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

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae New England Legal Foundation ("NELF"), Associated Industries of Massachusetts ("AIM"), and Chamber of Commerce of the United States of America ("the Chamber") seek to present their views, and the views of their supporters, on the issue whether Article III, § 2 of the United States Constitution, which limits the federal judiciary's jurisdiction to "cases" and "controversies," should confer standing on an individual who alleges only the violation of a federal statutory right but who cannot establish that she suffered any concrete, particularized injury caused by the alleged violation.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amici, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, amicus notes that on July 11 and August 12, 2011, counsel for petitioners and counsel for respondent respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

AIM was founded in 1915 and is a nonprofit association incorporated in Massachusetts under Chapter 180 of the Massachusetts General Laws, and designated under the Internal Revenue Code (26 U.S.C. §501 (c)(6)) as a not-for-profit entity. AIM's mission is to promote the well-being of its members and their employees and the prosperity of the Commonwealth of Massachusetts by: improving the economic climate of Massachusetts; proactively advocating fair and equitable public policy; and providing relevant, reliable information and excellent services. AIM does not issue stock or any other form of securities and does not have any parent corporation. AIM is governed by a self-perpetuating Board of Directors.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to New England's business community.[2] The Chamber also regularly appears as amicus curiae in cases that raise issues of vital concern to the Nation's business community as a whole.[3] This is such a case, and amici believe that this brief provides an additional perspective to aid the Court in deciding the issue presented within.

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[2] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.,* 130 S. Ct. 2592 (2010); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London,* 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001).

[3] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006); (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

SUMMARY OF ARGUMENT

An individual who claims the violation of a statutory right cannot establish Article III standing unless she can also show that the violation caused her to suffer a concrete and personal injury. In this case, the Ninth Circuit has interpreted the applicable statute, the anti-kickback provision of the Real Estate Settlement Procedures Act, ("RESPA"), 12 U.S.C. §§ 2601 *et seq*., as providing a private remedy for a bare violation of the law. Where Congress purportedly does not require injury in fact, and the plaintiff has failed to allege any, Article III is not satisfied and the case should be dismissed for lack of jurisdiction.

Article III injury requires an independent judicial determination that has nothing to do with the applicable statute. Applying this independent standard of review, the Court has repeatedly denied Article III standing where, as here, the plaintiff who has suffered no concrete injury sues under a statute that purports to discard this fundamental constitutional requirement of standing.

Despite the Court's clear precedent requiring independent judicial determination of the existence of injury in fact, the Ninth Circuit nevertheless concluded that the text of RESPA could, by itself, create Article III jurisdiction, without the need for such a judicial determination. The apparent source of the Ninth Circuit's error is its misinterpretation of

the Court's language, from earlier decisions, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Selden*, 422 U.S. 490, 500 (1975). The Ninth Circuit apparently interpreted this language to mean that statutory standing is simply coextensive with constitutional standing, and that a court need only consult the text of the statute to find injury in fact. In misapplying the Court's "invasion of rights" formulation of standing, the Ninth Circuit, and other lower federal courts, have apparently disregarded *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). In *Lujan*, the Court explained that the invasion of a statutory right can establish Article III standing, but only if the statutory violation corresponds with, and gives legal recognition to, a concrete, identifiable injury that exists apart from the statute. *Id.*, 504 U.S. at 578.

The RESPA claim at issue in this case fails the *Lujan* framework. Under *Lujan*, Article III would require the homebuyer to show that she suffered a concrete and identifiable harm from a violation of statutory duties pertaining to the market behavior of real estate settlement service providers. Where, as here, it is undisputed that there was no economic harm, and no other form of concrete injury has been identified, there can be no injury in fact. Therefore, the jurisdictional

requirements of Article III have not been satisfied.

