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,
Respondent.

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

BRIEF OF ERICK AND WHITNEY CARTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JOHN T. MURRAY
Counsel of Record
MURRAY & MURRAY CO., L.P.A.
111 EAST SHORELINE DRIVE
SANDUSKY, OH 44870
419.624.3000
jotm@murrayandmurray.com

Counsel for Amici Curiae, Erick and Whitney Carter

October 18, 2011

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

REGULATIONS

INTEREST OF THE AMICI CURIAE[1]

Amici curiae, Erick and Whitney Carter, are plaintiffs in the case entitled *Erick C. Carter, et al. v. Welles-Bowen, Inc., et al.*, in the Northern District of Ohio, Case No. 3:05 CV 7427. The Carters have alleged violations of the Real Estate Settlement Procedures Act's, 12 U.S.C. § 2601, *et seq.* ("RESPA"), anti-kickback and fee-splitting provisions, 12 U.S.C. § 2607(a) and (b).

The Carters filed their complaint in 2005 alleging that the defendants set up a sham affiliated business arrangement (ABA) for the sole purpose of providing illegal kickbacks in exchange for the referral of real estate settlement work. The defendants filed a motion to dismiss, pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), arguing that the court lacked subject matter jurisdiction because the Carters suffered no injury-in-fact and thus had no standing. On May 31, 2007, the district court entered an order granting defendants' motion to dismiss all of the Carters' claims for lack of subject matter jurisdiction. At the core of the district court's decision was the conclusion that the Carters lacked standing because they did not allege an "overcharge" for settlement services provided.

The Carters appealed that judgment to the Sixth Circuit Court of Appeals which reversed the district

---

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for a party wrote 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 the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

court's judgment holding that the Carters did, in fact, have Article III standing to bring their claims because they were the recipients of "referrals sullied by kickbacks in violation of RESPA." The Sixth Circuit went on to state that "[t]he plain meaning of the statutory language and the persuasive authorities examined by the court indicate that Congress created a private right of action to impose damages where kickbacks and unearned fees have occurred – even where there is no overcharge." The Sixth Circuit's opinion is reported at 553 F.3d 979.

This case threatens to overrule the Sixth Circuit's holding regarding whether a private purchaser of real estate settlement services has standing under RESPA to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If overruled, title insurers in certain states, including Ohio, will have carte blanche to pay kickbacks and referral fees, completely gutting RESPA of its intended purpose.

SUMMARY OF ARGUMENT

Consumer protection statutes, such as RESPA, "are designed to remedy and prevent harm arising from practices that injure many people but are not, in most instances, sufficiently damaging to outweigh the cost of litigation." *Kahrer v. Ameriquest Mortgage Co.*, 418

F. Supp.2d 748, 756 (W.D. Pa. 2005) (quoting *Patton v. Triad Guar. Ins. Corp.*, No. CV100-132 (S.D. Ga. October 10, 2002)). These statutes often provide a private right of action and seek to encourage litigation by allowing for "statutory damages" which "relieve litigants of the burden of having to prove an exact measure of pecuniary harm arising from a violation of their rights under the statute." *Id.*

Such remedies are particularly important in cases involving anti-competitive behavior because the effect or consequences of that behavior may be difficult to prove. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-400 (1927); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-64 (1931). RESPA is aimed at eliminating anti-competitive behavior: "[t]he purpose of [RESPA] is to prevent certain practices that are harmful to all consumers by establishing that consumers have a right not be subject to those practices…." *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 988 (6th Cir. 2009) (quoting *Kahrer*, 418 F. Supp.2d at 756 (internal quotation marks and citation omitted)).

In this case, the Ninth Circuit held that a plaintiff bringing a private cause of action for a RESPA violation need not allege an overcharge to satisfy the Article III requirement of standing. *Edwards v. First Am. Title Ins. Co.*, 610 F.3d 514, 518 (9th Cir. 2010). Quoting this Court's decision in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), the Ninth Circuit recognized that "[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." *Edwards*, 610 F.3d at 517. RESPA "creates an individual right to receive [settlement services] untainted by kickbacks or fee-

splitting [or referral fees]." *Carter*, 553 F.3d at 989. Here, because Edwards has pleaded that she received settlement services "sullied by [referral fees] in violation of RESPA," she has Article III standing to bring her claims. *Id.*

Petitioners have challenged the Ninth Circuit's decision claiming that Edwards failed to allege an injury-in-fact sufficient to satisfy Article III's standing requirement. They base their argument upon the flawed reasoning contained in a line of cases that has been rejected by numerous courts. Reversing the decision of the Ninth Circuit and adopting that flawed reasoning would require this Court to completely ignore RESPA's plain language and Congress's intent in enacting the statute.

ARGUMENT

Petitioners argue that, when bringing an action for a violation of § 2607 of RESPA, a plaintiff cannot adequately allege an injury-in-fact sufficient to establish Article III standing without alleging that he or she has been "overcharged" for the settlement services provided or has suffered some form of informational injury. Brief for Petitioners (hereinafter "Pet. Br."), at pp. 14-15. Petitioners' position relies upon an outcome-based approach to interpreting RESPA. Courts invoking that approach refuse to recognize that a private litigant may, when authorized to do so, bring an action for statutory damages only.

