No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits the payment of kickbacks in exchange for referrals of "business incident to or a part of a [covered] real estate settlement service." 12 U.S.C. 2607(a). Any person who pays or receives a kickback in violation of Section 2607(a) is liable "to the person or persons charged for the settlement service involved in the violation" for statutory damages "in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The questions presented are as follows:

1. Whether RESPA requires the plaintiff in a private damages action to allege that an unlawful kickback concretely affected the price, quality, or other characteristics of the relevant settlement service.

2. Whether a plaintiff who paid for a settlement service, after being unlawfully referred to the service provider in exchange for a prohibited kickback, has established a sufficient injury-in-fact to have standing to sue in federal court under Article III of the Constitution.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, to protect consumers in the market for "real estate settlement services." RESPA defines the term "[s]ettlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, loan processing and underwriting, and the like. 12 U.S.C. 2602(3). Congress found that consumers needed "greater and more

timely information on the nature and costs of the settlement process," as well as "protect[ion] from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a).

One of RESPA's stated "purpose[s]" is "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). RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, 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).[1] RESPA also prohibits unearned fees by providing that no portion of the charge for any covered settlement service may go to any person "other than for services actually performed." 12 U.S.C. 2607(b). RESPA establishes limited exceptions to those prohibitions. 12 U.S.C. 2607(c). For example, RESPA allows certain "affiliated business arrangements," but only if such arrangements are disclosed to the consumer in advance and other specified conditions are satisfied. 12 U.S.C. 2607(c)(4); see 12 U.S.C. 2602(7) (defining "affiliated business arrangement").

Congress has authorized the Department of Housing and Urban Development (HUD) to administer RESPA. HUD may "prescribe such rules and regulations" and "make such interpretations * * * as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. 2617(a).[2]

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[1] The criteria for identifying "federally related" loans are set forth in 12 U.S.C. 2602(1).

[2] Later this year, the bulk of that authority will be transferred to the Bureau of Consumer Financial Protection. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113 (2010).

HUD regulations promulgated pursuant to that authority are codified at 24 C.F.R. Pt. 3500. One of those regulations provides that "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited." 24 C.F.R. 3500.14(g)(2).

RESPA initially provided for enforcement of Section 2607 only through criminal prosecution and private civil actions "to recover damages." 12 U.S.C. 2607(d), 2614 (1976). Damages for unlawful kickbacks were calculated by reference to the amount of the kickback. Under that version of the statute, a person who violated the anti-kickback prohibition was "liable to the person * * * whose business ha[d] been referred in an amount equal to three times the value or amount of the fee or thing of value" that was given and accepted pursuant to the unlawful agreement. 12 U.S.C. 2607(d)(2) (1976). Similarly, any person who violated the prohibition on unearned fees in Section 2607(b) was liable in the amount of three times the unearned fee, or the unearned portion of the fee. *Ibid.* The statute also authorized the award of attorney's fees to a successful plaintiff. *Ibid.*[3]

As amended in 1983, RESPA's remedies provision now states that statutory damages will be calculated by reference to the cost of the settlement service for which the consumer paid, rather than the amount of the kickback or the unearned fee. See Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231. Any person who violates the prohibition on kickbacks or unearned fees "shall be * * * liable to the person or persons charged for the settlement service involved in the violation

[3] The current version of RESPA authorizes the court to award costs and attorney's fees to "the prevailing party" in a private action under Section 2607. 12 U.S.C. 2607(d)(5).

in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The 1983 amendments also included a new provision authorizing the Secretary of HUD, state attorneys general, and state insurance commissioners to bring actions to enjoin violations of Section 2607. 12 U.S.C. 2607(d)(4).

2. Respondent purchased a home and used Tower City Title Agency, LLC (Tower City), as the settlement agent. Tower City referred respondent to petitioner First American Title Insurance Company (First American Title). Respondent purchased title insurance from First American Title, and she and the seller of the property shared the cost. Pet. App. 53a-54a. First American Title was a subsidiary of First American Corporation, whose successor in interest is also a petitioner here. *Id.* at 50a; Pet. ii.

