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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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December 30, 2010

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars who teach and write about federal courts and federal jurisdiction.[2] Although *amici* differ among themselves on the answers to the issues presented here, they are united in their belief that this case presents an unsettled constitutional question of great importance that the Court should resolve.

ARGUMENT

This case presents the question whether an individual who has not suffered an injury in fact has standing to sue in the federal courts based solely on the violation of a federal statute conferring a right of recovery on that individual. This Court has issued conflicting decisions regarding the proper resolution of this important question, and this question has divided the courts of appeals as well. Given the central role of standing in maintaining the appropriate

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the Sandra Day O'Connor College of Law, Arizona State University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

[2] The *amici* who join this brief as individuals and not as representatives of any institutions with which they are affiliated are: John Bronsteen, Loyola University Chicago School of Law; Scott Dodson, Associate Professor of Law, William & Mary School of Law; Robert J. Pushaw, Jr., James Wilson Endowed Professor, Pepperdine University School of Law; Michael R. Dimino, Sr., Associate Professor, Widener University School of Law in Harrisburg, Pennsylvania; F. Andrew Hessick, Sandra Day O'Connor College of Law, Arizona State University.

division of powers among the branches of government, it is critical that the law of standing be clear. Accordingly, this Court should grant review to clarify the requirements for standing under Article III.

I. THIS COURT SHOULD CLARIFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III

Article III of the Constitution limits the federal judicial power to resolving "Cases" or "Controversies." Standing is one of the doctrines that implement this restriction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). To establish standing to sue in federal court, a plaintiff must allege an "injury in fact" that is both "fairly traceable" to the defendant's alleged unlawful conduct and "likely" to be "redressed" by the requested relief. *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009); *see DaimlerChrysler*, 547 U.S. at 342; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

This Court has repeatedly noted that the injury-in-fact requirement, as well as the other components of standing, is a "key factor in dividing the power of government between the courts and the two political branches." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *see DaimlerChrysler*, 547 U.S. at 342 (describing standing's requirements as an "essential and unchanging part of the case-or-controversy requirement of Article III"). The requirement ensures that the judiciary stays within its "province . . . of decid[ing] on the rights of individuals." *Lujan*, 504 U.S. at 576 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 130, 170 (1803)); *see Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (standing ensures that courts only "decide on the rights of individuals").

Given the critical role that standing plays in preserving the separation of powers, it is absolutely essential that this Court clearly define the requirements for standing.

A. Lower Courts Have Disagreed on Whether the Violation of a Statute Suffices for Standing

Despite the importance of a clear law of standing, the law of standing has generated substantial confusion in the lower courts. *See* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 276 & n.3 (2008). One of the principal points of confusion in standing law is whether the violation of a statutory right unaccompanied by a factual injury suffices for standing. The confusion stems in large part from the role that the injury-in-fact requirement plays. As noted above, the purpose of the injury-in-fact requirement is to ensure that the federal judiciary limits itself to resolving only the "rights of individuals." *Hein*, 551 U.S. at 598. Given this role of the requirement, it is unclear whether an injury in fact is necessary in suits in which an individual alleges a violation of an individual right.

This confusion has led to disagreement in the lower courts over whether standing may be based on the violation of a right alone. Some courts of appeals, like the Ninth Circuit in this case, have held that the violation of a statutory right does provides the injury necessary for standing. *See Edwards v. First American Corp.*, 610 F.3d 514, 518 (9th Cir. 2010) ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants."); *see also, e.g.*, *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir.

2010) ("[T]he violation of a statute can create the particularized injury required by Article III . . . when an individual right has been conferred on a person by statute." (internal quotation marks omitted)); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d Cir. 2009) (finding standing based solely on violation of private right under RESPA); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988-89 (6th Cir. 2009) (stating that Congress "has the authority to create a right of action whose *only* injury-in-fact involves the violation of [a] statutory right"). For these courts, the injury in fact arises from the violation of the right itself. As the D.C. Circuit has explained, "[a]lthough it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute." *Zivotofsky ex rel. Ari Z. v. Secretary of State*, 444 F.3d 614, 619 (D.C. Cir. 2006).

