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 *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS AND FOR REVERSAL OF THE NINTH CIRCUIT'S JUDGMENT

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August 29, 2011

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] *amicus curiae*, the Consumer Data Industry Association ("CDIA"), submits its brief in support of petitioners, First American.[2]

CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies ("CRAs") in the marketplace. CDIA is the largest trade association of its kind in the world. Its membership includes more than 200

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[1] Petitioners and respondent have filed blanket consent letters with the Court concerning the filing of *amicus* briefs. Therefore, under Rule 37.3(a), all parties have consented to the filing of CDIA's *amicus* brief. The parties' blanket consent letters on are on file with the Clerk of Court.

As required by Rule 37.6, CDIA states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] As used herein, "First American" refers to petitioners, First American Financial Corporation, successor in interest to The First American Corporation and First American Title Insurance Company.

consumer credit and other specialized CRAs operating in the United States and throughout the world.

CDIA is vitally interested in the outcome of this case because the court of appeals' decision misapplies this Court's decisions to conclude that an *uninjured* plaintiff demonstrates Article III standing,[3] and may seek statutory damages, simply by alleging that a defendant violated a statute regulating the defendant's conduct in a transaction that *involved* the plaintiff.

Because CRAs are sued many times each year by uninjured plaintiffs seeking statutory damages for the alleged willful violation of the Fair Credit Reporting Act ("FCRA"), CDIA's members may be directly impacted by the court's decision. The court of appeals' decision could be relied upon by such plaintiffs to avoid Article III standing requirements when bringing claims against CRAs, including putative class actions – to recover between $100 and $1,000 for each violation – under the FCRA's civil liability provision which permits such recovery for willful violations but does not expressly limit its application to only those instances when a plaintiff can allege some injury.

[3] U.S. Const. Art. III.

SUMMARY OF ARGUMENT

A statutory provision enacted by Congress that permits the recovery of damages without expressly requiring that a plaintiff allege and prove an actual injury fairly traceable to the alleged violation cannot confer Article III standing upon a plaintiff alleging claims under such a statute. Allowing a plaintiff to bring a claim under such a statute when the plaintiff has not alleged an injury would undermine the requirement that this Court has described as the "irreducible constitutional minimum of standing."[4]

Moreover, such a decision could be used by plaintiffs to avoid the Article III standing requirement when bringing claims under statutes, such as the FCRA, that permit the recovery of up to $1,000 for each alleged willful violation without expressly requiring an actual injury. To prevent such an outcome, this Court should reverse the court of appeals' decision to make clear that actual injury remains part of the "hard floor of Article III jurisdiction that cannot be removed by statute[s]," [5] such as RESPA or the FCRA, which do not expressly require "injury" in order to recover statutory damages.

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[5] *Summers v. Earth Island Inst.*, 555 U.S. 483, 129 S. Ct. 1142, 1151 (2009).

ARGUMENT

CDIA agrees with First American that the court of appeals' failed to correctly apply the U.S. Constitution's Article III standing requirement to respondent Denise Edwards' ("Edwards") claim seeking recovery, under RESPA, of three times the amount Edwards paid to Tower City Title Agency LLC ("Tower City") to purchase lender and borrower title insurance policies that Tower City issued on behalf of First American.[6]

Because CDIA has been involved in the consumer reporting industry for more a century, CDIA provides its separate brief to describe the potential impact of the court of appeals' decision beyond its immediate application to an uninjured plaintiffs' ability to recover penalties under the Real Estate Settlement Procedures Act ("RESPA").

THE COURT OF APPEALS' DECISION ERRANTLY TRANSFORMS A PLAINTIFF'S "INVOLVEMENT" IN A TRANSACTION INTO "INJURY-IN-FACT" TO FIND ARTICLE III STANDING.

