of these instances, the payment or thing of value furnished by the person to whom the settlement business is referred *tends to increase the cost of settlement services* without providing any benefits to the home buyer." *Id.* (emphases added). Likewise, in a floor statement introducing earlier legislation, Senator Brock explained that the provision that is now § 8(a) "would prohibit any kickback or referral fee that is paid or received for the mere referral of settlement business and would prohibit any fee-splitting among persons who render settlement services unless the fee is paid in return for services actually rendered. These kickbacks or referral fees *increase the cost of settlement services to the home buyer* without providing any benefits to him." 120 Cong. Rec. 6586 (Mar. 13, 1974) (emphasis added).

The government has relied on a committee report accompanying the 1983 amendments to RESPA. *See* U.S. Inv. Br. 12. But that legislation did not amend § 8(a), which has remained unchanged since its enactment in 1974. A 1982 committee report sheds no light on Congress's intent in passing § 8(a). *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). In any event, that report referred to arrangements under which a consumer "is likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." H.R. Rep. No. 97-

First American does not now argue that Edwards has failed to establish statutory standing under the "'zone-of-interests' test." *Bennett v. Spear*, 520 U.S. 154, 161 (1997). That would be an argument that, even if Edwards had alleged a *de facto* injury, the statute does not render that injury cognizable. The point here is, rather, that the absence from RESPA of any indication that the bare invasion of a right to "conflict-free" settlement services constitutes an injury in itself reinforces the conclusion that an alleged statutory violation, in the absence of adverse effects, is not an actual injury and cannot support standing under Article III.

III. ENFORCEMENT OF ARTICLE III'S STANDING REQUIREMENT SERVES INTERESTS THAT ARE CRITICAL TO THE ADMINISTRATION OF JUSTICE AND SEPARATION OF POWERS

This Court has "always insisted on strict compliance with th[e] jurisdictional standing requirement." *Raines*, 521 U.S. at 819. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011).

In evaluating Edwards's claim of injury, it pays to keep in mind *why* Edwards's complaint looks the way it does and to consider, in particular, why Edwards's experienced class counsel might have chosen to emphasize that First American's conduct had

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532, at 51 (1982). Edwards does not allege that she (much less "all members of the proposed plaintiff class") suffered any of those concrete injuries.

"injured all members of the proposed plaintiff class in precisely the same way." App. 49a (Compl. ¶ 5). One likely reason is that an individual plaintiff with a truly personal and concrete injury – one, for example, who had bought title insurance in a jurisdiction where underwriters charged different rates for title insurance, and who therefore could plausibly allege an overcharge – would have been much less adequate as a putative class representative. Such a plaintiff would have been unable to argue, as Edwards did, that her "claim [was] . . . not only *typical* of the Class claims in this case, [but] *identical*" to all the others. JA138 (second emphasis added). *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law.") (citation and internal quotation marks omitted); *cf. ASARCO*, 490 U.S. at 615 (plurality) ("the doctrine of standing to sue is not a kind of gaming device").

By sponsoring a theory of injury that requires no more than an alleged statutory violation, without any need for consideration of the effect (if any) of that violation on individual class members, Edwards has so far been able to maintain herself as a plausible representative for a vast class. Section 8(d)(2) of RESPA authorizes recovery of "three times the amount of any charge paid for . . . settlement service." 12 U.S.C. § 2607(d)(2). A defendant in such a case might face potentially enormous damages. That prospect allows a class representative to take advantage of the *in terrorem* effect to pursue a settlement without even alleging that the defendant's conduct actually made *anyone*, including her, worse off.

Given the consequences of a judgment – even if its probability is low – allowing such suits to proceed undermines, rather than serves, the interests of ensuring the just resolution of real disputes. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."). We do not question that the damages class action serves a legitimate function when it enables recovery on behalf of a broad class whose members have each suffered an actual but small injury. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). When it is used, however, to multiply by many thousands the kind of recovery – unmoored to a concrete injury – that this Court has compared to a "wager upon the outcome" of a lawsuit, *Vermont Agency*, 529 U.S. at 772, it is not within the traditional and legitimate role of the courts.

A finding that Article III jurisdiction is lacking here would by no means undermine enforcement of § 8(a). RESPA itself not only is a criminal statute, but also has civil enforcement provisions that permit either federal or state regulators to seek broad injunctive relief to prevent violations and protect consumers. *See* 12 U.S.C. § 2607(d).[22] In addition, it explicitly preserves from preemption state laws that govern affiliated business arrangements, and many states – including Ohio – regulate extensively the

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[22] HUD actively enforces RESPA, including § 8(a), as do state insurance officials. *See*, *e.g.*, Press Release, *HUD Settles Allegations that Prospect Mortgage Violated RESPA and FHA Reporting Requirements*, HUD No. 11-146 (July 13, 2011), *available at* http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2011/HUDNo.11-146.

business of title insurance and the role of title insurance agents. *See*, *e.g.*, Ohio Rev. Code §§ 3953.25, 3953.26 (restricting commissions payable for title insurance to licensed title insurance agents and prohibiting the payment of other inducements to obtain title insurance business); Palomar, *Title Insurance Law* ch. 18. Although First American is confident that it violated neither RESPA nor state law through the transactions that Edwards has alleged, this Court need not be concerned that there is any shortage of enforcement authority available if federal or state regulators think otherwise.

