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No. 10-708

IN THE
Supreme Court of the United States

THE FIRST AMERICAN CORPORATION AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE EDWARDS,
Respondent.

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

BRIEF OF THE AMERICAN ESCROW ASSOCIATION, CONSUMER MORTGAGE COALITION, MORTGAGE BANKERS ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, AND REAL ESTATE SERVICES PROVIDERS COUNCIL, INC. (RESPRO®) AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* and their members have a strong interest in the proper and consistent construction and application of existing federal statutes governing the mortgage lending industry.

The American Escrow Association is a national association of real estate settlement agents. It acts on behalf of professionals conducting all types of settlement practices throughout the United States. Its goals are to further the knowledge and professionalism of settlement agents and to educate and advise decision makers at the national level on issues of consequence to the settlement industry as a whole.

The Consumer Mortgage Coalition is an industry trade group representing national residential mortgage lenders, servicers, and service providers. Its members participate in every stage of the home financing process, from providing loan information and taking loan applications to processing and funding loans, to purchasing loans from brokers and other lenders, and to pooling loans for sale on the secondary market as mortgaged backed securities. The Coalition acts to pursue

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented 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 counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

reform of the mortgage origination process, to assure that consumers are properly informed when making credit choices, and to reduce abusive lending practices. It participates in almost every aspect of federal legislative activity and regulatory rulemaking relating to the mortgage industry.

The Mortgage Bankers Association (MBA) is a national association representing the real estate finance industry. It has over 2,200 members comprised of real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies, and others in the mortgage lending field. MBA seeks to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. It promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and publications.

The National Association of Realtors® is the country's largest membership organization for residential and commercial real estate agents. It provides ongoing research and education programs for its members' professional development, advocates for laws and policies that support the right to own, use, and transfer real property, and develops and promotes standards for efficient, effective, and ethical real estate business practices.

The Real Estate Services Providers Council, Inc. (RESPRO®) is a national non-profit trade association of providers from all segments of the residential home buying and financing industry,

including real estate broker-owners, mortgage lenders, title agents/underwriters, homebuilders, and financial institutions. They all offer a diversified menu of services (commonly referred to as "one-stop shopping") for home buyers and home owners through wholly-owned subsidiaries or through joint ventures with other providers, both of which are designated under the Real Estate Settlement Procedures Act as "affiliated business arrangements." One of RESPRO®'s major purposes is to educate its members on how to comply with RESPA and other relevant federal and state laws through regulatory compliance publications, an on-line Regulatory Compliance Center, and regulatory compliance seminars.

SUMMARY OF ARGUMENT

1. Certiorari should be granted to reconcile the conflicting interpretations of the Real Estate Settlement Procedures Acts ("RESPA") among the federal courts of appeals. The *amici* and their members comprise the full spectrum of businesses involved in the residential mortgage industry, many of them operate in states falling within different federal Circuits, and they should not be subject to different federal legal obligations depending on where they happen to be doing business at the time.

2. The decision below was wrongly decided because the court of appeals appears to have believed, erroneously, that RESPA bars exclusive referral agreements. Rather, RESPA bars only referral agreements based on kickbacks or the giving of another "thing of value," the presence of which will "increase unnecessarily the costs" of the settlement service being provided. 12 U.S.C. 2601(b)(2).

Because RESPA permits exclusive referral agreements, the courts that have ruled that RESPA confers on consumers a right to "impartial" referrals are incorrect. There is no right to impartial referrals; there is only a right to referrals untainted by kickbacks that unnecessarily increase settlement costs. RESPA creates a private cause of action only when the price of the referred service is increased because of the kickback – that is, when the plaintiff actually suffered economic injury.

This construction of RESPA avoids the grave constitutional issues that the court of appeals' construction raises, for Respondent's concession that she was not overcharged for and is fully satisfied with her title insurance policy disables her from establishing the concrete and individualized injury required for Article III standing.

The court of appeals reached the wrong result in this case because it failed to appreciate the role of the kickback in the statutory scheme and because it focused instead on, and misconstrued, the language of RESPA's damages provision, § 2607(d), as amended in 1983. The amendment did not change RESPA's stated and precisely focused purpose of protecting consumers from kickbacks that tend to "increase unnecessarily the costs" of settlement services (12 U.S.C. 2601(b)(2)), or create a new RESPA cause of action for non-financial harm.

REASONS FOR GRANTING THE WRIT

I.