The court of appeals' decision briefly acknowledges the three minimum requirements a plaintiff

[6] First American's brief at 18-42.

must allege to have standing under Article III – "injury, causation, and redressability."[7]

This Court has explained more fully that "the irreducible constitutional minimum of standing contains three elements:"[8]

> First, the plaintiff must have suffered an "injury-in-fact" – an invasion of a legally protected interest which is (a) concrete and particularized . . . ; and (b) is actual or imminent, not conjectural or hypothetical. . . .
>
> Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action". . . .
>
> Third, it must be "likely" as opposed to merely "speculative," that the injury will be redressed by a favorable decision. . . .[9]

The court of appeals focused on the first element, whether Edwards alleged an "injury" for Article III purposes.[10] For the court, because "RESPA prohibits the payment of 'any fee, kickback, or thing of value' in exchange for business referrals," Edwards sufficiently alleged an "injury" simply by alleging the fact of the

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[7] *Edwards v. First Am. Corp.*, 610 F.3d 514, 516 (9th Cir. 2010) (*citing*, *Fulfillment Servs., Inc. v. UPS*, 528 F.3d 614 (9th Cir. 2008)).

[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

[9] *Lujan*, 504 U.S. at 560-561.

[10] *Edwards*, 610 F.3d at 516.

violation of the RESPA prohibition in a transaction in which Edwards was "involved" because she paid for the settlement services.[11]

The court of appeals reached its conclusion by misinterpreting this Court's decision in *Warth v. Seldin*. The court observed:

> The injury required by Article III can exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing." [citations omitted][12] Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.[13]

The court, however, did not consider the context for the quoted language. In *Warth*, this Court was referring, for example, to instances in which Congress authorized a public official to perform certain functions and provided for judicial review of those actions.[14] The issue was whether a third-party could

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[11] *Id.* at 517. Edwards did not allege that the exclusive agency agreements between First American and Tower City caused her to receive lower quality services or to incur any other economic, physical or psychological harm. *Id.* at 516-517; First American's brief at 8.

[12] *Id.* at 517 (*citing, Fulfillment Servs.*, 528 F.3d at 618-619 which quoted *Warth v. Seldin*, 422 U.S. 490, 500 (1975)).

[13] *Id.* (*quoting, Warth*, 422 U.S. at 500).

[14] *Warth*, 422 U.S. at 500 (*citing, Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)).

invoke the court's jurisdiction to determine whether the public official performed his functions according to the law.[15] The standing question the Court addressed in *Warth* was what "injury" must be alleged by "persons who claim *injury of a non-economic nature* to interests that are widely shared."[16] The Court concluded that non-economic injuries – but *injuries* nonetheless – could meet the Article III standing requirement.[17] The paragraph quoted by the court of appeals continues in *Warth*:

> Of course, *Art. III's requirement remains*: the plaintiff must still allege *a distinct and palpable injury to himself*, even if it is an injury shared by a large class of other possible litigants. . . .[18]

This Court has explained that a plaintiff's injury-in-fact must be concrete in both a qualitative and temporal sense."[19] "Abstract" or "hypothetical" injuries will not suffice.[20]

Because Edwards had not alleged an economic injury, the court of appeals searched for a "harm" that

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[15] *See, e.g., Sierra Club*, 405 U.S. at 732.

[16] *Id.* at 734.

[17] *Id.* (non-economic injuries that will support Article III standing include changes in the aesthetics and ecology of an area).

[18] *Warth*, 422 U.S. at 501 (emphasis added).

[19] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

[20] *Id.*

could meet the "injury-in-fact" standing requirement, concluding that RESPA's referral fee payment prohibition was intended to prevent a non-economic harm: the possibility that the advice of the person providing the referral would be influenced by a financial interest in the recommended service provider.[21]

CDIA does not dispute that RESPA was intended to prevent the non-economic harm identified by the court of appeals. However, the mere *possibility* of such a harm which – in the case before the court of appeals – could not be linked to a "distinct and palpable injury" *to Edwards* herself that was caused by the alleged violation, is merely the sort of abstract and hypothetical injury this Court has rejected as a basis for Article III standing.

The application of the court of appeals' decision to claims alleging that CRAs willfully violated the FCRA, could permit consumers to maintain claims, including putative class action claims, against CRAs – seeking up to $1,000 for each class member – for FCRA violations without even the suggestion that the violation injured any class member. CDIA believes that such claims require that the plaintiff allege and prove some injury to meet the Article III standing requirement.