Just as the Ninth Circuit, and other lower federal courts, have misinterpreted the "invasion of rights" language as eliminating the independent constitutional requirement of injury in fact, so too have the courts misapplied the Court's decision in *Havens Realty v. Coleman*, 455 U.S. 363 (1982). Contrary to the lower courts' views, the Court's decision in *Havens Realty* does not establish that statutory standing automatically satisfies constitutional standing. Instead, *Havens Realty* is consistent with *Lujan* because the statutory injury at issue in *Havens Realty* apparently entailed a concrete harm, namely the dignitary harm inherent in virtually any form of discrimination. *Havens Realty* is therefore consistent with *Lujan* and should provide no support for the position that statutory standing automatically establishes constitutional standing.

The Ninth Circuit's interpretation of Article III conflates statutory standing with constitutional standing. In so doing, the lower court's decision not only disregards *Lujan* but also runs afoul of the judiciary's exclusive power and duty to interpret the Constitution and "say what the law is," as established famously in *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). According to the Ninth Circuit, Article III standing is simply a matter

of statutory construction. If Congress has prohibited the violation of a statutory duty, then the constitutional requirement of "injury in fact" is summarily satisfied. According to the Ninth Circuit, then, a "case" or "controversy" under Article III is simply what Congress says it should be. The meaning of those key constitutional terms is to be decided by the majoritarian will of Congress, and not by the judiciary. Simply put, under the Ninth Circuit's view, Congress has virtually boundless powers to expand the judiciary's jurisdiction. Federal courts should defer to the language of a statute, and not the Constitution, to define the limits of their jurisdiction.

This cannot be. The Ninth Circuit's interpretation of Article III would have the judiciary relinquish its exclusive institutional power and responsibility to interpret and enforce the Constitution—i.e., to "say what the law is," and hold the other branches accountable to this supreme document, as the Court established long ago in *Marbury v. Madison*, 5 U.S., at 176-78. To the contrary, the Court alone has the authority and the duty to determine the meaning of Article III's definition of the federal judiciary's jurisdiction. This is not a question to be decided by Congress. And, having interpreted the limits of federal jurisdiction under Article III, the Court should then enforce those limits on the power of Congress.

The Ninth Circuit's decision offends the separation of powers among all three branches of government, a bedrock principle of checks and balances that the Court has embraced as a foundational theory in its Article III jurisprudence. In this case, an individual who has not suffered any injury in fact seeks, in court, to vindicate the general public interest in the enforcement of RESPA. Granting standing under those circumstances would not only exceed Article III's jurisdictional limits but it would also implicate the exclusive constitutional power of the Executive Branch to "take Care that the Laws be faithfully executed." Art. II, § 3. The separation of powers forbids Congress from converting the general public interest in enforcement of the law, which is ordinarily pursued through the political process, into a private right of action for the uninjured plaintiff. *Lujan*, 504 U.S. at 576-77.

ARGUMENT

I. AN INDIVIDUAL WHO ALLEGES ONLY A VIOLATION OF A STATUTORY RIGHT, WITHOUT ANY RESULTING CONCRETE INJURY, CANNOT ESTABLISH STANDING UNDER ARTICLE III.

At issue in this case is whether Article III, § 2 of the United States Constitution, which

limits the federal judiciary's jurisdiction to "cases" and "controversies," confers standing on an individual who alleges the violation of a statutory right but who cannot show that the violation caused her any concrete injury.[4] In this case, the Ninth Circuit has interpreted the applicable statute, the anti-kickback provision of the Real Estate Settlement Procedures Act, ("RESPA"), 12 U.S.C. §§ 2601 *et seq.* as providing a private remedy for a bare violation of the law. *Edwards v. First Am. Fin. Corp.*, 610 F.3d 514, 516-17 (9th Cir. 2010).[5]

Consequently, the lower court concluded that Article III was satisfied even though Congress does not require, and the respondent,

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[4] It goes without saying that "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11 (2004).

[5] For the sake of this brief only, amici will assume *arguendo* that the Ninth Circuit's interpretation of RESPA is correct, and that Congress has provided a private remedy based solely on a violation of the law.