Respondent alleges that First American Corporation paid kickbacks to Tower City in return for Tower City's agreement to refer all title-insurance underwriting business exclusively to First American Title. Pet. App. 51a, 53a. The kickback allegedly took the form of (a) First American Corporation's purchase of a minority interest in Tower City for "significantly more" than the entire agency was worth, and (b) a subsequent payment of more than $800,000. *Id.* at 51a-52a. Respondent alleged that First American Corporation did not exercise the prerogatives ordinarily associated with partial ownership, and that the company had acquired the minority stake "to give the kickback the appearance of legitimacy." *Id.* at 51a; see *id.* at 52a.

Respondent filed this putative class action, alleging that petitioners had violated Section 2607 by paying kickbacks for business referrals, and that those referrals were "calculated * * * 'to increase unnecessarily the costs' of title insurance." Pet. App. 49a (quoting 12 U.S.C. 2601(b)(2)); see *id.* at 58a. She further alleged that petitioners had not

disclosed their arrangement with Tower City to her, and that the tainted referral had denied her "the opportunity to compare prices on the open market." *Id.* at 52a; see *id.* at 49a. Respondent did not allege, however, that she had paid more for title insurance, or that she had received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback. See *id.* at 14a.

3. Petitioners moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. They argued, *inter alia*, that respondent had not been overcharged for her title insurance and therefore had not suffered any injury cognizable under RESPA or under Article III of the Constitution. Pet. App. 14a.

The district court denied the motion to dismiss. Pet. App. 12a-22a. The court first held that RESPA's "plain language" does not limit damages "to overcharges," but rather provides that "violators are liable for 'any charge paid' for [a] settlement service 'involved in' a violation of RESPA." *Id*. at 16a. The court found further support for that conclusion in the statutory history and in HUD's regulations. *Id.* at 17a-18a. The court concluded that respondent "need not have suffered an overcharge to invoke the protection of RESPA." *Id*. at 19a.

The district court further held that respondent had Article III standing. The court explained that "[b]y its 1983 amendment, Congress created a right to be free from referral-tainted settlement services." Pet. App. 19a. The court concluded that "[i]f [respondent] can prove her claim, there is a statutory injury fairly traceable to [petitioners'] action and redressable by a favorable decision. Accordingly, this Court has subject matter jurisdiction over the case." *Ibid.*

Finally, the court held that respondent had adequately pleaded the other elements of a RESPA claim. Pet. App. 20a-21a. In particular, the court held that respondent had

sufficiently alleged that petitioners paid kickbacks in exchange for referrals and did not provide the disclosure necessary to qualify for Section 2407(c)'s safe harbor. *Id.* at 21a. The court recognized that petitioners had controverted those allegations, but it concluded that resolution of that dispute was "better suited for argument in a motion for summary judgment." *Ibid.*

Petitioners asked the district court to certify its ruling for interlocutory appeal pursuant to 28 U.S.C. 1292(b), but the court declined. Order (Dec. 11, 2007).

The district court subsequently denied two motions by respondent for class certification. Pet. App. 23a-40a. The court of appeals allowed respondent to pursue an interlocutory appeal of the class-certification rulings. C.A. E.R. 27; see Fed. R. Civ. P. 23(f).[4] In a motion and in their answering brief, petitioners contended that the appeal should be dismissed, and that the district court lacked jurisdiction over the suit, because respondent did not have standing under either RESPA or Article III.

4. As relevant here, the court of appeals rejected petitioners' challenge to respondent's standing. Pet. App. 1a-7a.[5]

The court of appeals held that respondent has a cause of action under RESPA whether or not the alleged kickback affected the charge she paid for her title insurance. The court stated that, under the "clear" language of Section 2607, "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount

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[4] Although the court of appeals stated in its subsequent opinion that "[d]efendants [*i.e.*, petitioners] brought this appeal," and that the court had appellate jurisdiction pursuant to 28 U.S.C. 1292(b), Pet. App. 2a, those statements were incorrect.

[5] As a result, the court reached the merits of the district court's class-certification orders, which it affirmed in part and reversed in part. Pet. App. 8a-11a.

of *any* charge paid. The use of the term 'any' demonstrates that charges are [not] restricted to a particular type of charge, such as an overcharge." Pet. App. 5a. The court also observed that the legislative history of the 1983 RESPA amendments reflects Congress's intent to protect consumers from non-economic injury. *Id.* at 6a-7a.