Here, the Ninth Circuit rejected that outcome-based approach, aligning itself with two other circuit courts to have considered the argument presented by petitioners. *Edwards*, 610 F.3d at 518; *accord Carter*,

553 F.3d 979; *Alston v. Countywide Fin. Corp.*, 585 F.3d 753 (3rd Cir. 2009). Requiring a plaintiff bringing a private cause of action for a violation of RESPA to allege an "overcharge" to have Article III standing would be inconsistent with both the unambiguous statutory language and Congress's intent in enacting RESPA, i.e., the elimination of kickbacks and referral fees. This Court should affirm the judgment of the Ninth Circuit because its holding is consistent with: (1) RESPA's plain language; (2) the legislative history of RESPA; and, (3) the standing requirement of Article III. Additionally, this Court must reject the position suggested by Petitioners because it would completely gut RESPA of its codified purpose.

I. PETITIONERS' ARGUMENT RELIES UPON AN OUTCOME-BASED INTERPRETATION OF RESPA.

The "overcharge" theory offered by Petitioners ignores the plain, unambiguous statutory language and the legislative history of RESPA. It is the product of courts that seek to prevent plaintiffs with otherwise concrete, palpable injuries from seeking redress in federal courts simply because they seek only statutory damages. Examining the line of cases used to support the "overcharge" theory demonstrates that it is based upon flawed reasoning.

A. The genesis of the "overcharge" theory propounded by Petitioners lies within the district court's opinion in *Durr v. Intercounty Title Co. of Ill.*, 826 F. Supp. 259 (N.D. Ill. 1993). The plaintiff in that case brought a putative class action against the defendant for alleged RESPA violations including

"overcharging real estate sellers and buyers for settlement services…." *Id.* at 260. In determining the measure of damages, the court was content with concluding, without discussion, that the plaintiff's damages were equal to three times the amount by which the plaintiff was overcharged. *Id.*

The plaintiff alleged that the defendant charged him $25 to record the deed and $37 to record the mortgage when, in fact, the true recording costs were $23 for the deed and $31.50 for the mortgage. *Durr*, 826 F. Supp. at 259. The plaintiff, however, mistakenly sought three times "the *entire* amount that was billed to [the plaintiff] by [the defendant] for *all* of its services and outlays," even those that were never alleged to have been improper in any way. *Id.* at 260. Incensed by this "greed and obduracy," the district court was eager to dismiss the plaintiff's RESPA claim and to impose sanctions upon plaintiff's counsel. *Id.* at 261. In its haste, the district completely ignored the plain language of RESPA's damages provision. *Id.* Instead, the court blithely concluded that because the plaintiff was overcharged by $7.50, the plaintiff's damages were, at most, equal to three times that amount, totaling $22.50. *Id.*

Had the court examined the language of RESPA's damages provision, 12 U.S.C. § 2607(d)(2), as it was required to do, it would have concluded that the proper measure of damages was three times the amount of charges paid for the settlement services "involved in the violation." 12 U.S.C. § 2607(b). The plaintiff was charged $25 to record the deed and $37 to record the mortgage totaling $62. *Durr*, 826 F. Supp. at 259. So the proper measure of plaintiff's damages was $186.

B. Latching onto the *Durr* court's approach to damages under § 2607(d)(2), the district court in *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418 (S.D. Fla. 1997), also blatantly ignored the plain language of RESPA that speaks to the calculation of damages. *See id.* at 1427. Instead, the *Morales* court, in an effort to construct a façade of legitimacy for its outcome-based approach, emphasized the language that describes who may recover damages under § 2607(d)(2): "the 'person charged for the settlement service involved in the violation.'" *Id.* (quoting 12 U.S.C. § 2607(d)(2)). Based upon that language, the court concluded that a "better reading of the statute is that the damage award consist of three times the amount which violates RESPA." *Id.* That conclusion is a non-sequitur as the language quoted by the court is wholly irrelevant to the calculation of damages; rather, it speaks to the person to whom liability is owed. *See Kahrer*, 418 F. Supp.2d at 753.

Nor does the *Morales* court's resort to the language in § 2608(b) legitimize its reasoning. The court reasoned that because Congress used the word "all" to modify the word "charges" in § 2608(b), which governs a seller's liability, its use of the word "any" to modify the word "charges" in § 2607(d)(2) renders "obvious" the conclusion that Congress intended the measure of damages in § 2607(d)(2) to be equal to three times the amount of the "overcharge." *Morales*, 983 F. Supp. at 1427. However, Congress's use of the word "any" "is more indicative of an intent to include all charges rather than merely the portion that constitutes the overpayment." *Kahrer*, 418 F. Supp.2d at 753. Indeed, if Congress intended for damages to be based upon the amount by which a plaintiff was overcharged, it "could

have stated that trebled damages pertained only to the overcharged portion of the fee…." *Id.*