Other courts of appeals have concluded that to establish standing an individual must allege some injury in fact in addition to the violation of a statutory right. *See, e.g.*, *Kendall v. Employees Retirement Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (rejecting standing based solely on claim of breach of fiduciary duty imposed by Employee Retirement Income Security Act of 1974 (ERISA) on the ground that the injury-in-fact requirement requires some injury to result from the breach); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated."); *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 594 (10th Cir. 1996)

(stating that the denial of a right against discrimination "does not constitute injury in fact" for standing; standing requires the individual to show that he would have received "the benefit at stake in the absence of discrimination").[3]

This Court should grant review to resolve these disagreements among the circuits and provide guidance on whether standing may exist based solely on the violation of a private right, even where that violation does not result in an additional factual injury.

B. This Court Should Resolve Whether the Injury-in-Fact Test Applies to Suits Against Private Individuals

This Court should also grant review to clarify whether the injury-in-fact requirement applies in suits, such as this one, against private individuals. This Court has repeatedly made it clear that the requirement applies in suits against the government. In *Lujan*, for example, Congress had enacted a

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[3] This issue has also arisen in the context of mootness. Mootness is the requirement of standing in a timeframe. A case becomes moot only if the plaintiff loses the interest that confers standing itself. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92 & n.5 (2000). Although most courts have concluded that a claim for nominal damages based on a violation of right unaccompanied by a factual injury suffices to prevent a case from becoming moot, *see Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (collecting cases from Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits holding that claims for nominal damages prevent mootness), at least one judge has concluded that, to be consistent with standing law, such claims should not be justiciable, *see Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (McConnell, J., concurring); *see also People for Ethical Treatment of Animals, Inc. v. Gittens*, 396 F.3d 416, 421 (D.C. Cir. 2005) (noting, but not answering, the question).

citizen-suit provision conferring a right on individuals to bring a civil action to enjoin the United States to comply with the requirements of the Endangered Species Act of 1973 (ESA). *See* 504 U.S. at 571-72. The Court held that, despite this citizen-suit provision, a private individual did not have standing to force the government's compliance with the ESA unless that individual suffered an injury in fact. The Court explained that the Constitution empowers the President to ensure that the government obeys the law, and that recognizing standing for private individuals based *solely* on the right conferred through the citizen-suit provision to demand government compliance with the law would "transfer from the President to the courts the Chief Executive's . . . constitutional duty . . . to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. Const. art. II, § 3). In so holding, however, the Court expressly limited the requirement of a factual injury to suits against the government; it did not address whether this requirement applies in suits against private individuals. *See id.* at 578 ("[I]t is clear that in suits against the Government, at least, the concrete injury requirement must remain.").[4]

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[4] In *Friends of the Earth*, the Court applied the injury-in-fact test in determining whether a plaintiff had standing in a suit against private individuals. But, in doing so, the Court did not say that the injury in fact was required; it found that there was sufficient injury for standing and, therefore, did not have occasion to say whether standing would have been proper in the absence of an injury in fact. *See* 528 U.S. at 183. Nor does *Vermont Agency* resolve whether an individual must establish injury in fact, as opposed to merely a violation of right, to have standing to bring suit against another private individual. There, the Court explained that an individual's interest in obtaining a bounty for a successful *qui tam* action did not support

Lower courts have disagreed in the wake of *Lujan* whether the injury-in-fact requirement applies to suits against private individuals. *Compare, e.g.*, *Wilson*, 98 F.3d at 594 (requiring injury in fact in suits against private individuals), *with Betancourt v. Federated Dep't Stores*, No. SA-09-CA-856-XR, 2010 WL 3199617, at *15 n.6 (W.D. Tex. Aug. 10, 2010) (suggesting that the injury-in-fact requirement does not apply to suits against private individuals), *and Olsen v. Hegarty*, 180 F. Supp. 2d 552, 564 n.3 (D.N.J. 2001) (same).