The court of appeals next explained that when Congress enacts "statutes creating legal rights," the "invasion" of those rights may "create[] standing" if the statutes "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Pet. App. 4a (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (intervening citation omitted). The court concluded that, because RESPA confers such a right on respondent, the allegation that petitioners had violated RESPA in selling respondent services made out "an injury sufficient to satisfy Article III." *Id.* at 5a.

Finally, the court observed that its holdings were in accord with those of two other circuits. Pet. App. 7a (citing *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009), and *Alston* v. *Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009)).

DISCUSSION

The decision of the court of appeals is correct and does not conflict with any precedential decision of another court of appeals. RESPA provides a cause of action for a consumer who alleges a kickback in connection with a settlement service for which she was charged, whether or not the kickback demonstrably affected the price or quality of the relevant settlement service. Such a consumer has sufficient injury-in-fact to sue in federal court. In addition, this case came to the court of appeals on an interlocutory appeal from the district court's denial of class certification, and the posture of the case makes it an unsuitable vehicle for ple-

nary review. The petition for a writ of certiorari therefore should be denied.

A. The Decision Of The Court Of Appeals Is Correct

1. a. Section 2607(a) prohibits the payment or receipt of kickbacks in exchange for referring "business incident to or a part of a [covered] real estate settlement service." A payment therefore violates Section 2607(a) only if it has a specified nexus to a settlement service.[6] Section 2607(d)(2), in turn, provides that anyone who violates Section 2607 is 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 use of the definite article—"*the* settlement service involved in the violation"—confirms that the settlement service that is the basis for civil liability is the same settlement service already referred to in the substantive prohibition, *i.e.*, the service "incident to" which, or as "part of" which, the referral was made and the kickback paid.

The critical facts that trigger liability for statutory damages under Section 2607(d)(2) are the "violation" of the substantive prohibitions of Section 2607 and the plaintiff's payment of a "charge[] for the settlement service involved in the violation." Nothing in RESPA suggests that either the existence of a violation or a plaintiff's right to invoke the statutory-damages provision turns on a comparison between the price the plaintiff paid and the price he would have paid if no kickback had occurred. The court below therefore was correct to hold, consistent with decisions of the Third and Sixth Circuits, that the "clear" language of Section 2607(d)(2) does not require plaintiffs to establish that the unlawful kickback resulted in an overcharge. Pet. App. 5a; accord *Alston* v. *Countrywide Fin. Corp.*, 585 F.2d

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[6] Similarly, Section 2607(b) states that unearned fees are illegal when charged for "a real estate settlement service."

753, 759 (3d Cir. 2009) ("The plain language of [Section 2607] does not require plaintiffs to allege an overcharge."); *Carter* v. *Welles-Bowen Realty, Inc.*, 553 F.3d 979, 986 (6th Cir. 2009) (holding that "the plain language of the statute" does not impose such a requirement).

Petitioners argue (Pet. 22) that, even if a particular payment is made in exchange for a settlement-service referral, the relevant settlement service is not "involved in the violation" unless the kickback affects the "price, quality, or other characteristics" of the service. Consistent with applicable HUD regulations (see p. 3, *supra*), petitioners appear to acknowledge (*e.g.*, Pet. 23; Cert. Reply 8 n.6) that a payment can violate Section 2607(a) even though no such effect is present. Petitioners' argument thus assumes that there can be violations of Section 2607(a) in which no settlement service is "involved." As explained above, however, the *sine qua non* of a Section 2607(a) violation is a specified connection between a payment and a settlement service. And Congress would not likely have referred to "*the* settlement service involved in the violation" if it had contemplated that settlement services would be involved in some Section 2607(a) violations but not in others.

b. Other provisions of RESPA confirm that the plaintiff in a Section 2607(d)(2) suit is not required to prove an actual impact on the price or quality of the relevant settlement service. "Congress knew how to limit recovery [under RESPA] to actual, out-of-pocket damages." *Alston*, 585 F.3d at 761. For example, recovery for a violation of a different RESPA provision, which governs the assignment, sale, or transfer of loan servicing, is limited to the borrower's "actual damages," as well as "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance," up to $1000. 12 U.S.C. 2605(f)(1); see 12 U.S.C. 2605(f)(2) ("actual damages" plus "additional damages" in class actions involving violations of that provision).