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[21] *Edwards*, 610 F.3d at 517-518.

A. The consumer reporting industry and civil liability for willful violations of the FCRA.

Congress recognizes that the consumer reporting industry is vital to the U.S. economy.[22] Each year, CRAs furnish more than 1.5 billion consumer reports to creditors, insurers, employers, landlords, law enforcement and counter-terrorist agencies, all of which use this information to make important risk-based decisions, hire employees, evaluate the backgrounds of potential tenants, and locate individuals suspected of criminal activity.[23]

In order to prepare these reports, CRAs have created and maintain data files on nearly 200 million consumers.[24] The files contain 2.6 billion tradelines[25] that include billions of items of information the CRAs

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[22] 15 U.S.C. § 1681(a)(1) ("The banking system is dependent upon fair and accurate credit reporting."); 15 U.S.C. § 1681(a)(2) (the consumer reporting system is an "elaborate mechanism" for investigating and evaluating a consumer's credit worthiness, credit standing, credit capacity, character, and general reputation); *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001) ("Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy.").

[23] *Id.*; *Sarver v. Experian Info. Solutions*, 390 F.3d 969, 972 (7th Cir. 2004); Michael E. Staten and Fred H. Cate, *The Impact of National Credit Reporting Under the Fair Credit Reporting Act: The Risk of New Restrictions and State Regulation* at vi (May 2003).

[24] Federal Trade Commission, *Report to Congress Under Sections 318 and 319 of the Fair and Accurate Credit Transactions Act of 2003* (2004) at 8-9.

[25] *Id.* at 8-9.

receive from tens of thousands of furnishers on a monthly basis.[26]

Because CRAs produce more than 1.5 billion consumer reports each year, it is not surprising that they are sued hundreds of times each year by consumers alleging violations of the FCRA. Typical lawsuits include claims that the CRAs failed to follow "reasonable procedures" to assure the maximum possible accuracy of the information used to prepare consumer reports concerning the plaintiffs,[27] or that the CRAs failed to conduct reasonable reinvestigations following the receipt of consumer disputes concerning the accuracy or completeness of the information in the CRA's files relating to the plaintiffs.[28] Although such lawsuits arise from less than .0001% of the consumer reports, the costs of defense represent significant expenses for CRAs that must be passed along to their users and ultimately borne by the consumers themselves in the form of higher costs for the users' goods and services.

The FCRA permits consumers to recover for both negligent and willful violations of its requirements.[29] A consumer alleging a negligent violation of the FCRA may recover "*actual damages* sustained by the consumer as a result of the failure" to comply with an

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[26] *Id.*

[27] 15 U.S.C. § 1681e(b).

[28] 15 U.S.C. § 1681i(a).

[29] 15 U.S.C. §§ 1681n, 1681o.

FCRA requirement.[30] A consumer alleging the willful violation of the FCRA may recover "any actual damages sustained by the consumer as a result of the failure *or damages* of not less than $100 and not more than $1,000."[31] For a consumer alleging a willful violation of the FCRA, the consumer is permitted to elect the measure of "damages" she will recover – *either* "any actual damages" *or* "damages of between $100 and $1,000.[32]

Although the term "damages" is not otherwise defined in the FCRA, its accepted ordinary meaning is: "Money claimed by, or ordered to be paid to, a person as compensation for *loss or injury*."[33] The limited legislative history to the 1996 amendment, which added the $100 to $1,000 alternative measure of damages for a willful violation of the FCRA, did not alter this:

> When [consumer report] information is wrong, *lives can be ruined* . . . we must strengthen consumers' ability to correct false reports as quickly as possible. And when

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[30] 15 U.S.C. § 1681o(a)(1). Plaintiffs may also recover "the costs of the action together with reasonable attorneys' fees as determined by the court." *Id.* § 1681o(1)(2).

[31] 15 U.S.C. § 1681n(a)(1)(A) (emphasis added). In addition to the costs of the action and reasonable attorney's fees, plaintiffs may also recover "punitive damages as the court may allow." *Id.* § 1681n(a)(2)&(3).

