No. 10-708

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus Curiae RESPRO®—the Real Estate Service Providers Council, Inc.—is a non-profit trade association comprised of more than 150 members from all segments of the residential home buying and financing industry whose common bond is to offer so-called "one-stop shopping programs" for homebuyers through alliances, contractual agreements and arrangements known under the Real Estate Settlement Procedures Act ("RESPA") as "affiliated business arrangements" or "ABAs." These include joint ventures, parent-subsidiary relationships, minority investments in existing providers, strategic alliances and marketing agreements to name a few.

RESPRO is particularly interested in this case because the investment in another settlement service provider, like that made by Petitioner here, is a common course of conduct engaged in by RESPRO members. Indeed, because such investments and the formation of ABAs are a form of "vertical integration" that enable new entry into real estate service markets and increase competition and service levels, the work of ABAs is often challenged. This is not unlike in earlier days when large supermarkets, chain stores, or other new business models had to defend against unfair and anti-competitively

[1] The parties have consented to the filing of this brief in letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus, its members, or their counsel made a monetary contribution to this brief's preparation or submission.

motivated attacks. The irony here, however, is that the majority of RESPRO members—which primarily consists of real estate brokerage firms, title agencies, escrow companies, home warranty companies, and mortgage lenders or brokers—are privately owned and or relatively small businesses. Indeed, the formation of ABAs often permits small, family owned, companies to raise capital, add needed business expertise, and solve business succession issues.

Since 1992, RESPRO has advocated for a legal and regulatory environment that promotes and does not unreasonably discriminate against one-stop shopping programs and ABAs. RESPRO also consistently provides regulatory compliance programs and publishes guides and articles about RESPA, ABAs, and relevant industry issues, and regularly testifies and comments on proposed legislation or regulations in the consumer finance area. RESPRO has authored several other amicus briefs on these issues and some of its members have seen first hand the frustration of being defendants in putative class actions where the named plaintiffs after closing have sent thank you notes and presents to the companies they later have been convinced to sue. As such, RESPRO can provide a valuable perspective to the underlying issues in this case and the plaintiff's asserted injury.

SUMMARY OF ARGUMENT

Amicus seeks to make three main points. First, based on the text of statute and its accompanying regulatory history, it is clear that Congress did not define an injury that would confer standing absent a violation that adversely impacted the plaintiff. Section 8(a) of RESPA, on which Plaintiff Denise

Edwards seeks to base her only claim, was designed to protect consumers' pecuniary interests by deterring improper "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2); *see also* 12 U.S.C. § 2607(a). While Plaintiff alleges to the contrary, investment in title agencies or affiliated business arrangements ("ABAs") do not improperly facilitate referral fees or otherwise violate RESPA. Rather, Congress created an express safe harbor exemption for ABAs; it did not prohibit them per se in any way shape or form. Moreover, participating in a settlement transaction with an ABA, even one which does not meet RESPA's safe harbor exemption test, does not necessarily give rise to a pecuniary injury for the homebuyer or home seller. ABAs generally provide consumers with convenience, accountability and often lower prices. In any event, they do not constitute a RESPA violation absent proof of the elements of a Section 8(a) or 8(b) violation.

Second, Plaintiff's asserted injury does not confer Article III standing. She has not alleged any pecuniary injury. She cannot base her claim on standing on some asserted right to an impartial referral because RESPA does not create such a right. In fact, RESPA approves of exclusive referrals (therefore, presumably "partial") in some circumstances. Nor can she assert standing based on an alleged breach of a duty of loyalty, because nothing in Section 8(a) of RESPA gives rise to such a duty.

Third, Plaintiff should not be permitted to avoid pleading a traditional injury-in-fact just to increase the likelihood of obtaining a certified class. Even meritless class actions can create overwhelming pressure on defendants, particularly when the statute at issue permits the recovery of treble damages. The appropriate balance is to permit plaintiffs who can actually allege a traditional injury-in-fact to pursue their claims. In addition, federal and state agencies are empowered to, and have, enforced RESPA. Settlement service practices are also governed by state laws. Thus, there exists adequate measures to ensure RESPA's goal of avoiding kickbacks or referral fees that unnecessarily increase settlement costs.