Under Section 2607(d)(2), by contrast, quantification of statutory damages does not turn on a comparison between the fee that the plaintiff paid and the fee he would have paid if no kickback had occurred, or upon proof that the kickback tangibly affected the quality of the relevant settlement service. Rather, under the 1983 RESPA amendments, the remedy for all violations of Section 2607 is based on the total cost of the settlement service.

Contrary to petitioners' contention (Pet. 22), Congress's finding that kickbacks "tend to increase unnecessarily the costs of certain settlement services," 12 U.S.C. 2601(b)(2), does not support petitioners' reading of Section 2607(d)(2). Kickback schemes can often involve numerous participants and complex payment and referral arrangements, making it difficult or impossible to quantify and apportion the injury to a particular consumer whose settlement is linked to such a kickback. Congress could reasonably conclude that kickbacks for settlement-service referrals cause substantial aggregate harm, see Am. Escrow Ass'n Br. 7 (acknowledging that kickbacks are ultimately passed on to consumers as "a cost of doing business"), but that Section 2607(d)(2)'s remedial and deterrent objectives would be disserved by requiring case-specific proof of such an effect.

2. The court of appeals also correctly held that respondent has alleged sufficient injury to establish her standing under Article III. On respondent's theory, petitioners' unlawful kickback arrangement caused her to pay for a settlement service based on a tainted referral. Petitioners therefore infringed her statutory rights under RESPA in a way that caused her a particularized, concrete injury.

a. The Court has long held that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973). Even if an allegation would be "inadequate in law"

to support standing in the absence of a statute, Congress may "elevat[e]" such claims "to the status of legally cognizable injuries" that support Article III standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 578 (1992). To be sure, certain "generally available grievance[s] about government" are too "abstract and indefinite" to confer standing, whether or not they are codified in a statute. *Id.* at 573-578; *FEC* v. *Akins*, 524 U.S. 11, 23 (1998). But there is no requirement that statutory injury (or any injury-in-fact) be economic in nature. See, *e.g.*, *Defenders of Wildlife*, 504 U.S. at 562-563 ("purely esthetic" injury).

Thus, for instance, a statutory right to receive information can confer standing. See, *e.g.*, *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-375 (1982) (holding that a "tester" had standing to sue over a verbal misrepresentation about apartment availability because the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, creates a "right to truthful housing information," even if the tester "fully expect[ed] that he would receive false information, and [had no] intention of buying or renting"); accord *Akins*, 524 U.S. at 21. Similarly, even though the existence of business competition is not ordinarily a cognizable injury, Congress can create a statutory "competitive injury" that gives businesses a statutory right to sue to exclude their would-be competitors from the market. *Hardin* v. *Kentucky Utils. Co.*, 390 U.S. 1, 5-6 (1968); see *Defenders of Wildlife*, 504 U.S. at 578.

Section 2607 gives consumers the legal right to a real estate settlement untainted by kickbacks, improper referrals, and unearned fees.[7] As the legislative history of

[7] Amici contend (Am. Escrow Ass'n Br. 10-13) that Section 2607 does not require untainted referrals because its exceptions allow for compensated referrals in certain limited circumstances. But those exceptions do not apply on the facts pleaded here, and the mere *existence* of exceptions says nothing about the taint caused by kickbacks prohibited by the general rule.

amended Section 2607 explains, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror [*sic*] or his associates have a financial interest in the company being recommended." H.R. Rep. No. 532, 97th Cong., 2d Sess. 52 (1982). RESPA's kickback prohibition thus serves in part as a conflict-of-interest rule that protects consumers' ability to receive dispassionate settlement-service advice. The constitutional authority of federal courts to grant relief for violations of federal conflict-of-interest rules does not depend on proof that a violation actually affected the outcome of the conflicted person's decision. Cf., *e.g.*, *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-870 (1988) (affirming new-trial order based on district court's conflict of interest, without suggesting that district court's merits rulings had been demonstrably affected by the conflict); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927) (holding that trial judge's financial incentive to convict deprived defendant of his right to due process of law, regardless of the strength of the evidence of guilt, because "[n]o matter what the evidence was against him, he had the right to have an impartial judge").