RESPA bars the payment of "any fee, kickback, or thing of value" in exchange for the referral to "a real estate settlement service involving a federally related mortgage loan . . . ." 12 U.S.C. § 2607(a). RESPA allows any homebuyer who has purchased "a settlement service involved in the violation" to recover treble the cost of the settlement service, plus reasonable attorney's fees, from anyone who committed the violation. 12 U.S.C. § 2607(d)(2).

Denise P. Edwards, has not shown, that the invasion of her statutory rights has caused her any actual injury.[6] The stark question becomes whether Article III jurisdiction can be established where, as here, any trace of concrete injury has been eliminated by joint operation of the law and the record.

This question covers familiar ground and warrants a resolute answer in the negative. As the Court has made abundantly clear, Article III does not countenance injury in the abstract and instead requires "injury in fact," i.e., a "concrete and particularized" harm, *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), which "has nothing to do with the text of the statute relied upon." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). Injury in fact is simply "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1151 (2009). *See also Raines v. Byrd*, 521 U.S. 811, 820 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing . . . ."). Simply put, a

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[6] As the Ninth Circuit observed in this case, Edwards cannot show any economic injury from the alleged violation of RESPA, "because Ohio law [her state of residence] mandates that all title insurers charge the same price." *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 516.

statutory violation must cause injury in fact to satisfy Article III. *See Lewis v. Casey*, 518 U.S. 343, 353, n.4 (1996).

Consequently, Article III injury is a threshold jurisdictional determination requiring independent judicial scrutiny to determine whether the plaintiff suing under a statute has suffered concrete injury, apart from any statutory violation or remedy. Applying this independent standard of review, the Court has repeatedly denied Article III standing where, as here, the plaintiff who has suffered no concrete injury sues under a statute that purports to discard this fundamental constitutional requirement for standing. *See Summers v. Earth Island Inst.*, at 1151 (environmental organizations had no Article III standing to sue U.S. Forest Service under applicable federal law to enjoin enforcement of disputed regulation because organizations' members failed to identify any resulting concrete injury, and because "deprivation of a procedural right without some concrete interest that is affected by the deprivation--a procedural right *in vacuo*--is insufficient to create Article III standing. . . [I]t *makes no difference that the procedural right has been accorded by Congress*.") (emphasis added). *See also Raines v. Byrd*, 521 U.S. at 821 (members of Congress had no Article III standing to sue under Line Item Veto Act because broad statutory remedy did not require any concrete injury, and

because plaintiffs alleged only a general, institutional injury, rather than the loss of any private right); *Lujan,* 504 U.S. at 573 (environmental groups suing Secretary of Interior under broad citizen-suit provision of Endangered Species Act had no Article III standing because they did not allege any concrete injury, and because "the injury-in-fact requirement [could not be] satisfied by congressional conferral upon all persons of an *abstract, self-contained, noninstrumental* 'right' to have the Executive observe the procedures required by law.") (emphasis added). These cases clearly illustrate the basic principle that a claim based solely on the violation of a statutory duty cannot establish the jurisdictional requirement of injury in fact under Article III, regardless of whether Congress has adorned such an inchoate claim with a private remedy for damages.

In light of this clear precedent, Edwards's claim should be dismissed for lack of jurisdiction under Article III. As already noted above, neither the RESPA provision at issue nor her allegations can establish the necessary injury in fact. The RESPA provision, 12 U.S.C. § 2607(d)(2), establishes liability for any homebuyer who has purchased "a settlement service involved in the violation," as opposed to a settlement service that has been *affected* in some measurable way by the violation. The provision is closely analogous to the statutes at

issue in *Lujan* and its progeny, discussed above, because it apparently affords a private remedy for a violation of the law without requiring any resulting, concrete injury. Article III, however, bars a federal court from exercising jurisdiction over a statutory violation that does not affect the individual's rights in some direct, palpable way. After all, "federal courts sit "solely, to decide on the rights of individuals . . . ." *Marbury v. Madison,* 1 Cranch 137, 170, 2 L.Ed. 60 (1803). Because Edwards has not suffered any identifiable injury from the alleged violation of RESPA, her claim should be dismissed for lack of jurisdiction.