Furthermore, allowing a plaintiff to pursue a statutory cause of action in the absence of an actual injury would expand judicial and legislative power at the expense of the executive. Unlike a private litigant, the executive does not need to establish standing to pursue a legal violation: criminal and civil enforcement is brought by the executive in the *public* interest, and the executive exercises considerable discretion – usually, though not always, unreviewable, *see Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) – with respect to which violations or potential violations warrant the commitment of executive resources to pursue. Unlike private litigants and unelected judges, political actors in the executive branch remain accountable through the democratic process for decisions to enforce (or not to enforce) statutes in the public interest.[23]

The limits on the judicial power are not simply a constitutional nicety; they significantly affect those who are subject to suit. It should never be forgotten

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[23] *See generally* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. Pa. J. Const. L. 781 (2009).

that the "exercise of judicial power . . . can . . . profoundly affect the lives, liberty, and property of those to whom it extends." *Valley Forge Christian College*, 454 U.S. at 473. A person who has suffered a legal wrong deserves a forum to vindicate her interest and obtain compensation, and a wrongdoer is fairly held accountable for the harm his wrong inflicts on others. But it is no part of the judicial role to inflict a punishment, and to award a windfall, at the behest of a claimant who has suffered no harm.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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)

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

August 22, 2011

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STATUTORY PROVISIONS INVOLVED

1. Section 2 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601, provides:

§ 2601. Congressional findings and purpose

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

2. Section 3 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2602, provides:

§ 2602. Definitions

For purposes of this chapter –

(1) the term "federally related mortgage loan" includes any loan (other than temporary financing such as a construction loan) which –

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corpora-

tion, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term "creditor" does not include any agency or instrumentality of any State;

(2) the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration;

(3) the term "Settlement services" includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term "title company" means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

(6) the term "Secretary" means the Secretary of Housing and Urban Development;

(7) the term "affiliated business arrangement" means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term "associate" means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.

3. Section 4 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2603, provides:

§ 2603. Uniform settlement statement

(a) The Secretary, in consultation with the Administrator of Veteran's Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the

borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.

4. Section 5 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2604, provides:

§ 2604. Special information booklets

(a) Distribution by Secretary to lenders to help borrowers

The Secretary shall prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services. The Secretary shall distribute such booklets to all lenders which make federally related mortgage loans.

(b) Form and detail; cost elements, standard settlement form, escrow accounts, selection of persons for settlement services; consideration of differences in settlement procedures

Each booklet shall be in such form and detail as the Secretary shall prescribe and, in addition to such other information as the Secretary may provide, shall include in clear and concise language –

(1) a description and explanation of the nature and purpose of each cost incident to a real estate settlement;

(2) an explanation and sample of the standard real estate settlement form developed and prescribed under section 2603 of this title;

(3) a description and explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate;

(4) an explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incident to a real estate settlement; and

(5) an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

Such booklets shall take into consideration differences in real estate settlement procedures which may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

(c) Estimate of charges

Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

(d) Distribution by lenders to loan applicants at time of receipt or preparation of applications

Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

(e) Printing and distribution by lenders of booklets approved by Secretary

Booklets may be printed and distributed by lenders if their form and content are approved by the Secretary as meeting the requirements of subsection (b) of this section.

5. Section 6 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2605, provides:

§ 2605. Servicing of mortgage loans and administration of escrow accounts

(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

(b) Notice by transferor of loan servicing at time of transfer

(1) Notice requirement

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

(2) Time of notice

(A) In general

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or

transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor

servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

(c) Notice by transferee of loan servicing at time of transfer

(1) Notice requirement

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

(2) Time of notice

(A) In general

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

(B) Exception for certain proceedings

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(C) Exception for notice provided at closing

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property

for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

(3) Contents of notice

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

(d) Treatment of loan payments during transfer period

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

(e) Duty of loan servicer to respond to borrower inquiries

(1) Notice of receipt of inquiry

(A) In general

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

(B) Qualified written request

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that –

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

(2) Action with respect to inquiry

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall –

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) to the extent applicable, a statement of the reasons for which the servicer believes the

account of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes –

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

(3) Protection of credit rating

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

(f) Damages and costs

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

(1) Individuals

In the case of any action by an individual, an amount equal to the sum of –

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of non-compliance with the requirements of this section, in an amount not to exceed $1,000.

(2) Class actions

In the case of a class action, an amount equal to the sum of –

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of non-compliance with the requirements of this section, in an amount not greater than $1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of –

(i) $500,000; or

(ii) 1 percent of the net worth of the servicer.

(3) Costs

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

(4) Nonliability

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

(g) Administration of escrow accounts

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

(h) Preemption of conflicting State laws

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding

timing, content, and procedures for notification of the borrower.

(i) Definitions

For purposes of this section:

(1) Effective date of transfer

The term "effective date of transfer" means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

(2) Servicer

The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include –

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by –

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

(3) Servicing

The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

(j) Transition

(1) Originator liability

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

(2) Servicer liability

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

(3) Regulations and effective date

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

6. Section 8 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607, provides:

§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law

for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone,[1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any

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[1] So in original. The comma probably should not appear.

required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate

title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

7. Section 12 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2610, provides:

§ 2610. Prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements

No fee shall be imposed or charge made upon any other person (as a part of settlement costs or otherwise) by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a mobile home), or by a servicer (as the term is defined under section 2605(i) of this title), for or on account of the preparation and submission by such lender or servicer of the statement or statements required (in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C. 1601 § et seq.].

8. Section 16 of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2614, provides:

§ 2614. Jurisdiction of courts; limitations

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is

alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.