Section 2607(d)(2)'s cause of action is available, moreover, only to plaintiffs who have made a monetary outlay that bears a specified nexus to the unlawful kickback, *i.e.*, plaintiffs who have been "charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2).[8] Thus,

[8] Neither respondent's claim of individualized injury, nor the decision below, is based on respondent's naked financial interest in the statutory damages she may recover. Petitioners' reliance (Pet. 28-29) on *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), is therefore misplaced. Although the interest in recovering a statutory bounty standing alone may not be sufficient to

Congress has both "identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Congress acted well within its constitutional authority in determining that a person who pays money for a settlement service, based on a referral tainted by financial self-interest, can obtain judicial relief without proving in addition that the kickback affected the price or quality of the relevant settlement service. See *Carter*, 553 F.3d at 989 (consumer who alleges a Section 2607 violation "plainly [has] an individualized injury"); *Alston*, 585 F.3d at 763 (same); cf. *Defenders of Wildlife*, 504 U.S. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

B. This Case Does Not Present A Circuit Conflict Warranting This Court's Review

1. Two other courts of appeals have squarely decided, in precedential opinions, the question of RESPA interpretation that petitioners present. Both of those rulings are consistent with the decision below. See *Carter*, 553 F.3d at 989; *Alston*, 585 F.3d at 763. No court of appeals has adopted the reading of Section 2607(d)(2) that petitioners advance, under which the phrase "involved in the violation" excludes any settlement service that the violation did not demonstrably affect in specified ways, see p. 9, *supra*. Petitioners rely on an inapposite Seventh Circuit case and a non-precedential Fifth Circuit decision, but neither establishes a conflict that warrants review.

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confer standing, respondent sufficiently asserts that the tainted referral caused "the violation of [her] legally protected right." *Id.* at 772-773.

In *Durr* v. *Intercounty Title Co.*, 14 F.3d 1183, 1185 (7th Cir.), cert. denied, 513 U.S. 811 (1994), the plaintiff claimed that he had been overcharged $8 for a particular recording fee, and that the overcharge violated Section 2607(b). He sought to recover three times the amount he had paid the defendant for *all* settlement services, including settlement services that did not relate to any RESPA violation. The district court held that Durr had not stated a claim under Section 2607(b), and it imposed Rule 11 sanctions on Durr's counsel for the excessive damage request. *Id.* at 1186.

The court of appeals upheld both rulings. First, the court held that the overcharge did not violate Section 2607(b) because it was not shared with anyone and did not represent a fee-splitting arrangement. 14 F.3d at 1187.[9] Second, the court upheld the attorney sanctions as a permissible exercise of the district court's discretion, on the ground that Durr's counsel had no apparent basis for claiming statutory damages based on charges for untainted services. The court stated in passing that, although the complaint could have properly sought damages for the alleged overcharge, "[t]o the extent the claim exceeded three times the $8.00, * * * there was no basis for it." *Id.* at 1188. The Seventh Circuit did not adopt petitioners' reading of Section 2607(d)(2); it did not discuss or analyze the statutory text; and precise parsing of Section 2607(d)(2) was unnecessary to the court's disposition of the case. Accordingly, the decision in *Durr* (which was rendered well before three other circuits clearly and uniformly answered the RESPA question presented here) does not create any conflict warranting this Court's review.[10]

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[9] The correctness of that construction of Section 2607(b) is not presented here, but is the question presented in *Freeman* v. *Quicken Loans, Inc.*, petition for cert. pending, No. 10-1042 (filed Feb. 15, 2011).