ARGUMENT

I. PLAINTIFF'S CLAIMED INJURY SEEKS REDRESS FOR A RIGHT THAT DOES NOT EXIST IN RESPA OR OTHERWISE.

A. Plaintiff Attempts To Ground Her Claimed Injury And Theories In RESPA.

Pursuant to RESPA Section 8(a), the Plaintiff, Denise Edwards, alleges that First American unlawfully paid a "kickback" to numerous title agencies by purchasing an interest in the agencies for more than their market value, in expectation of future referrals. App. 58a (Compl. ¶ 41).[2]

Plaintiff does not claim that she suffered any financial or other actual harm, since, as the Court of Appeals recognized, she does not contend that these alleged kickbacks increased the cost of her title

[2] Citations to the Appendix accompanying the petition for a writ of certiorari are cited as "App. _" and citations to the Joint Appendix are cited as "J.A. _."

insurance or otherwise affected the quality of services she received from First American. *See, e.g.*, App. 4a; App. at 49a (Compl. ¶ 5) (complaining only of allegedly missing "information about the costs").

Nonetheless, Plaintiff's theory is that "RESPA gives homebuyer a right to conflict-free referral advice" (*i.e.*, a statutory right to an impartial referral for settlement services). Respondent's Brief in Opposition (hereafter, "Br. in Opp.") at 21; *see also* App. 19a. As explained below, this theory does not correspond to any right that exists in RESPA or otherwise.

Similarly, although it is not alleged in her complaint, Plaintiff asserts that the Defendants breached a "duty of loyalty" that she suggests is created by RESPA. Br. in Opp. at 21-22. RESPA also does not create such a duty.

This Court is only addressing question two from the petition for a writ of certiorari, regarding Article III standing and not whether there is statutory standing under RESPA. However, an understanding of RESPA and ABAs may help to shed light on the constitutional inadequacy of Plaintiff's asserted injuries.[3] Below, Amicus discuss the relevant aspects of both.

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[3] Alternatively, this Court could decline to reach the constitutional issue if nonconstitutional grounds exists that could resolve this case. *See, e.g.*, *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011).

B. ABAs Are Accepted And Have A Long History Under RESPA.

1. ABAs are just another form of "vertical integration" that enable new entry into real estate service markets.

An ABA essentially exists where one residential real estate service provider has an ownership interest, whole or partial, in another residential real estate service provider, not unlike when an auto company buys a parts company or a drug company buys distributors. Specifically, RESPA defines ABAs as arrangements in which:

> (A) a person who is in a position to refer business incident to or part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person,[4] 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 person directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

12 U.S.C. § 2602(7). Thus, ABAs arise when real estate providers have cross-ownership interests in other providers and refer or endorse their affiliate(s) to consumers.

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[4] The term "associate" is a catchall phrase that includes certain family members of the referring person, as well as various business associates. *See* 12 U.S.C. § 2602(8).

2. ABAs provide consumers with significant benefits.

For a residential real estate transaction to close successfully, many moving parts must come together. Once a real estate broker assists a consumer in finding a home, the homebuyer generally requires mortgage financing and the parties and the lender typically obtain title insurance to ensure that the title to the property is clear, and homeowners insurance to protect the underlying property. And of course, someone—a title company, escrow company, or lawyer—must close the transaction and help transfer the property. If any one of these providers does not do its job, the transaction will not close. Thus, one critical reason why residential real estate settlement service providers have formed ABAs is to coordinate and ensure these services are provided with the desired level of quality.

From the consumer perspective, ABAs also provide a one-stop shopping alternative that can facilitate the closing of the transaction. A consumer need not hunt down five different providers. Rather, when talking to a real estate brokerage firm, the customer might learn about or even meet a mortgage lender, independent title agency, title insurer, and/or escrow company, who have experience working together. Moreover, because the companies are affiliated, there is some accountability. Instead of a title agent and a mortgage lender pointing fingers at each other when a problem exists that could threaten a closing, they will work together toward resolution.

Contrary to some charges leveled at ABAs, economic studies show that in practice the convenience and accountability of one-stop shopping do not cost extra and can actually cost less. *See HUD'S Proposed RESPA Rule: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.,* 110th Cong. 138 (2008) (statement of David H. Stevens, then-President of Affiliated Businesses, Long & Foster Companies, on behalf of RESPRO) (in 2009, Mr. Stevens subsequently served as the Department of Housing and Urban Development ("HUD") Assistant Secretary and Federal Housing Administration Commissioner). Indeed, HUD and other regulators have consistently acknowledged the benefits that ABAs (previously called "controlled business arrangements" or "CBAs"), offer to consumers. *See, e.g.*, Amendments to Regulation X, the RESPA regulation, 59 Fed. Reg. 37,360, 37,361 (July 21, 1994) ("[ABAs] and so-called 'one-stop shopping' may offer consumers significant benefits including reducing time, complexity, and costs associated with settlements").[5] Thus, there are numerous legitimate and pro-competitive justifications for forming an ABA.[6]

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[5] *See also In re Request for Comment on Proposed Amendments to the Regulations Implementing RESPA*, Docket No. FR-5180-P-01, at 30 (June 11, 2008) http://www.ftc.gov/os/2008/06/v080012respa.pdf ("Bundling related services can create efficiencies in–lower the costs of–providing those services, and discounting the bundle allows consumers to pay less for the services.").

