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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their petition for a writ of certiorari, and there are no amendments to that Statement.

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The government defends (at 7) as "correct" the Ninth Circuit's judgment that RESPA confers standing on a plaintiff "who alleges a kickback . . . whether or not the kickback demonstrably affected the price or quality of the relevant settlement service" and that such a plaintiff "has sufficient injury-in-fact to sue in federal court." The government's argument leaves no doubt that this case squarely presents both the statutory and Article III standing issues, matters of surpassing importance to the constitutional and statutory scheme, to petitioners, and to the industry. Neither the fact that the standing issues were decided in the context of an appeal under Federal Rule of Civil Procedure 23(f), nor the fact that the appeal is interlocutory, diminishes the importance of deciding the threshold standing questions now. To the contrary, given the stakes in this class-action litigation, it is important to resolve the questions presented without delay.

The government fails to reconcile the result below with this Court's decisions interpreting Article III to require a plaintiff to establish a "distinct and palpable injury" – separate from the interest in collecting a monetary reward from the suit – to have standing. *Gollust*, 501 U.S. at 126; *see Vermont Agency*, 529 U.S. at 772-73. The government compares plaintiff's "ability to receive dispassionate settlement-service advice" to a litigant's interest in having an unbiased judge. Br. 12. Leaving aside that respondent never alleged a deprivation of "dispassionate advice," the government's need to stretch for such an inapposite analogy emphasizes the unprecedented extension of the judicial power that the Ninth Circuit authorized.

Particularly in light of the difficult constitutional issue that would otherwise arise, RESPA is properly

read to restrict standing to private parties who can allege a concrete injury. In any event, Article III requires that result. The circuits have divided on these questions (as the government has previously acknowledged) and the lower courts are in disarray. Further, these issues are not only recurring (the decision below has already been followed twice) but also critical to those subject to RESPA. The petition should be granted.

I. THIS CASE PROVIDES A PROPER VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

A. The government recognizes (at 18) that "Article III standing" "may be decided in a Rule 23(f) appeal." And it admits (at 5) that respondent's complaint contains no allegation that she "paid more for title insurance," or "received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback." The government thus agrees that this case cleanly presents the question whether a private party can establish constitutional standing without suffering any injury other than the alleged violation of a "statutory right" – as respondent already conceded. *See* Cert. Reply 1.

The government further acknowledges (at 18) that the Court can review the statutory-standing issue "to the extent that it is necessary to construe RESPA to determine respondent's Article III standing." There should therefore be no dispute that the first question presented is likewise properly before the Court, because the Ninth Circuit's conclusion on the constitutional question rested exclusively on its holding that respondent had standing to sue under RESPA. *See* App. 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has stand-

ing to pursue her claims against Defendants."). The Ninth Circuit implicitly, and correctly, recognized that respondent had alleged no *other* injury – apart from what she characterizes as the "invasion of an individual statutory right," Opp. 18 n.10 – that could satisfy the Article III actual-injury requirement.

The government asserts (at 19) that it is not "clear that statutory standing may be raised on a Rule 23(f) appeal," but provides no reason to doubt it. *Steel Co.*, which the government cites, supports petitioners: it stands for the proposition that statutory standing *can* be considered before Article III standing. *See* 523 U.S. at 92, 97 n.2; Pet. 24 n.16. The government offers no support for any argument that appeals under Rule 23(f) are an exception to that rule, and such an exception would not make sense. If a reviewing court were required to take as a given a lower court's ruling on statutory standing, it would be forced to address the constitutional standing question in circumstances where a constitutional ruling might be unnecessary – contrary to "a familiar principle of [this Court's] jurisprudence." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993); *see FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 489-90 (1985) ("In view of our conclusion that the [plaintiffs] lack standing under the statute, there is no need to reach the Art. III issue decided by the District Court."). Especially in a case like this one, where the constitutional issue hinges (in the lower court's view) on the statutory issue, consideration of the statutory question cannot and should not be deferred.

There is likewise no merit to the government's suggestion (at 18-19) that the first question concerns the scope of the statutory right of action rather than

an issue of statutory standing. The challenge to respondent's right to maintain her action does not rest on whether the challenged conduct (*i.e.*, the investment in the title agency) could support liability, a question that would go to the scope of the cause of action. *See Steel Co.*, 523 U.S. at 97 n.2 (explaining that questions involving the scope of the statutory cause of action involve the question "whether *any* plaintiff [asserting a particular legal theory] has a cause of action under the statute"). Rather, petitioners' challenge is based on "whether [the statute at issue] authorizes *this plaintiff* to sue." *Id.* at 92 (emphasis added). Whether RESPA authorizes suits by plaintiffs who lack any concrete injury is thus a matter of statutory standing. *See also Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 287 (1992) (Scalia, J., concurring in the judgment) (one "element of statutory standing" is whether "the plaintiff is within the class of persons sought to be benefited by the provision at issue").