[10] To the extent that *Durr* can be misread (as some district courts have done, Cert. Reply 4) to reach a holding that would conflict with

Petitioners also rely on the unpublished decision in *Moore* v. *Radian Group Inc.*, No. 02-41464 (5th Cir. May 30, 2003). That decision clearly states, however, that it is "not precedent" even in the Fifth Circuit, "except under the limited circumstances set forth in 5th Cir. R. 47.5.4," *i.e.*, for purposes of res judicata, collateral estoppel, and law of the case. *Id.* slip op. 1 n.1. As respondents note (Br. in Opp. 15 n.8), although this Court may sometimes grant review of a non-precedential decision to resolve a conflict between circuits' precedential decisions, a non-precedential decision (like a district court decision) does not *by itself* establish a conflict because it does not bind any other court, even in the circuit that issued it.[11] Furthermore, although the Fifth Circuit in *Moore* addressed a question similar to the one presented here, and held that the plaintiff had not stated a claim under RESPA, the court found it unnecessary to decide "which portions of the settlement charge are available for trebling under [Section] 2607(d)(2)." *Moore*, slip op. 10. The court thus did not adopt the construction of the phrase "involved in the violation" that petitioners advance here.[12]

2. Petitioners also allege a circuit conflict on the Article III standing question, but the decisions on which they rely

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Carter, *Alston*, and the decision below, any Seventh Circuit panel could disavow that reading and eliminate the conflict without full rehearing en banc. See 7th Cir. R. 40(e).

[11] Petitioners contend (Cert. Reply 3) that district courts in the Fifth Circuit can "be expected to follow *Moore*," but their sole example actually cited the *district court* opinion in *Moore*, which it described as having been affirmed "*without opinion*." *Williams* v. *First Am. Title Ins. Co.*, No. 2:02CV194-B-B, 2005 WL 2219460, at *2 (N.D. Miss. Sept. 13, 2005).

[12] To the extent that the court addressed Article III standing, it did so only on the premise that RESPA did not, as a statutory matter, "grant persons in the plaintiffs' position [a] right to judicial relief." *Moore*, slip op. 13.

arose in different contexts. Thus, in *Kendall* v. *Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), the plaintiff contended that she could sue her retirement plan for violating the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, even if she could not show "individualized harm" as a participant in the plan. 561 F.3d at 117, 118, 120. The Second Circuit held that the plaintiff was required to "allege some injury or deprivation of a specific right that arose from" the statutory duty to comply with ERISA. *Id.* at 121. But the court acknowledged that plaintiffs who sue to enforce certain ERISA requirements—such as a statutory disclosure obligation—can establish standing even though their rights are shared in common with other plan participants. *Id.* at 120-121. The court thus recognized that the range of plaintiffs who may sue to challenge an alleged statutory violation depends on the nature of the statutory right in question. *Kendall* sheds no light on what rights respondent has under RESPA or whether she has standing to enforce those rights.

Wilson v. *Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), is even farther afield. The plaintiffs in that case sought to challenge allegedly discriminatory housing practices. See *id.* at 592. The court of appeals held that the plaintiffs lacked standing to sue because they were ineligible to live in the relevant housing for reasons unrelated to the alleged discrimination (*i.e.*, because the housing was open only to Brigham Young University (BYU) students, and the plaintiffs were not BYU students). See *id.* at 593-594. The plaintiffs also challenged the defendants' use of advertisements for gender-segregated housing, contending that those advertisements violated a separate provision of the Fair Housing Act. See *id.* at 594. The court held that the plaintiffs' "mere receipt" of allegedly unlawful advertisements, which were not directed at the

plaintiffs and were not alleged to have affected their behavior, created at most an "abstract stigmatic injury," which is insufficient under Article III. *Id.* at 595-596.

This case, by contrast, involves an *individualized* injury to respondent rather than an abstract or generalized grievance. In order to recover under RESPA, respondent will be required to prove that she paid money for a settlement service, and that an unlawful kickback was made in connection with that particular service. The decisions on which petitioners rely do not speak to the question whether that link between plaintiff and violation is sufficient to establish Article III standing.