[6] While Plaintiff insinuates that ABAs are simply designed to facilitate referral payments or kickbacks, and frequently refers to the First American "scheme" in this case, as if there were some preconceived attempt to deceive, a RESPA Section 8(a) claim contains no element of intent. *See Glover v. Standard Fed. Bank*, 283 F.3d 953, 964-65 (8th Cir. 2002) (rejecting

3. The formation of ABAs often permits small companies to raise capital, add needed business expertise, and solve business succession issues.

The great majority of RESPRO's members are non-publicly traded companies, and include many relatively small, family-owned companies struggling with what has been a very difficult real estate market. For many of these entities, and countless others, an ABA business model can provide needed capital and needed expertise, each of which helps smaller companies compete in the marketplace and better finance their businesses. Indeed, as HUD noted in its Economic Analysis accompanying its June 7, 1996 final RESPA regulation:

> there is some reason to expect that referrals among affiliated firms may reduce costs to business and consumers. Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement

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argument that payments for a referral were automatically illegal under RESPA Section 8(a) because "inventive minds making clever arguments can turn virtually *any* payment flowing from a lender to a broker, in connection with the payment of a mortgage loan, into a purported placement for the unlawful referral of business;" such an argument would "clash" with Section 8(c), which expressly permits reasonable payments for goods and services even when done in connection with a referral) (emphasis in the original). As the *Glover* court recognized, Section 8(c) exempts from liability payments made for fair value, regardless of intent or whether those payments accompany a referral, *id.* at 964, and also exempts ABAs that meet its three safe harbor requirements. 12 U.S.C. § 2607(c)(4).

> service provides. In the long run, any cost savings should be passed on to consumers in most cases.[7]

C. Plaintiff's Claims Are Governed By RESPA Section 8.

Plaintiff's claim here is that Petitioners violated Section 8(a) of RESPA which 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." 12 U.S.C. § 2607(a). Section 8(b) prohibits certain unearned fees. 12 U.S.C. § 2607(b). Together, these are the RESPA Section 8 prohibitions.

However, RESPA also provides that certain courses of conduct are exempt from these prohibitions. "[T]he 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," is, for example, exempt. 12 U.S.C. § 2607(c)(1)(B). Any payment that is reasonably related to the fair value of a service, good, or facility furnished also is exempt. *Id.* at 2607(c)(2). In addition, RESPA provides a safe harbor exemption for ABAs under Section 8(c)(4), which provides:

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[7] HUD's Regulatory Impact Analysis accompanying its June 7, 1996 final RESPA regulation governing affiliated business arrangements.

> Nothing in this section [i.e., RESPA § 8] shall be construed as prohibiting . . . affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred . . . , (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.

12 U.S.C. § 2607(c)(4).

D. RESPA Does Not Give Consumers A Right To Conflict-Free Referral Advice.

One assertion made by Plaintiff Edwards in this case (Br. in Opp. at 21) and often made in other RESPA cases, is that RESPA was designed to give consumers an impartial (or "conflict-free") referral for settlement services. This is plainly untrue. When one reviews the provisions of Section 8 discussed above, it is clear that all that is prohibited is a payment in exchange for a referral of settlement services. Referrals themselves are nowhere proscribed in any case where the referring party does not receive a "thing of value."[8] Thus, it is not

[8] "Thing of value" is broadly defined and not only encompasses the payment of monies, but also covers the offering of discounts, the provision of free services and goods and so on. *See generally* 24 C.F.R. § 3500.14(d). But it does not include obtaining a

surprising that referrals of services are lawfully made to friends, relatives, customers, and entities with whom long established business relationships exist.