II. THE NINTH CIRCUIT DISREGARDED THIS COURT'S EXPLANATION IN *LUJAN* THAT THE INVASION OF A LEGAL RIGHT MUST CAUSE CONCRETE INJURY TO ESTABLISH ARTICLE III STANDING.

Despite the clarity of the Court's precedent requiring an independent judicial determination of Article III injury that "has nothing to do with the text of the statute relied upon," *Steel Co.*, 523 U.S. at 97 n.2, the Ninth Circuit nevertheless concluded in this case that "the text of the statute relied upon" was alone sufficient to establish Article III standing.

Edwards v. First Am. Fin. Corp., 610 F.3d 514, 517 (9th Cir. 2010). The apparent source of the Ninth Circuit's error is its misinterpretation of the Court's language, from earlier decisions, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Selden*, 422 U.S. at 500 (internal citation omitted). The Ninth Circuit apparently interpreted this language to mean that statutory standing is simply coextensive with constitutional standing, and that a court need only consult the text of the statute to find injury in fact. The Third and Sixth Circuits have apparently committed the same error of interpretation in finding Article III standing under the identical anti-kickback RESPA provision.[7]

In misapplying the Court's "invasion of rights" formulation of standing, these lower courts have apparently disregarded the Court's

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[7] *See Carter. v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988 (6th Cir. 2009) ("Congress . . . generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right") (citing *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n. 3 (1973)); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763 (3d. Cir. 2009)("A plaintiff need not demonstrate that he or she suffered actual monetary damages, because 'the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'") (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

explanation, in *Lujan*, that harmonizes the formulation with the requirement of injury in fact. *Lujan*, 504 U.S. at 578. As the Court explained in *Lujan,* its formulation in *Warth v. Selden* meant that the invasion of a statutory right can establish Article III standing, but only if the statutory violation corresponds with, and gives legal recognition to, a concrete, identifiable injury that exists apart from the statute. As the Court stated:

> Nothing in this [discussion of Article III standing] contradicts the principle that "[t]he . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth,* 422 U.S., at 500, 95 S.Ct., at 2206 (quoting *Linda R. S. v. Richard D.,* 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' *elevating to the status of legally cognizable injuries concrete, de facto injuries* that were previously inadequate in law . . . .

Lujan, 504 U.S. at 578 (emphasis added).

Thus, *Lujan* establishes that the invasion of a statutory right satisfies Article III

only if it is based on a preexisting, *de facto* harm and transforms it into a *de jure* injury. Contrary to the view of the Ninth Circuit and other federal courts, then, *Lujan* reinforces the principle that the invasion of a statutory right must cause, or at least be associated with, an injury in fact to establish Article III standing.

The Ninth Circuit, in failing to consider *Lujan*, conflated statutory standing with constitutional standing. *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 517. In so doing, the lower court discarded the essential requirement of injury in fact, contrary to the Court's pronouncement that injury in fact is "a hard floor of Article III jurisdiction that *cannot be removed by statute*." *Summers v. Earth Island Inst.*, 129 S.Ct. at 1151 (emphasis added).

The RESPA claim at issue in this case fails the *Lujan* framework. Under *Lujan*, Article III would require the homebuyer to show that she suffered a concrete and identifiable harm from a violation of statutory duties pertaining to the market behavior of real estate settlement service providers. Where, as here, proof of any economic harm is foreclosed, and no other form of *de facto* injury has been identified, there can be no injury in fact, and jurisdiction should be denied.

Just as the Ninth Circuit misinterpreted the "invasion of rights" language as eliminating the independent constitutional requirement of injury in fact, so too did it misapply the Court's

decision in *Havens Realty v. Coleman*, 455 U.S. 363 (1982). Other lower federal courts have also apparently misinterpreted that case. *See Carter. v. Welles-Bowen Realty, Inc., 553 F.3d 979, 989* (6th Cir. 2009); *Alston v. Countrywide Fin. Corp., 585 F.3d 753, 763 (3d. Cir.* 2009).[8]