The Residential Mortgage Industry Needs A Uniform Federal Rule

Amici represent the full spectrum of participants in the residential mortgage industry who are subject to RESPA, from mortgage companies to mortgage brokers, commercial banks, thrifts, title insurers and agents, homeowners insurance providers, real estate agents, settlement agents, and mortgage service providers of all kinds. Although many of these companies are small and hence local, many others operate regionally and/or nationally. So long as the interpretation of RESPA remains unsettled, for the same conduct undertaken in different places these companies are subject to liability for what are in effect punitive damages in the fifteen states covered by the Third, Sixth, and Ninth Circuits, not subject to liability in the six states covered by the Fifth and Seventh Circuits, and left to guess at their exposure in the remaining states. This fracturing of the legal landscape along Circuit fault lines requires the Court's attention.

In addition to subjecting the industry to conflicting standards, the current uncertainty raises questions about the proper scope of RESPA class actions and the appropriate enforcement of its prohibitions. A RESPA plaintiff must sue in the federal or state court where "the property involved is located, or where the violation is alleged to have occurred." 12 U.S.C. 2614. Attorneys seeking to represent a nationwide class of plaintiffs who suffered no economic harm will surely sue in a federal district court within the Third, Sixth, or

Ninth Circuits and include putative class members residing in Texas, Louisiana, Mississippi, Wisconsin, Illinois, and Indiana who would have no cause of action in their home courts. Absent this Court's guidance, the procedural mechanism of a class action could be used improperly to change the substantive result of those putative class members' claims. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985) (forbidding a state court from using the class action device to apply its law to all class members when the state has a lack of "interest" in claims unrelated to that state and its substantive law conflicted with that of other states). Moreover, Federal Rule of Civil Procedure 82 provides that "[t]hese rules [including Rule 23] do not extend or limit the jurisdiction of the district courts," yet allowing a district court to assert jurisdiction over a claim which, if brought in the plaintiff's home district court, would be beyond that court's jurisdiction, has the practical effect of extending the court's jurisdiction.

Accordingly, because the members of the residential mortgage industry need a nationally uniform interpretation of RESPA, and because the existing Circuit conflict has the potential to cause mischief in the enforcement of RESPA class actions, the Court should grant the writ. .

II.
RESPA Grants A Private Cause Of Action Only When A Kickback Increases The Cost Of A Settlement Service, Not Whenever There Is An Exclusive Referral Agreement Or The Alleged Denial Of An "Impartial Referral"

A. RESPA's Goal Is To Bar Kickbacks That Increase Costs.

Congress expressly declared its intent in enacting RESPA: "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result * * * in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. 2601(b)(2).

Kickbacks obviously do "tend to increase unnecessarily the costs" to consumers because the service provider who pays a kickback in exchange for the referral typically treats the kickback as a cost of doing business, which it passes on to the consumer in the form of unnecessarily higher fees.

The statute refers to "fees" and "things of value" as well as kickbacks. It says that no person shall give "any fee, kickback, or thing of value pursuant to any agreement * * * that * * * a real estate settlement service * * * shall be referred to any person." § 2607(a). But the "fee" or "thing of value" must be in the nature of a kickback to create a private cause of action; *i.e.,* it must increase the service provider's cost of doing business and lead to unnecessarily higher fees to the consumer. Indeed, § 2607(c)(2) exempts "the payment * * * of a bona fide salary or compensation or other payment for

goods or facilities actually furnished or for services actually performed." A "reasonable relationship" test is used to determine whether a payment is bona fide: "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods." 24 C.F.R. § 3500.14. That is, the "excess" portion of the payment could represent a kickback that unnecessarily increased settlement costs.

Plaintiff recognizes that she must allege a kickback to recover, and she does: she says that First American overpaid for its 17 percent interest in Tower City. Pet. App. 51a-52a. Her theory is that First American in effect paid an advance kickback. Thus, instead of saying to Tower City, "I'll give you $10 for every consumer you refer to me," First American is alleged to have said something like, "Here's $100 in exchange for ten future referrals." *See id.*

The Department of Housing and Urban Development ("HUD") recognizes this point as well. Its regulations cite, as an example of a RESPA violation, the situation in which A gives settlement services at a cut rate to B, a builder, in return for B's agreement to refer home purchasers to A. 24 C.F.R. 3500, App. B. The necessary implication is that A will make up the discount by increasing its charge to home purchasers – and that, if A charged full price to B, there would be no violation even if as part of the transaction B had agreed to make the referrals.