The notion that impartial referrals were desired apparently comes from a misreading and improper characterization of Section 8(c)(4) of RESPA as an outlawing of ABAs unless certain conditions are satisfied.[9] In fact, however, Congress did not prohibit ABAs. Rather, as the plain text of the statute reveals, it gave ABAs a safe harbor that exempts participants in ABAs from application of Section 8 under certain conditions (including certain required disclosures). What Edwards and numerous others misconstrue is that if a participant in an ABA does not meet the test for an exemption, there is no automatic RESPA violation unless the elements of a violation are proven and no other exemption applies. *See, e.g., McCullough v. Howard Hanna Co.,* No.

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feeling of confidence, satisfaction, or well-being that you have made a referral to someone whom you think will do a good job, or who needs the work, or whom is a friend. And nowhere in RESPA is there an obligation to disclose why a referral is made or a standard that the absolutely best referral (assuming that could even be defined) must be made.

[9] Some courts have reached this conclusion by relying on comments from a House Report submitted in conjunction with the 1983 amendments to RESPA. *See, e.g., Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 987 (6th Cir. 2009) (citing H.R. Rep. No. 97-532 (1982)). While that Report expressed concern about a referrer "los[ing] its impartiality," Hr. Rep. No. 97-532 at 52 (1982), as noted above, Congress did not ban referrals that are not "impartial" and clearly permitted express referrals.

1:09cv2858, 2010 WL 1258112 at *3 (N.D. Ohio Mar. 26, 2010) (citing additional cases); *cf. infra* note 11.

1. Before 1983, RESPA did not address ABAs.

Congress enacted RESPA in 1974. Before 1983, when Section 8 of RESPA introduced an exemption for ABAs (then known as controlled business arrangements or "CBAs"), 12 U.S.C. § 2607(c)(4), there was no provision expressly prohibiting or regulating such arrangements. In the summer of 1980, HUD published a Federal Register notice (labeled an "interpretative rule"), which HUD said was issued in response to public inquiries about "controlled business." *See* Effect on RESPA on Certain Practices Known as Controlled Business, 45 Fed. Reg. 49,360 (July 24, 1980). This notice stated that a "'controlled business' relationship *may* be a violation of Section 8," but did not really explain how or when this could occur. *Id.* (emphasis added). Two years later, HUD withdrew the 1980 interpretative rule. HUD had received "severe criticism" for failing to address the real question—"whether, or under what circumstances, a return on capital invested which did *not* vary in proportion to volume or value of business referred" was impermissible—and for implying that CBAs might be illegal per se. *See* 47 Fed. Reg. 21,304, 21,304 (May 18, 1982). HUD replaced its original notice with one clarifying that ABAs were not per se illegal but that a problem could be raised if returns of capital were based on referrals rather than ownership interests—a concern that Plaintiff has not raised here. *See id.*

2. In 1983, Congress provided that ABAs were exempt from RESPA Section 8 scrutiny under three provisos.

In 1983, Congress passed what is currently the affiliated business arrangement exemption: Section 8(c)(4) of RESPA. At the Housing Subcommittee markup of the bill, a proposal to limit or prohibit CBAs by permitting them in only a small percentage of transactions was raised but ultimately rejected.[10] Thus, Congress ultimately passed the ABA "exemption" but declined to otherwise prohibit or regulate ABAs. The exemption as enacted, quoted above, places ABAs beyond Section 8 scrutiny if the parties satisfy three provisos: (1) make the appropriate disclosure to the consumer; (2) do not require use of the ABA; and (3) receive returns based on ownership interests rather than referrals. *See* 12 U.S.C. § 2607(c)(4).

3. Failure to disclose an ABA relationship is not a per se RESPA violation.

Participants in ABAs who want to take advantage of the 8(c)(4) exemption should provide the

[10] Representative Jerry M. Patterson proposed placing a fifty percent limitation on arrangements involving title companies, meaning that a title company participating in a transaction involving a CBA for that company would have to obtain fifty percent of its business from outside referrals. Patterson argued this restriction would require the entity to demonstrate that it could compete successfully in the marketplace. *See Impact of Regulations Under the Real Estate Settlement Procedures Act on Small Business: Hearing before the H. Comm. on Small Bus.*, 103rd Cong. 32, at 187-89 (1993).

required disclosure describing the arrangement as HUD has specified. However, simply because a disclosure is not made or not made properly does not mean that the participant violated Section 8 of RESPA such that they can be held liable for three times the value of the settlement service involved in the alleged violation. 12 U.S.C. § 2607(d)(2). A plaintiff making such an allegation would still be required to show that the referring party obtained a referral fee in exchange for the referral or that an unearned fee was received in violation of Section 8(b). Claims to the contrary are not consistent with RESPA's plain statutory language[11] and do not support Edwards's claim that she has sufficient