3. The questions presented are not of sufficient magnitude to warrant resolution in the absence of a circuit conflict. Petitioners' amici suggest (Am. Land Title Ass'n Br. 2-3) that the decision below "threatens" certain common business relationships within the title industry. That argument, however, goes to the question whether the conduct of which respondent complains actually violated RESPA's anti-kickback prohibition, not to the question whether respondent is entitled to sue. The court below did not decide, and the petition for a writ of certiorari does not present any question concerning, whether respondent's complaint states a claim under Section 2607(a). See also pp. 19-20, *infra.*

C. This Case Is An Unsuitable Vehicle For Resolution Of The Questions Presented Because The Case Is Currently In An Interlocutory Posture And The Ninth Circuit's Jurisdiction Rested On Respondent's Appeal From The Denial Of Class Certification

This Court generally does not grant plenary review at an interlocutory stage of a case. Two aspects of this case provide especially strong reasons for adhering to that general practice. First, the decision below rested on a limited grant of appellate jurisdiction that could artificially constrain the scope of this Court's review. Second, there is a

significant possibility that the RESPA claim in this case will be resolved on other grounds.

1. As explained above (see pp. 5-6 & note 4, *supra*), the district court denied petitioners' motion to dismiss *and* denied their motion to certify that ruling for interlocutory appeal. This case moved to the court of appeals only because *respondent* appealed the denial of class certification pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. The court of appeals therefore had jurisdiction to review only the class-certification "order" itself. Fed. R. Civ. P. 23(f); cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996) (interlocutory appeal under 28 U.S.C. 1292(b) "may not reach beyond the certified order to address other orders made in the case").

In responding to the class-certification appeal, petitioners asserted that the district court lacked subject-matter jurisdiction because respondent lacked standing. The courts of appeals generally agree that jurisdictional issues of that sort may be decided in a Rule 23(f) appeal. See, *e.g.*, *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 108 (D.C. Cir. 2002). Thus, to the extent that it is necessary to construe RESPA to determine respondent's Article III standing, that exercise would be within the court's appellate jurisdiction.

Petitioners argue, however, that this Court should grant review to consider issues going beyond the presence or absence of Article III standing. For example, petitioners urge the Court to construe RESPA narrowly to avoid the "grave concerns" under Article III that they believe the decision below creates. Pet. 23. Petitioners characterize the question of Section 2607(d)(2)'s coverage as one of "standing." But statutory standing refers to the question "whether [the statute] authorizes this plaintiff to sue," whereas "the scope of the [statutory] right of action * * * goes to the merits and not to statutory standing." *Steel Co.*

v. *Citizens for a Better Env't*, 523 U.S. 83, 92 (1998); see also *id.* at 97 (zone-of-interests limitation on prudential standing is an example of statutory standing). Even if petitioners' characterization were accurate, moreover, it is far from clear that statutory standing may be raised on a Rule 23(f) appeal, since the issue of statutory standing (like the question whether petitioners' conduct violated Section 2607(a)) "has nothing to do with whether there is [a] case or controversy under Article III." *Id.* at 97. And petitioners do not explain how an inquiry into statutory standing is properly part of the review of class certification. See Pet. App. 10a-11a.

2. The interlocutory posture of this case makes the questions petitioners present particularly abstract. In a pending dispositive motion, petitioners contend that Tower City did not engage in "referr[als]" within the meaning of Section 2607(a), but merely issued policies underwritten by First American Title as its agent, and that petitioners' payments to Tower City therefore were not prohibited by RESPA. See Mem. in Supp. of Mot. for J. on Pleadings (filed Apr. 25, 2011) (set for hearing July 5, 2011); see also Cert. Reply 10 (arguing that petitioners' particular arrangement with Tower City could not have affected competition). Petitioners also have asserted numerous affirmative defenses, including that the alleged kickback to Tower City represented payment for fair market value. See Am. Answer 6 (filed Feb. 23, 2011). If petitioners prevail on any of those merits grounds, it will be unnecessary to determine the proper application of RESPA's statutory-damages remedy to the circumstances of this case.

Petitioners contend in this Court, as part of their standing argument, that *no* aspect of respondent's settlement service was affected by the referral agreement because respondent did not "have any complaints about" her title insurance. Pet. 6; see Pet. 26. But that factual averment

may be controverted if the litigation is allowed to proceed. Indeed, the deposition excerpts that petitioners cite (Pet. 6 & nn.2-3) are not yet in the district court record, but rather were appended to a procedural filing in the court of appeals. Whether and to what extent respondent was satisfied with her settlement services is a factual question that this Court cannot examine at this stage (except to the extent the complaint addresses it), and any ruling on the standing question that depends on knowing whether petitioner was satisfied would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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