Contrary to the Ninth Circuit's view, the Court's decision in *Havens Realty* does not establish that statutory standing automatically satisfies constitutional standing. Instead, *Havens Realty* is consistent with *Lujan* because the alleged statutory injury at issue in *Havens Realty* apparently entailed a concrete, *de facto* harm--namely the dignitary harm inherent in most forms of discrimination. See *Allen v. Wright*, 468 U.S. 737, 755 (1984) (noting "the stigmatizing injury often caused by racial discrimination"). *See also U.S. v. Burke*, 504 U.S. 229, 241 n.12 (1992) (discussing Congressional findings concerning Civil Rights Act of 1991, and noting that "'[m]onetary damages also are necessary to make

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[8] In *Havens Realty*, an African-American "tester" of discriminatory housing practices allegedly received false, race-based information on the unavailability of housing, in violation of the Fair Housing Act's broad prohibition against false, discriminatory representations concerning housing availability. *Id.,* 455 U.S. at 368-69. The Court, applying the "invasion of rights" language discussed above, held that the tester had Article III standing, even though he had no intention of renting and may have expected to receive the false information. *Havens Realty*, 455 U.S. at 373-74.

discrimination victims whole for the terrible injury to their careers, to their *mental and emotional health*, and to their *self-respect and dignity*'") (quoting H.R.Rep. No. 102-40, pt. 1, pp. 64-65 (1991), U.S.Code Cong. & Admin.News 1991, pp. 549, 602, 603 (Report of Committee on Education and Labor)) (emphasis added); Michael E. Rosman, *Standing Alone under the Fair Housing Act*, 60 Mo. L. Rev. 547, 577 (1995) (discussing *Havens Realty* in light of common-law dignitary tort). In short, *Havens Realty* is consistent with *Lujan* and should therefore provide no support for the position that statutory standing automatically establishes constitutional standing.

III. BY CONFLATING STATUTORY STANDING WITH CONSTITUTIONAL STANDING, THE NINTH CIRCUIT HAS RELINQUISHED THE JUDICIARY'S POWER AND DUTY "TO SAY WHAT THE LAW IS."

As noted above, the Ninth Circuit's interpretation of Article III in this case conflates statutory standing with constitutional standing. In so doing, the lower court's decision not only disregards *Lujan* but also runs afoul of the judiciary's exclusive power and duty to interpret the Constitution and "say what the law is," as established famously in *Marbury v.*

Madison, 1 Cranch at 177. According to the Ninth Circuit, Article III standing is simply a matter of statutory construction. If Congress has prohibited the violation of a statutory duty, then the constitutional requirement of "injury in fact" is summarily satisfied. In the Ninth Circuit's view, "we must look to the text of RESPA to determine whether it prohibited Defendants' conduct; if it did, then Plaintiff has demonstrated an injury sufficient to satisfy Article III." *Edwards v. First Am. Fin. Corp.*, 610 F.3d at 517.

According to the Ninth Circuit, then, a "case" or "controversy" under Article III is simply what Congress says it should be. The meaning of those key constitutional terms is to be decided by the majoritarian will of Congress, and not by the judiciary. But this view would mean that Congress has virtually boundless powers to expand the judiciary's jurisdiction, and that federal courts should defer to Congress, and not the Constitution, to define the limits of their jurisdiction. Under such a view, Article III's limits are no more. *See* Rosman, *Standing Alone*, 60 Mo. L. Rev. at 578 ("[I]f Congress . . . creates a legal right the violation of which will meet the injury 'in fact' requirement, it can indeed 'abrogate' the Article III minima because the Court will not examine the 'factual' existence of an 'injury' beyond the violation of a legal right.").

This cannot be. The Ninth Circuit would have the judiciary relinquish its exclusive institutional power and responsibility to interpret and enforce the Constitution—i.e., to "say what the law is," and to hold the other branches accountable to this supreme document, as the Court established long ago in *Marbury v. Madison*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written . . . [as] the fundamental and paramount law of the nation. . . . It is emphatically the *province and duty of the judicial department to say what the law is*. . . . This is of the very essence of judicial duty. . . . [I]f the legislature shall do what is expressly forbidden [by the Constitution], . . . [i]t would be giving to the legislature a practical and real omnipotence . . . .