[11] Two courts—*Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268 (N.D. Ohio 2006) and *Minter v. Wells Fargo Bank, N.A.*, No. WMN-07-3442, 2011 WL 1675262, at *10 (D. Md. May 3, 2011), have ignored that Congress created an ABA safe harbor exemption, not a prohibition, and have seized on language in Section 8(d)(3) of RESPA to conclude that a failure to comply with all of Section 8(c)(4)'s requirements is an automatic RESPA violation. Section 8(d)(3) in essence provides that no person should be held to violate or not to comply with the ABA safe harbor disclosure component if, even though they did not provide a disclosure in a particular case, they show 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." 12 U.S.C. § 2607(d)(3). Based on this language, which obviously was intended not to convert an inadvertent error into an automatic disqualification from the exemption, these courts contend that the ABA safe harbor provisions are mandatory and failure to adhere to them are automatic RESPA "violations." Amicus respectfully suggests that such an interpretation is contrary to the overall statutory framework of RESPA and is erroneous.

injury to prosecute a RESPA claim for damages based on the incorrect premise that she had a right to an impartial referral or to some referral free of a tainted market.

E. The Particular Violation Alleged Here—That First American Overpaid For Its Interest In The Agency—Is Not The Kind Of Thing That RESPA Was Designed To Address.

As part of her claim Plaintiff asserts that First American overpaid for its interest in Tower City Title. Accepting that allegation as true does nothing to establish Plaintiff's injury. The theory that overpaying for an interest in a title agency somehow secured future referrals is inherently speculative, raising a seeming myriad of issues about whether putative class members were in fact referred within the meaning of RESPA, and referred in exchange for that overpayment. However, even assuming that this could be proven for each putative class member, regardless of how long ago this "overpayment" was made, it can not permit consumers to recover damages if, as is the case here, no separate injury-in-fact was alleged or occurred.

The theory underlying the enactment of RESPA was that referral fees tended to increase the amount of settlement service costs. *See* 12 U.S.C. § 2601(b)(2). But here, where there is an allegation of overpayments made years ago for a minority interest in a title agency (App. 51a-52a (Compl. ¶ 16)), and where there is no showing that title costs increased or that individual consumers were harmed, there can be no private recovery of damages under RESPA and certainly no Article III standing.

II. PLAINTIFF LACKS ARTICLE III STANDING.

This Court has repeatedly recognized the important limitation on judicial power reflected in Article III's standing requirement. Adopting the view of the Ninth Circuit in this case would significantly limit Article III's force and permit Congress to undermine the separation-of-powers principle grounded in it. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1148 (2009); *cf. City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Article III provides that the "judicial Power" of the United States can be applied only to decide "Cases" and "Controversies." U.S. Const. Art. III. This Court has interpreted Article III to require that: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Friends of Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 80-81 (2000).

The central issue in this case is whether Plaintiff has alleged an "injury-in-fact." That is, "a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Vt. 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)). The Constitution does not permit Congress to simply dispense with Article III's standing requirement by adopting a statute. *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."); *see also Valley Forge Christian College v. Ams. United for Separation of Church & State*, 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.").

In other words, even when Congress grants a party the right to sue for relief based on a defendant's violation of a federal statute, that is not in itself sufficient to confer standing. *See id.; see also, e.g., Gollust v. Mendell*, 501 U.S. 115, 125 (1991) (Securities Exchange Act of 1934 could not be interpreted to permit party later "divested of any interest in the outcome of the litigation" to pursue claim because of "serious constitutional doubt whether" such a plaintiff "could demonstrate the standing required by Article III's case-or-controversy limitation"). Thus, courts must determine, even when plaintiffs are pursuing claims under such statutes, that Article III's separate requirements for showing an injury-in-fact are satisfied. *See id.*; *see also Summers*, 129 S. Ct. at 1149; *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Here, the Ninth Circuit held Article III standing existed based on its conclusion that RESPA created a cause of action addressing Defendants' conduct. The Ninth Circuit summed up its holding this way: "Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants." App. 7a;[12] *see also id.* at 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.").