B. The government also argues (at 17) that the "interlocutory posture" of this appeal weighs against review, but it fails to respond to our point that, because the petition raises threshold issues of standing, review is appropriate now (Pet. 30 n.21). This Court regularly grants review of interlocutory decisions, particularly when, as here, the questions presented involve issues of jurisdiction or other "important and clear-cut issue[s] of law that [are] fundamental to the further conduct of the case." Eugene Gressman et al., *Supreme Court Practice* 281-82 (9th ed. 2007); *see Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (argued Mar. 29, 2011) (Rule 23(f) appeal); *see also Vermont Agency*, 529 U.S. at 770.

The government notes (at 19) that petitioners have raised numerous defenses to respondent's claims, but given the massive liability threatened in this case, confronted with "even a small chance of a devastating loss," petitioners will face "pressure[]" to compromise even "questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see* Pet. 31. Thus, the government's speculation (at 17-18) that this case may be resolved "on other grounds" does not justify denying the petition given the substantial questions about respondent's standing to maintain this suit. The existence in this case of "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

The government also speculates (at 19-20) that, "if the litigation is allowed to proceed," respondent "may" allege some injury from the claimed RESPA violation. That (merely theoretical) possibility is beside the point: respondent bases her standing to sue exclusively on the alleged violation of a statutory right (*see* Opp. 18 n.10); in the absence of any allegation or evidence of injury, the case cannot proceed. *See Lujan*, 504 U.S. at 561.* Moreover, in light of the Ninth Circuit's holding, respondent has no reason to show that the alleged RESPA violation caused her an actual injury.

On the other hand, if this Court grants review and reaffirms that a plaintiff such as respondent must allege (and prove) an actual injury to have standing,

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* The deadline for amending the pleadings has passed. *See* Joint Rule 26(f) Report at 10 (Oct. 25, 2010) (DN 172).

that determination will have a profound impact on the litigation even if one assumes that this plaintiff could succeed in demonstrating injury. In a class action, "the court must be able to find that both the class and the representatives have suffered some injury" sufficient to confer standing. 7AA Charles A. Wright et al., *Federal Practice and Procedure* § 1785.1, at 390 (3d ed. 2005); *see Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("[N]o class may be certified that contains members lacking Article III standing."). The need for both respondent and the class members to demonstrate an actual injury distinct from the statutory violation – as well as respondent's obligation to show that her claim is representative of the claims of the class, *see* Fed. R. Civ. P. 23(a)(4) – would call into question the propriety of class-wide adjudication of this case.

II. THE GOVERNMENT FAILS TO SQUARE THE NINTH CIRCUIT'S DECISION WITH THIS COURT'S STANDING JURISPRUDENCE OR THE STATUTE

A. For the critical proposition that Article III standing can be based on the "taint" of a statutory violation, the government cites (at 12) not cases interpreting Article III but cases holding that an appellate court can remedy a district judge's erroneous refusal to recuse without having to determine whether the judge's conflict of interest actually affected the result. Those decisions apply a commonsense principle that, *in a case in which jurisdiction exists under Article III*, an appellate court can order a new trial before an impartial judge. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988) (remedy of new trial appropriate when statutory violation "create[d] precisely the kind of appear-

ance of impropriety that [the statute] was intended to prevent"); *Tumey v. Ohio*, 273 U.S. 510, 523, 535 (1927) (it "deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case"). That says nothing about whether Article III jurisdiction can be based on a claimed statutory violation that causes no demonstrable harm. That the government must stretch to draw this analogy is powerful evidence that the Ninth Circuit's standing determination represents an expansion of judicial power beyond anything that has been recognized by this Court.

None of the other cases cited by the government authorized standing based on a statutory violation that caused no actual injury. In relying (at 11) on *Havens* and *Akins*, the government neither acknowledges nor disputes our showing that the plaintiffs in those cases alleged actual injuries resulting from the statutory violations. *See* Pet. 27-28 & n.18. Nor does the government contest our explanation that those cases are inapposite, both because § 8(a) (unlike other sections of RESPA, *see, e.g.*, 12 U.S.C. § 2604) is not a disclosure provision (*see Moore*, 5th Cir. Op. 11-12) and because respondent has abandoned any claim that she was denied statutorily required information about the cost of title insurance. *See* Pet. 7, 22 & n.15, 28 n.18.

The government quotes (at 10) the dictum from *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), that "Congress may enact statutes creating legal rights, the invasion of which creates standing." *Id.* at 617 n.3. But, as the Court explained in *Lujan*, the *Linda*

R.S. dictum refers to statutes in which Congress "elevat[ed] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 504 U.S. at 578. Nothing in *Linda R.S.* (or any of this Court's other cases) supports the Ninth Circuit's radical holding that Congress can manufacture Article III standing simply by creating a statutory right and a cause of action to enforce it. Instead, this Court has held that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue." *Raines*, 521 U.S. at 820 n.3; *see* Pet. 26-27.