Marbury v. Madison, 5 U.S., at 176-78 (invalidating federal statute that exceeded Article III's exclusive bases for Court's original jurisdiction) (emphasis added).

Simply put, as *Marbury v. Madison* established, the Court alone has the authority and the duty to determine the meaning of

Article III's definition of the federal judiciary's jurisdiction. This is not a question to be decided by Congress. And, having interpreted the limits of federal jurisdiction under Article III, the Court should then enforce those limits on the power of Congress.

IV. THE NINTH CIRCUIT'S DECISION, VIOLATES THE SEPARATION OF POWERS BECAUSE IT ALLOWS AN INDIVIDUAL WHO HAS SUFFERED NO INJURY IN FACT TO ENFORCE GENERAL STATUTORY DUTIES IN COURT.

In this case, an individual who has not suffered any concrete, personal injury seeks to enforce the law in federal court. As amici argue further below, granting standing under those circumstances would not only exceed Article III's limits but it would also implicate the exclusive power of the Executive Branch to "take Care that the Laws be faithfully executed." Art. II, § 3. Consequently, the Ninth Circuit's decision offends the separation of powers among all three branches of government, a bedrock principle of checks and balances that the Court has embraced as a foundational theory in its Article III jurisprudence. "[T]he law of Art. III standing is built on a single basic idea--the idea of separation of powers[,] . . . th[e] overriding and

time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . ." *Raines v. Byrd,* 521 U.S. 811, 820 (1997) (internal quotations and citation omitted). *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the *tripartite allocation of power* set forth in the Constitution.") (internal quotations and citations omitted) (emphasis added); *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) ("[T]his [Article III standing] doctrine has a separation-of-powers component, which keeps courts within certain traditional bounds vis-à-vis the other branches . . . . That is where the 'actual injury' requirement comes from.").

The Court has stated that the separation of powers forbids Congress from authorizing the judiciary to exceed its limited Article III powers and, in so doing, to intrude upon the exclusive and discretionary power of the Executive Branch to enforce the law, under Art. II, § 3. *See Lujan*, 504 U.S. at 577 ("If the concrete injury requirement has the separation-of-powers significance we have always said, the[n] . . . [t]o permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most

important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."). *See also Allen v. Wright*, 468 U.S. at 761 ("Art. III [jurisprudence,] . . . grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3.").

Recognition of standing in this case would not only exceed the judiciary's limited jurisdiction under Article III, but it would also intrude upon the exclusive Article II powers of the Executive Branch to enforce the law on behalf of the general public. As already discussed above, RESPA provides a private right of action based solely on a violation of the law, and Edwards has not identified any concrete injury caused by the alleged violation of RESPA. Article III is readily exceeded in this case because there is no injury in fact. Taking jurisdiction of the case would thus be *ultra vires* of Article III. After all, the judiciary's limited role is to vindicate private rights, to protect the interests of the individual who claims to have suffered a particular injury. *See Marbury v. Madison,* 5 U.S. at 170 ("[T]he

province of the court is, solely, to decide on the rights of individuals . . . ."). No such private injury is identified under either the statute or the respondent's allegations here. Consequently, the federal judiciary has no constitutional role to play and, for this reason alone, should deny jurisdiction.

Article II is also offended here because an uninjured individual effectively seeks, in court, to vindicate the general public interest, in this case pertaining to a market free of kickbacks and paid referrals. However, "[v]indicating the *public* interest . . . is the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576 (emphasis in original). Article II restricts law enforcement activities to the Executive Branch. *See id.*, 504 U.S. at 577 ("Congress [may not] transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3."). *See also Marbury v. Madison,* 5 U.S. at 170 ("the province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion.").