The Ninth Circuit based this conclusion on a misinterpretation (App. at 4a) of this Court's decision in *Warth v. Seldin*, 422 U.S. 490 (1975), wherein this Court stated: "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). However, reading *Warth*, and this Court's other Article III cases, in context, demonstrates that Congress cannot simply create a legal right out of whole cloth and thereby create standing. "Art. III's requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself." *Id.* at 501; *see also Raines*, 521 U.S. at 820 n.3. The plaintiff must "allege specific, concrete facts demonstrating that the challenged practices harm *him*." *Warth*, 422 U.S. at 508 (emphasis provided).

Under a proper Article III analysis, it is clear that Plaintiff lacks standing because she failed to allege any injury-in-fact. She alleges no pecuniary injury, no informational injury, and no other form of

[12] Amicus are not conceding that Plaintiff has even statutory standing under RESPA to pursue her claim, but limits its discussion in this brief to the Article III standing question upon which this Court granted the petition for a writ of certiorari.

"distinct and palpable" injury to herself or imminent threat of such injury. *Id.* at 501.

A. Plaintiff Alleges No Pecuniary Injury.

It is undisputed that, based on the State of Ohio's filed rate regulatory regime, all title insurance available in Ohio at the time of Plaintiff's purchase was offered at the same price. App. 14a (noting that Plaintiff "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price"); *cf.* Br. in Opp. at 6 & n.3. As recognized below, Plaintiff does not allege that "the charge for title insurance was higher than it would have been without the [alleged] exclusivity agreement." App. 4a. "Plaintiff does not and cannot make this allegation because Ohio law mandates that all title insurers charge the same price." *Id.* Plaintiff also does not allege she received inadequate (or less) value from First American. In other words, she does not allege that she could have received better service from another title insurer.

Plaintiff, however, asserts that "the absence of an 'overcharge'" is not the same as "the absence of economic injury." Br. in Opp. at 22. That may be true in general, but Plaintiff does not adequately allege any economic injury.

In opposition to certiorari, Plaintiff claims she suffered an "economic injury" resulting from "systemic effects" of "reverse competition" in pricing of title insurance. *Id.* This too is inadequate to confer standing for three reasons.

First, as noted above, Plaintiff does not allege that she was actually charged and paid a price higher than she would have if there had not been the alleged exclusive agreement. App. 4a. The allegation simply is not in the Complaint.

Second, the suggestion that the Defendants' conduct resulted in the title insurance market in Ohio having higher prices on a "systemic" basis is pure conjecture. "Hypothetical assumptions," *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 614 (1989), and unsubstantiated, but "remote possibilities," "that [plaintiff's] situation might have been better had [the defendants] acted otherwise," do not suffice to establish standing. *Warth*, 422 U.S. at 507.

Finally, standing is also lacking when the alleged injury is "highly indirect and 'result[ed] from the independent action[s] of some third part[ies] not before the court.'" *Allen*, 468 U.S. at 757 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)). Here, in her opposition to certiorari, Plaintiff states that it is because the "industry is so concentrated," not the relationship between First American and Tower City, that has caused prices to be set where they are in Ohio. Br. in Opp. at 6 n.4.

In short, unable to assert that she was overcharged for title insurance, Plaintiff cannot obtain standing based on unpleaded and belated hypotheticals and implausible conjecture that, in any event, is not "fairly traceable to the challenged action of the defendant[s]." *Friends of the Earth*, 528 U.S. at 180.

B. Plaintiff Cannot Claim Standing On Any Asserted RESPA Requirement For An Impartial Referral.

In her opposition to certiorari, Plaintiff asserts that: "RESPA gives homebuyer [sic] a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement). The invasion of that statutory right is an injury conferring standing." Br. in Opp. at 21. That is incorrect.

a. Plaintiff has acknowledged that exclusive referral agreements—which could hardly be called "impartial"—are permitted under RESPA. Reply Br. of Appellant-Petition at 2, *Edwards v. First Am. Corp.*, No. 08-56536 (9th Cir. Apr. 20, 2009) ("[T]itle companies may have exclusive relationships with title insurers" under RESPA.).

As noted above, far from establishing a right to impartial (or "conflict-free") referrals, Congress did not ban exclusive referrals in RESPA and HUD has issued a policy statement about affiliated business arrangements which makes clear its understanding that exclusive referrals are permissible. *See* Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996) (discussing ABAs and their referral process). In reviewing guidelines that it utilizes, HUD cites an example of an exclusive referral agreement as permissible. *Id.* p. 29,264 ("[U]pon review there appears to be nothing impermissible about these [exclusive] referrals of title business from the title agency to the title insurance company.").