None of this is to say that an injury must be "economic in nature" to confer standing. Gov't Br. 11. But respondent does not allege that she suffered even a non-economic injury, besides the asserted "invasion of an individual statutory right." Opp. 18 n.10. The government's observation (at 12-13) that respondent "made a monetary outlay" for title insurance does not establish an injury in fact. Respondent received a service (title insurance) in return for that "monetary outlay." In light of the concession that she neither was overcharged nor received deficient services, there is no basis for characterizing the payment of a state-regulated premium in return for services as an "injury."

B. On the statutory question, the government asserts (at 8-9) that § 8(a) requires a "nexus" between a prohibited payment and a settlement service, and it points to the appearance of the definite article in § 8(d). From that, it infers that, for every violation of § 8(a), there must be a private plaintiff entitled to demand treble damages under § 8(d). But that inference is unsound. A "kickback" violates § 8(a) when it is given "pursuant to an[] agreement" that

"business incident to or a part of a real estate settlement service ... shall be referred to a[] person." Such an agreement to refer settlement-service business can exist even if no particular settlement service is ever actually referred. The critical statutory phrase – "involved in the violation" – appears only in § 8(d), and it requires a private plaintiff seeking to recover treble damages to show that the alleged referral agreement had a concrete effect on her particular settlement-service transaction. *See Moore*, 5th Cir. Op. 8, 10; *Moore*, 233 F. Supp. 2d at 826.

Reading RESPA to require that the alleged statutory violation have affected the terms of the settlement transaction accords with the Act's purpose of preventing and remedying "unnecessarily high" settlement charges. 12 U.S.C. § 2601(a). That interpretation reconciles the provision with an underlying principle of constitutional standing – the requirement of an injury in fact – of which Congress is expected to have been aware. And it properly avoids the grave constitutional concerns raised by the government's contrary construction. The government rightly does not argue that private actions are necessary to enforce the law; federal and state regulators can do so without establishing harm to a private party. *See* Pet. 23.

It does not help the government to assert (at 9-10) that other sections of RESPA contain different measures of damages, allowing recovery of "actual damages," rather than triple the charges paid. The availability of a particular type of damages for plaintiffs *who have standing* does not answer the question of *which* plaintiffs have standing. *See* Pet. 24-25.

Nor do the 1983 amendments to RESPA, on which the government relies (at 10), support its inter-

pretation of § 8(d)(2). Originally, § 8(d)(2) contained separate clauses addressing suits for violations of § 8(a) (the kickback provision allegedly violated here) and § 8(b) (which prohibits certain fee-splitting arrangements). *See* 12 U.S.C. § 2607(d)(2) (1976). The 1983 amendments consolidated those clauses and eliminated the original version's reference to recovery of three times "the value or amount of the fee or thing of value" paid, *id.* – language that would have made no sense as applied to § 8(b). The government identifies nothing in the legislative history of the 1983 amendments (and we are not aware of anything) suggesting that Congress intended to change the meaning of § 8(d)(2) to authorize uninjured plaintiffs to sue.

III. THERE ARE CONFLICTS IN THE CIRCUITS ON THE QUESTIONS PRESENTED

Like respondent, the government claims (at 13) that *Durr* is "inapposite," but it previously represented to the Third Circuit that *Durr* was part of a "line of cases" that had "reached the opposite conclusion" from *Carter*. Brief for Intervenor U.S. at 12, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (No. 08-4334). There, the government recognized that, "in *Durr*, both the district court and the court of appeals" took the position that "damages under section 8(d)(2) are limited to three times the amount *of the overcharge*." *Id.* at 13 (citation omitted; emphasis added). The government was correct in *Alston* that *Durr* cannot be squared with the decision below. *See* Pet. 11-14; Cert. Reply 4.

The government also questions (at 15) the precedential weight of *Moore* – as did respondent – even as it admits (at 15 n.11) that the only court in the Fifth Circuit to consider the issue since *Moore* followed

that case. Cert. Reply 3. Although the government also suggests that *Moore* is off point, the Fifth Circuit squarely held that RESPA's "language" and "history" demonstrate that a private party "cannot establish standing simply by alleging a violation of the language of § 2607(a)." 5th Cir. Op. 13.

The government seeks (at 15-17) to distinguish *Kendall* and *Wilson* on the ground that they involved statutes other than RESPA. But the government makes no effort to explain why the fact that *Kendall* involved ERISA renders inapposite the Second Circuit's conclusion that some actual injury beyond the mere claim of a statutory violation is necessary for standing under Article III. Cert. Reply 5-6. Similarly, the government fails to explain how the plaintiff's receipt of discriminatory advertising in *Wilson* is more "abstract or generalized" (Br. 17) than the claim here. Respondent, on behalf of herself and a class of participants in more than a million transactions, seeks to recover three times the amount she paid for title insurance, based on an alleged violation that had no demonstrable effect on, and occurred eight years before, her transaction. *Wilson* is no different from this case; in both, the plaintiffs alleged that they had experienced a statutory violation. The Tenth Circuit held that such an allegation did not satisfy Article III's actual-injury requirement, whereas the Ninth Circuit reached the opposite (and incorrect) decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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