In short, for RESPA to be violated, A must give B something undeserved, in the nature of a kickback, for in that instance A will ordinarily need to recover

what it gave to B and will do so through higher fees to its customers – *i.e.,* through an overcharge. That's what Congress meant to protect against: settlement service costs that are "unnecessarily increase[d]" by the presence of kickbacks. § 2601(b)(2).

B. RESPA Does Not Create A Cause Of Action For An Exclusive Referral Agreement Or The Denial Of An Impartial Referral.

Although a kickback would be expected in most cases to increase the price to the consumer, some settlement service fees are government-regulated (prohibiting the provider from raising the price) and in other instances a provider may choose not to increase the price to the consumer. In these cases the courts have considered alleged kickbacks that result in no harm, with different results (as noted above).

Some courts that hold that RESPA provides a private right of action for a kickback scheme that results in no harm to the consumer get around that problem by concluding that RESPA protects the consumer not only against referrals that unnecessarily increase costs because of kickbacks, but also referrals that, because of the presence of a kickback – even one that does not increase costs – are not "impartial." *See Carter v. Welles-Bowen Realty, Inc.,* 553 F.3d 979, 987 (6th Cir. 2009) (cited and relied on by the court below, Pet. App. 7a); *Capell v. Pulte Mtge. L.L.C.,* No. 07-1901, 2007 U.S. Dist. LEXIS 82570, at *5 (E.D. Pa. Nov. 7, 2007).

The court of appeals in this case never clearly identified what it considered to be the RESPA

violation at issue, but it appears to have agreed with the *Carter* line of cases in accepting Respondent's claim "that her title insurance was referred to First American pursuant to an exclusive agency agreement, which * * * was illegal under RESPA." Pet. App. 3a.

To support the proposition that RESPA creates a right to impartial referrals, *Carter* and cases like it point to a House Report accompanying the 1983 amendments. *Carter*, 553 F.3d at 987; *see also* Pet. App. 6a. The Report voiced a concern about "affiliated business arrangements," under which referrals might be made without the explicit payment of kickbacks or similar fees, and lamented that the advice of the referrer in such an arrangement "may lose its impartiality" and reduce the "healthy competition generated by independent settlement service providers." H.R. Rep. No. 97-532, at 52 (1982). From that Report these few courts erroneously infer that RESPA itself creates a private cause of action "for harm to consumers beyond an increase in the cost of settlement services"; *i.e.*, that § 2607(a) "allows individuals to police the marketplace in order to ensure impartiality of referrals and competition between settlement service providers." *Carter,* 553 F.3d at 987, 988 (quoting *Capell,* 2007 U.S. Dist. LEXIS 82570, at *1).

The inference is erroneous because in fact Congress did not ban referrals that are not "impartial." On the contrary, it exempted affiliated business arrangements under § 2607(c)(4) – arrangements which may include exclusive referral agreements – provided only that the consumer is not actually required to use any particular settlement

service provider; the referrer advises the consumer of the existence of the affiliated business arrangement and provides a timely estimate of the service fees to be charged; and the company in the arrangement holding an interest in the other company receives nothing more than a return on its ownership interest – *i.e.,* no kickbacks to unnecessarily increase costs. *See* § 2607(c)(4).

HUD has issued a policy statement that expressly recognizes that exclusive referrals are permissible under RESPA. Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 *et. seq.* (June 7, 1996). HUD explained that lawful controlled business arrangements under § 2607(c)(4) consist of "a referrer of settlement service business (such as a real estate broker or real estate agent) and a recipient of referrals of business (such as a mortgage banker, mortgage broker, title agent or title company)." *Id.* at 29,259. HUD also recognized that these arrangements "may reduce costs to businesses and consumers." Thus:

> Businesses may benefit from lower marketing costs and the ability to share information on the home purchase or refinancing among settlement service providers. In the long run, any cost savings should be passed on to consumers in most cases. Consumers may benefit

additionally from reduced shopping time and related hassles.[2]

In determining whether the entity receiving referrals is "merely a sham arrangement used as a conduit for referral fee payments, [the Policy statement] balances a number of factors in determining whether a violation exists." *Id.* p. 29262. It enumerates ten factors, which "will be considered together." *Id.* No one is "determinative"; rather, HUD will consider all the factors "and will weigh them in light of the specific facts." *Id.* The last of the ten factors is the existence of an exclusive referral agreement. *Id.* Example #4 following the list approves an arrangement involving an exclusive agreement. *Id.* p. 29264 ("[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.").[3]