HUD has also noted that it is permissible for a title insurance agent to make what are the equivalent of exclusive referrals to title insurance companies when the agent performs certain defined "core title services." Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq*. (Sept. 19, 1996). HUD has interpreted such conduct to be consistent with RESPA's provision that permits 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," 12 U.S.C. § 2607(c)(1)(B). *Id.*

Thus, Plaintiff cannot base her standing argument on any right to an "impartial" referral.[13]

b. Likewise, Plaintiff cannot base her Article III standing argument on her suggestion that she has a right to a "timely disclosure" of the existence of the ABA or other factors relating to the referral. Br. in Opp. at 21.[14]

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[13] Similarly, the government argued in its brief on certiorari that the right to "conflict-free" advice is akin to a procedural right to a conflict-free judge. U.S. Inv. Br. 12. However, the denial of a procedural right alone is not sufficient to confer Article III standing. *See Summers*, 129 S. Ct. at 1151. The denial of the procedural right must "impair[]" some other "concrete interest[]" that arises to an injury-in-fact in its own right. *Summers*, 129 S. Ct. at 1151; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8 (1992).

[14] As noted above, in her Complaint, Plaintiff complains about a failure to disclose "critical information about the cost of title insurance" (App. 49a (Compl. ¶ 5)), but it is clear from the context of the paragraph containing this allegation and her later filings that the asserted right to information relates to a

As noted above, RESPA does not provide a party the right to know about an ABA arrangement per se. The disclosure of the relationship is only a defense to what would otherwise be considered a violation of Section 8(a). *See* 12 U.S.C. § 2607(c)(4); *see also supra* Part I.D. 2-3. While other sections of RESPA affirmatively require disclosure (for example, a right to receive a HUD-1 settlement statement, 12 U.S.C. § 2603, or a good faith estimate, 12 U.S.C. § 2604(c)), there is no affirmative obligation to disclose an ABA arrangement and even these other disclosure rights are not privately enforceable.[15]

The alleged failure of a defendant to make a disclosure consistent with the ABA exception in Section 8(c), however, does not by itself create an injury-in-fact. First, Plaintiff has not alleged how this type of disclosure affected her transaction. In fact, she has stated that "disclosure is . . . irrelevant" to her claims. J.A. 115. Second, standing should not hinge on the existence of a defense. The existence of a valid defense may mean that the plaintiff's claim is ultimately doomed, but it does not enter into the standing determination. *See, e.g., In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1004 (8th Cir. 2007) ("The existence of a defense to a cause of action does not deprive the plaintiff of standing.").

Plaintiff also cannot base her claim of standing on some more general claim of a right to unspecified

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disclosure of the allegedly "exclusive (and secret) referral agreements," (*id.*).

[15] *See, e.g.*, *Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir. 2010).

information about the "cost" of title insurance, especially in a state where cost is identical for title policies of all underwriters. When this Court has recognized an injury-in-fact relating to a party's non-receipt of information, it has been when the inability to obtain the information has caused some other distinct injury. In *FEC v. Akins*, 524 U.S. 11 (1998), this Court held that the information about the political committee in question would help the voters (the petitioners) "to evaluate candidates for public office." *Id.* at 21. In *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989), the plaintiff wanted access to meetings and records of the American Bar Association relating to the "judicial selection process" so that it could "monitor its workings" and more effectively participate in that process. The Court considered this a "concrete and particularized" harm because the individual sought and was denied specific information. *Id.* at 448-49.

Here, and it bears repeating, Plaintiff has not alleged that she was requesting any particular information or, more importantly, how that information would have altered her settlement in any way.

C. Plaintiff's Assertion Of A Breach Of Duty Of Loyalty Under RESPA Does Not Create Standing.

At the certiorari stage, in connection with her assertion of a right to a disclosure of the ABA status of Defendants, Plaintiff also suggested that she has somehow been injured by Defendants' breach of a "duty of loyalty" owed to her and that, based on this breach, she has been injured by way of deprivation of "property, contracts, and torts." Br. in Opp. at 21-22. Not surprisingly, Plaintiff never pled such an injury in her complaint. Moreover, RESPA does not create any such duty of loyalty under Section 8(a) that could form the basis of Plaintiff's now alleged injury-in-fact.