Nor is it clear whether Congress should have the power to confer standing on a private individual to sue another private individual based solely on a violation of law. On the one hand, standing arguably should be strictly limited in a suit against the government, because granting standing in those suits would allow the courts to dictate to the Executive the manner in which it should enforce government compliance with the law. A suit against a private individual does not raise this concern. On the other hand, disobedience of the law does not uniquely implicate any one individual's interest; instead, ensuring obedience of the law is a public interest generally shared by the community. As this Court has explained, the Executive has the task of enforcing these public interests, and Congress cannot transfer that power to individuals. *See Lujan*, 504 U.S. at 578.

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standing, explaining that standing requires the "violation of a legally protected right." 529 U.S. at 772.

II. THE STANDING ISSUE IN THIS CASE IS RECURRENT AND IMPORTANT

The Article III standing issues raised in this case are significantly important. Standing, as this Court has repeatedly explained, is essential to maintaining the separation of powers. *See, e.g.*, *Vermont Agency*, 529 U.S. at 771 (describing standing as a "key factor in dividing the power of government between the courts and the two political branches"); *Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993) ("standing is . . . essential . . . to . . . the idea of separation of powers on which the Federal Government is founded") (internal quotation marks omitted); *Hein*, 551 U.S. at 598 (plurality opinion) (noting that standing is a "controlling element" to maintaining "the judiciary's proper role in our system of government"); *id.* at 636 (Scalia, J., concurring in the judgment) (noting the "vital separation-of-powers aspect of Article III standing"). Precisely defining the limits of standing is therefore critical to preserving the proper distribution of power among the Judiciary, Congress, and the Executive. Lack of clarity and ambiguity in the law of standing may lead to federal courts either inappropriately exercising power beyond the scope authorized by Article III or erroneously dismissing for lack of jurisdiction cases over which the federal courts have jurisdiction.

Confirming the importance of accurately delineating the scope of the injury-in-fact requirement are the numerous decisions that the Court has issued detailing and refining that requirement. *See, e.g.*, *Summers*, 129 S. Ct. at 1148; *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007); *Friends of the Earth*, 528 U.S. at 183 (addressing whether fear of harm from

pollution constitutes injury in fact); *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (considering whether general water restrictions constituted injury in fact where plaintiffs could not establish that they would receive less water); *Lujan*, 504 U.S. at 563 (addressing whether potential endangerment of species constitutes cognizable injury); *Allen v. Wright*, 468 U.S. 737, 753-56 (1984) (considering whether stigma from discrimination constitutes injury in fact). Hardly any other issue has warranted so much of this Court's resources and attention.

Moreover, these issues are recurrent. In the context of RESPA alone, four circuits have already confronted the issue whether a violation of RESPA confers standing in the absence of a factual injury caused by that violation. *See Edwards*, 610 F.3d at 518 (finding standing based solely on a violation of RESPA); *Alston*, 585 F.3d at 763 (same); *Carter*, 553 F.3d at 988-89 (same); *Moore v. Radian Group Inc.*, 69 F. App'x 659 (5th Cir. 2003) (slip op. available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf) (denying standing based "simply" on "a violation of the language of [RESPA]").

And the issue is not limited to RESPA. Congress has created countless individual rights through statute, and federal courts often face the question whether a plaintiff may assert standing based solely on the violation of those statutory rights. *See Shaw*, 605 F.3d at 1042 (considering whether standing may rest solely on violation of rights under District of Columbia Consumer Protection Procedures Act); *Kendall*, 561 F.3d at 121 (considering whether breach of duty under ERISA supports standing); *Day v. Bond*, 500 F.3d 1127, 1139 (10th Cir. 2007) (considering whether violation of right against discrimination

under 8 U.S.C. § 1623 confers standing); *Zivotofsky*, 444 F.3d at 619 (considering whether standing may rest solely on violation of rights under Foreign Relations Authorization Act of 1972); *Wilson*, 98 F.3d at 594 (considering whether violation of right against discrimination under Fair Housing Act suffices for standing). Nor is the issue limited to statutory rights. Courts have confronted similar standing issues for constitutional rights. *See, e.g., Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 931 (9th Cir. 2008) ("Impairments to constitutional rights are generally deemed adequate to support a finding of 'injury' for purposes of standing.").

Accordingly, this Court should grant review to determine whether standing exists in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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