[32] 15 U.S.C. § 1681n(a)(1)(A).

[33] Black's Law Dictionary at 416 (8th ed. 2004) (emphasis added).

> such errors are inflicted *willfully or by negligence*, credit bureaus must know that they will be liable.[34]

CDIA believes that a consumer suing a CRA who has elected to forego the recovery of actual damages and to seek statutory damages of up to $1,000 must, to have Article III standing, still allege and prove that *some injury* occurred and that the *injury* was caused by the CRA's alleged violation of the FCRA. The FCRA's statutory damages provision merely permits that consumer to avoid having to prove the *amount* of damages sustained.

B. The impact of the court of appeals' decision if applied to the FCRA's statutory damages provision.

The FCRA governs all aspects of consumer reporting and contains 31 separate sections, 145 subsections, and approximately 34,000 words. In a recent decision involving class action claims for the alleged willful violation of the FCRA, this Court has commented on the dearth of guidance provided to businesses subject to the FCRA and its "less-than-pellucid statutory text."[35]

When preparing consumer reports, CRAs must "follow reasonable procedures to assure the maximum

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[34] 140 Cong. Rec. H9797 (Sep. 27, 1994) (statement of Mr. Schumer) (emphasis added).

[35] *Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 70 (2007).

possible accuracy of the information concerning the individual about whom the report relates."[36] A CRA that receives a consumer dispute must "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate. . . ."[37] Neither provision expressly requires that a consumer be "injured" as a result of an alleged willful violation in order to recover against a CRA. Some courts have read the absence of such an express "injury" requirement to mean that a plaintiff is not required to allege and prove an injury to have standing and to recover under the FCRA's willful violation provision.[38] CDIA submits that, consistent with Article III's standing requirement, a better reading of the FCRA's statutory damages provision is that consumers must allege and prove an injury caused by the alleged willful violation of the FCRA to have standing, but need not prove the *amount* of damages sustained to recover statutory damages under the FCRA.

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[36] 15 U.S.C. § 1681e(b) (emphasis added).

[37] 15 U.S.C. § 1681i(a)(1)(A) (emphasis added).

[38] *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) ("No Article III . . . standing problem arises, it bears adding, if Beaudry is permitted to file this claim. Congress 'has the power to create new legal rights, [including] right[s] of action, whose injury-in-fact involves the violation of that statutory right. . . ."); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages *without proof of injury*.") (emphasis added).

Under an analysis like that followed by the court of appeals, so long as the consumer is "involved" in the transaction (*e.g.*, if the consumer report is about the consumer), that "involvement" could be sufficient to provide Article III standing even in the absence of actual alleged injury resulting from an alleged violation.

In the case of the FCRA, such a result leads to the contravening Congress' expressed intent for CRAs. Congress' stated purpose for adopting the FCRA was to require that CRAs adopt reasonable procedures for "meeting the needs of commerce for credit, personnel, insurance, and other information."[39] This expressed intent makes clear that the FCRA is not a strict liability statute. Finding that a plaintiff has standing to bring a claim under the FCRA without any allegation of injury would transform the FCRA into such a statute. Such a result would discourage the economic activity the FCRA was intended to foster. Lower courts, without guidance from this Court, have demonstrated that they can and do read the "injury" requirement out of Article III to permit consumers to maintain claims against CRAs alleging willful violations of the FCRA without any allegation of actual injury resulting from such a violation.[40]

Because the court of appeals' erroneous decision, under which a plaintiff's "involvement" may – alone – constitute "injury" for purposes of Article III, could be applied to other laws, such as the FCRA, that permit

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[39] 15 U.S.C. § 1681(b).

[40] *Beaudry*, 579 F.3d at 707.

the recovery of statutory damages without expressly requiring "injury," the Court should correct the court of appeals' error to make clear that "injury-in-fact," rather than transactional "involvement," remains part of the irreducible minimum a plaintiff must allege and demonstrate in order to have standing.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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August 29, 2010