To read into Section 8(a) of RESPA a "duty of loyalty" would be contrary to its language and intent and would increase the potential liability of service providers like Amicus's members without reason or authority. Section 8(a) prohibits certain referral fees. It does not call on settlement service providers to act as agents for, or establish a fiduciary duty with, their customers.[16]

Even if Section 8(a) did somehow create a duty of loyalty, there still must be some underlying distinct injury-in-fact for Plaintiff to have Article III standing. *See, e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting argument in ERISA action that "deprivation of [an] entitlement to [a] fiduciary duty . . . constitute an injury-in-fact sufficient for constitutional standing"); *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-09 (6th Cir. 2007) ("Thus, even where statutory standing pursuant to

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[16] Nevertheless, most referring parties take their referrals very seriously because if they are not good referrals, they will get blamed and the repeat customer they are looking for will not materialize. Indeed, as one authoritative source noted, this is why in order to get a good capture rate in an ABA, you need great service and great rates, not just an ABA since agents will be skeptical and afraid to make a bad referral. Weston E. Edwards, *Competition at the Point of Sale*, 56 Mortg. Banking 129 (Oct. 1995).

ERISA is satisfied, the elements of Article III must be met."). Here, Plaintiff has alleged no such underlying form of injury.

III. RESTRICTING PRIVATE DAMAGE RECOVERIES TO SITUATIONS WHERE INJURY IS ACTUALLY ALLEGED AND CAN BE PROVEN WILL NOT CUT OFF LEGITIMATE RESPA CLAIMS.

Amicus is not suggesting that claims under RESPA based on compensated referrals are never actionable. In theory a plaintiff could be overcharged (in some states) or have a basis for a claim about the level of service he or she received, or some other concrete and particularized injury traceable to the defendant's conduct. To have Article III standing, however, those types of injuries must be alleged, and here they were not. Moreover, where the claim is brought as a class action for damages, they must be provable with common evidence and facts that predominate. *See* Fed. R. Civ. P. 23; *see also, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

Here, Edwards, has not (and apparently, based on her testimony, cannot allege) any overcharge or dissatisfaction with the level of service she received. In short, she is complaining about nothing.

Perhaps she has chosen to plead her claims in the way she has in order to make it more likely that a class could be certified, to claim as she does that "all of the" putative class members were "injured in precisely the same way." App. at 49a (Compl. ¶ 5).

But Article III does not permit a plaintiff, even one trying to certify a class action, to avoid pleading an actual injury-in-fact. This Court has previously recognized the threat that an unchecked class action device can pose. *Cf. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. at 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."). That is particularly concerning when the statute at issue, as RESPA does, permits the trebling of damages and an award of attorneys' fees.[17] In the words of Judge Friendly, the class action device alone can at times result in "blackmail settlements," where even defendants with meritorious defenses feel compelled to settle based on the enormous threat of liability a class action can present. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)). Expanding the ability to pursue class claims in federal court by altering the traditional injury-in-

[17] For Section 8 violations, RESPA provides:

> 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.

12 U.S.C. § 2607(d)(2); *see also* 12 U.S.C. § 2607(d)(5) (permitting the award of costs and attorneys' fees).

fact requirement for plaintiffs will simply make this practice more prevalent.

Class actions, of course, have a proper and important role to play in our judicial process. However, permitting them (or any litigation in federal court) to proceed even without the important limitations of Article III's standing requirements, is not what Congress or the framers of our Constitution envisioned.

That does not mean that violators of RESPA will escape scrutiny. First, those actually suffering an injury-in-fact may pursue claims. Second, HUD and state regulators have been empowered to enforce RESPA restrictions to prevent violations of RESPA, and frequently do so. *See* 12 U.S.C. § 2607(d)(4); *see also, e.g.*, *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1009 (9th Cir. 2002) ("HUD is the administrative agency charged with enforcing RESPA."); U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: RESPA SETTLEMENT AGREEMENTS, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/ramh/res/resetagr (last visited Aug. 26, 2011) (identifying twenty-five RESPA settlement agreements from 2006 to present). As of July 21, 2011, the Bureau of Consumer Financial Protection, created by the Dodd-Frank Act, can enforce RESPA and has even greater powers to do so. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, §§ 1011(a), 1012(a)(10), 1002(12)(m), 1061-62 (2010). Third, state laws also regulate settlement services conduct and are not preempted by RESPA. *See, e.g.*, *First Fed. Sav. & Loan Ass'n v. Greenwald*, 591 F.2d 417, 420 & n.5 (1st Cir. 1979) (noting that "any state law with respect to settlement practices" that is not inconsistent with RESPA is not preempted by it) (*citing* 12 U.S.C. § 2616). Thus, there is no need to allow private enforcement of RESPA when no traditional injury-in-fact has been alleged, much less incurred.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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