To be sure, the judiciary must frequently enforce the law, but only as a necessary incident to providing the injured plaintiff with a remedy. *See Marbury v. Madison*, 5 U.S. at 170-73 (plaintiff deprived of vested right to commission entitled, in appropriate court, to

private remedy against Executive Branch to enforce right). *See also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, The Injury-In-Fact Rule, And The Framers' Plan For Federal Courts Of Limited Jurisdiction*, 54 Rutgers L. Rev. 1, 85 (2001) ("[C]ourts are permitted to interfere in executive processes only to the extent necessary to vindicate individual rights but no more.").

Accordingly, where, as here, a plaintiff alleges a statutory violation without any resulting concrete injury, she presents no redressable grievance under Article III and instead effectively seeks, at the purported invitation of Congress, to enlist the judiciary in the enforcement of the law for the sake of the general public. As the Court recognized in *Lujan*, 504 U.S. at 576-77, the separation of powers forbids Congress from converting the general public interest in enforcement of the law, which is ordinarily pursued through the political process, into a private right of action for the uninjured plaintiff. Under the Ninth Circuit's interpretation of RESPA, Congress has done just that and has effectively delegated the Executive Branch's Article II enforcement powers to private parties and the judiciary. As one commentator has astutely observed, "Article II forbids private exercise of federal executive power as much as judicial exercise of federal executive power. If an uninjured plaintiff were to bring an action that rightfully

must be brought only by the executive power, the court would be countenancing a violation of Article II." Craig A. Stern, *Another Sign From Hein: Does The Generalized Grievance Fail A Constitutional Or A Prudential Test Of Federal Standing To Sue?*, 12 Lewis & Clark L. Rev. 1169, 1193 (2008).

While the Court's Article II concerns have so far arisen in the context of statutory citizen-suits against the Executive Branch (*Lujan*, e.g.), those Article II concerns should apply with full force to a private statutory claim, as in this case, that is based solely on a violation of the law. *Lujan* establishes that Congress cannot allow courts, and private parties, to compel the Executive Branch to comply with the law for the sake of the general public. *Id.* at 576-77. This case illustrates the related Article II concern that Congress cannot allow courts and private parties to perform the exclusive role of the Executive Branch in enforcing the law on behalf of the general public. In short,

> Enforcement of the law is a political decision left to the Executive Branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as

> individualized entitlements would disrupt the balance that the Framers created to protect the executive from legislative power.

Leonard & Brant, *The Half-Open Door*, 54 Rutgers L. Rev. at 115.

In sum, the Court in *Lujan* rejected Congress's efforts to allow individuals who have not suffered any injury in fact to seek judicial enforcement of the Executive Branch's statutory duties. Just as Congress cannot empower the courts, and private parties, to tell the administrative agencies how to do their job, Congress should not be able to empower the courts, and private parties. to *do* the exclusive job of the administrative agencies.[9]

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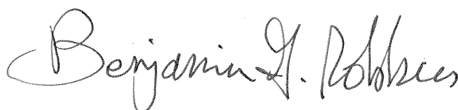
[9] It should be noted that, quite apart from the private statutory remedy at issue here, RESPA generously provides for many appropriate administrative and other avenues for enforcement of RESPA rights, at both the federal and state levels. First, RESPA delegates broad rule-making, investigative, and enforcement powers to the Department of Housing and Urban Development ("HUD"), and authorizes HUD *and* states' attorneys general and insurance commissioners to bring civil actions to enjoin violations of RESPA. 12 U.S.C §§ 2607(d)(4), 2617. RESPA also authorizes criminal actions, with a maximum penalty of $10,000, a one-year sentence, or both. 12 U.S.C. § 2607(d)(1). Moreover, RESPA confers concurrent jurisdiction on state courts to hear RESPA claims, where Article III does not apply. 12 U.S.C. § 2614. Finally, RESPA has an anti-preemption clause and allows states to enact their own RESPA-

CONCLUSION

For the reasons stated above, NELF, AIM, and the Chamber respectfully request that the Court reverse the judgment of the Ninth Circuit.

Respectfully submitted,

New England Legal Foundation and
Associated Industries of Massachusetts
By their attorneys,



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related statutes and regulations that can be more stringent than RESPA itself. 12 U.S.C. §§ 2607(d)(6), 2616.