Similarly, § 2607(c)(1)(b) of the statute expressly 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,"' and HUD has recognized that title insurance agents may make what are essentially

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

[3] *Amici* do not endorse the 1996 Policy Statement, which was promulgated without providing notice and an opportunity for comment, goes beyond the reach of the statute, and was recently held unconstitutionally vague in *Carter v. Welles-Bowen Realty, Inc.*, 719 F. Supp. 2d 846 (N.D. Ohio 2010). But the statement does demonstrate that, in HUD's view, exclusive referrals are permissible.

exclusive referrals to title insurance companies so long as the agent performs certain defined "core title services" for the company. *See* Statement of Policy 1996-4: Title Insurance Practices in Florida, 61 Fed. Reg. 49,397 *et seq.* (Sept. 19, 1996).

Respondent herself acknowledged in the court of appeals that exclusive referral agreements are permitted by RESPA.[4] Under these agreements, service provider referrals are not "impartial" and the "healthy competition generated by independent settlement service providers" (H.R. Rep. No. 97-532, *supra*) is reduced – all as expressly permitted by RESPA.

Accordingly, the court of appeals in this case erred in believing that RESPA does not permit exclusive referral agreements (and by implication grants a cause of action for referrals that are not impartial). It is true that RESPA gives an enforceable right to consumers to receive referral services "untainted" or "[un]sullied by kickbacks," *Carter,* 553 F.3d at 989, but only kickbacks that unnecessarily increase the costs of the settlement services.

That conclusion is strongly reinforced by RESPA's limitation of its private civil remedy to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). In many real estate transactions the seller or the lender may agree to assume some or all of the closing costs.

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[4] Reply Brief of Appellant-Petitioner, filed Apr. 20, 2009, at 2009 U.S. 9th Cir. Briefs LEXIS 735, at *3 ("title companies may have exclusive relationships with title insurers" under RESPA.).

If, for example, the appraisal in such a case was paid by the seller or lender but was tainted by a kickback, the borrower would have no remedy under § 2607(d)(2), showing that Congress meant to provide a remedy only to someone actually injured by an unnecessarily increased cost.

C. Construing RESPA To Create A Cause Of Action For Kickbacks Unnecessarily Increasing Costs Rather Than A Right To Impartial Referrals Avoids Article III Problems.

No one doubts that Congress may create new interests the invasion of which may confer Article III standing. *E.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). But not all new interests will qualify: Article III's injury-in-fact, causation, and redressability requirements must still be satisfied. *Id.* The injury-in-fact prong of the inquiry requires a showing of a legally protected interest that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). Although Article III injuries need not be financial in nature to be concrete and individualized, *id.,* they still must be concrete and individualized.[5]

Construing RESPA broadly to create a private right to an "impartial" referral for settlement services would raise serious Article III concerns, especially in a case like this one, where Respondent

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[5] As the party invoking federal jurisdiction, Respondent bears the burden of establishing these elements. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998).

(a) agrees that she was not overcharged, (b) has not alleged that there is any difference between the insurance policy she received from First American and a policy she could have received from any other, competing insurer, and (c) testified that she has no complaints about First American's policy or Tower City's work and that, so long as the price was the same, she would not have cared which insurer provided her policy. *See* Pet. 6. Given these undisputed facts demonstrating Respondent's satisfaction with the service and product she received, a complaint that she received an exclusive rather than impartial referral hardly states an injury sufficiently concrete and individualized, not conjectural or hypothetical, to satisfy Article III's injury-in-fact requirement.

Moreover, given her stated satisfaction, it is hard to see how the District Court could craft a remedy that would redress the ephemeral harm she has allegedly suffered. *See Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474, 486 (M.D.N.C. 2004) ("[E]ven if Plaintiffs were correct that RESPA confers upon them a statutory right to be free of kickback-tainted transactions and that this right meets the injury-in-fact element of standing, because Plaintiffs have not alleged that [Defendant] overcharged them, the Court cannot redress Plaintiffs' alleged injury."). A monetary award to Respondent will be an award for bringing a lawsuit, not a redress of a genuine injury.

D. The Court Of Appeals Misconstrued Section 2607(d)(2).

Section 2607(d)(2) provides that "persons who violate the prohibitions or limitations of this section

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." The court of appeals eschewed any analysis of what actually causes a RESPA violation. Instead, focusing only on this damages provision, it concluded that, because it does not mention an "overcharge" but instead refers to "any charge," RESPA creates a cause of action for three times the settlement service fee "[w]henever a violation * * * occurs." Pet. App. 5a. As shown above, however, no private right of action exists unless the cost of the settlement service at issue was unnecessarily increased by the giving of a kickback, fee, or thing of value in exchange for the referral. RESPA does not give consumers a right to receive only impartial referrals. The statute does not explicitly address this issue at all. Congress was concerned about whether a referral was being paid for, not whether it was impartial. Indeed, RESPA effectively allows referrals that are not impartial by permitting affiliated businesses to engage in exclusive referral agreements.

The court of appeals in this case and in *Carter* thought that the 1983 amendment to § 2607(d)(2) demonstrated Congress' intent to create a RESPA cause of action for non-financial harm. *See* Pet. App. 5a-6a; *Carter,* 553 F.3d at 987.[6] Before 1983, section

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[6] The court below and the *Carter* court repeated and perhaps were influenced by the similar error of the District Courts in *Kahrer v. Ameriquest Mtge. Co.*, 418 F. Supp. 2d 748 (W.D. Pa. 2006), *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478 (D. Md. 2006), and the other decisions cited in *Carter* at 553 F.3d at 983 n.2.

2607(d)(2) provided that a violator would be liable for "an amount equal to three times the value or amount of the fee or thing of value" whereas after the amendment the violator is liable for "an amount equal to three times the amount of any charge paid for such settlement service." The court below found it significant that Congress had "eliminated the 'thing of value' phrasing in the damages provision, replacing it with 'any charge paid,'" as if to say that Congress must have intended to expand the recovery of damages to cases in which no financial harm could be shown. Pet. App. 6a.

That analysis fails to appreciate that the earlier version of § 2607(d)(2) had two subsections, one establishing damages for a violation of § 2607(a) (kickbacks) and the other for a violation of § 2607(b) (fee splitting). *See* Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974). Section 2607(b) does not mention a "thing of value." Thus, when Congress in 1983 consolidated the two provisions of § 2607(d)(2) into one measure of damages for violations of both subsections (a) and (b), it necessarily removed the phrase "thing of value." Inferring a substantive change to expand the scope of recovery to cases where no financial harm may be shown contravenes this Court's caution that "'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States,* 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 187, 199 (1912)).

Nothing in RESPA's language or legislative history suggests that Congress intended, in

amending the damages provision of § 2607(d)(2), to expand RESPA's reach to provide a cause of action for the denial of an impartial referral. In particular, the 1983 amendment did not change RESPA's precisely stated purpose of protecting consumers from kickbacks that "increase unnecessarily the costs" of settlement services. § 2601(b)(2).[7] Thus, even if Congress intended in the 1983 amendment to expand recoverable damages from three times the amount of the overcharge to three times the amount of the entire service charge, that does not mean that Congress meant also to create a cause of action in cases where no overcharge is alleged or provable.[8]

In sum, the court below misconstrued § 2607(d)(2) and misunderstood RESPA. If Congress had meant to give consumers the right to "impartial" referrals, it would have banned all exclusive referral agreements. Instead it explicitly permits them. Hence the reasonable conclusion is that Congress meant to create a private cause of action under RESPA only for referrals causing an increase in price

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[7] In amending RESPA in 1983, Congress did not intend to "change current law which prohibits the payment of unearned fees, kickbacks, or other things of value in return for referrals of settlement service business."' H.R. Rep. No. 98-123 at 76 (1983).

[8] A contrary construction of RESPA could lead to ruinous liability of a settlement service provider who committed a technical violation of the statute, a result that would be inconsistent with other federal consumer laws that even for nontechnical violations impose a cap on exposure. *See* 15 U.S.C. 1640(a) (Truth in Lending Act), 15 U.S.C. 1681n(a) & (b) (Fair Credit Reporting Act), 15 U.S.C. 1692k(a) (Fair Debt Collection Practices Act).

to the consumer – an overcharge – because of the accompanying kickback. When an alleged kickback does *not* cause an increase in price – as all agree is the case here – the consumer has no injury and no cause of action under RESPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS M. HEFFERON
Counsel of Record
WILLIAM F. SHEEHAN
GOODWIN | PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for *Amici Curiae*

December 30, 2010

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