The *Morales* court then sought to support its "overcharge" theory by looking to RESPA's legislative history. *Morales*, 983 F. Supp. at 1427-28. The court, however, mistakenly examined the history of RESPA as it was originally enacted in 1974, which determined damages based upon the amount of the *proscribed payment*. *Id.* (quoting S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546, 6552). If the *Morales* court had considered RESPA's legislative history after it was amended in 1983, the court would have observed that Congress removed the "proscribed payment" language and replaced it with the phrase "any charge paid for such settlement services," which changed the focus of the damages calculation to the amount paid by the buyer rather than the amount of the proscribed payment. *Kahrer*, 418 F. Supp.2d at 753-54. Accordingly, "it is simply nonsensical to suggest that Congress still intended to provide for damages in an amount three times the proscribed payment when it eliminated that very language from the statute." *Id.* at 754.

Nevertheless, other district courts have relied upon the flawed reasoning of the *Morales* and *Durr* courts to conclude that plaintiffs claiming a RESPA violation must allege an "overcharge" to have standing under Article III. *See*, *e.g.*, *Moore v. Radian Group, Inc.*, 233 F. Supp.2d 819 (E.D. Tex. 2002); *see also Contawe v. Crescent Heights of America, Inc.*, U.S. Dist. LEXIS 20344 (E.D. Pa. 2004).

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH RESPA'S PLAIN LANGUAGE AND LEGISLATIVE HISTORY.

The plain language of RESPA does not, and has never, required a plaintiff to allege an "overcharge."

A. Currently, RESPA's damages provision provides that any person who violates 12 U.S.C. § 2607 is liable to the person "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." 12 U.S.C. § 2607(d)(2). The term "such settlement service" refers to "the settlement service involved in the violation." A plaintiff's damages are, therefore, equal to three times the amount paid "for the settlement service involved in the violation…." Here, the alleged RESPA violation is a referral fee paid by First American to Tower City. *Edwards*, 610 F.3d at 516. Therefore, the settlement services "involved in the violation" include all settlement services provided by First American Title to individuals who were referred to it by Tower City.

As the Ninth Circuit recognized, "the term 'overcharge' does not exist in anywhere within the text of the statute," so there is simply no requirement that Edwards allege that she was "overcharged" for any of those settlement services. *Id.* at 517; *accord Alston*, 585 F.3d at 759 ("The plain language of RESPA section 8 does not require plaintiffs to allege an overcharge."). Even the *Morales* decision, upon which Petitioners' argument relies, concedes that under a literal approach to this language, "recovery under RESPA would be three times the *full amount* of a settlement

charge, regardless of the nature or extent of the alleged RESPA violation." *Morales*, 983 F. Supp. at 1427 (emphasis added). Indeed, this reasoning was adopted by the court in *Kahrer*: "the literal language of § 2607(d)(2) provides for three times the amount of *any charge* paid for settlement services which would appear to encompass *all* of the charges associated with the services provided rather than only treble the amount of any overpayment." *Kahrer*, 418 F. Supp.2d at 753 (second emphasis added); *accord Robinson v. Fountainhead Title Group, Corp.*, 447 F. Supp.2d 478, 489 (D. Md. 2006); *Pettrey v. Enterprise Title Agency, Inc.*, 241 F.R.D. 268, 277 (N.D. Ohio 2006).

B. As its legislative history makes clear, RESPA has *never* required plaintiffs to allege an "overcharge" in order to maintain a private cause of action. Courts espousing the "overcharge" theory have invoked the legislative history of RESPA, as it was enacted in 1974, for support. *See*, *e.g.*, *Morales*, 983 F. Supp. at 1427-28; *see also Moore*, 233 F. Supp.2d at 825-26. Those courts cite to the Senate Report explaining that, at that time, the treble damages provision of § 2607(d)(2) provided: "any person or persons who violate the provisions of the section shall be liable to the person whose business has been referred for three times the amounts of the proscribed payment, kickback or referral fee." *Moore*, 233 F. Supp.2d at 825-26 (quoting S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546, 6552).

Yet, even that language does not require an "overcharge." The actual language of the statute prior to the 1983 amendment provided that:

> [A]ny person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services in an amount equal to three times the amount of the portion, split, or percentage.

Kahrer, 418 F. Supp.2d at 753-54 (quoting the Real Estate Settlement Procedures Act of 1974, Pub.L. No. 93-533, §8(D)(2), 88 Stat. 1724 (1974)).

This language, which is no longer controlling, does not refer to an "overcharge." Instead, as stated above, it merely provided for a different basis upon which to calculate the amount of damages. Here, the alleged RESPA violation is a referral fee paid by First American to Tower City. *Edwards*, 610 F.3d at 516. Edwards's business was referred by Tower City to First American. *Id.* Therefore, even under the pre-1983 version of the statute, both entities would be liable to Edwards in an amount equal to three times the referral fee paid by First American. This interpretation is supported by the implementing regulations promulgated by the U.S. Department of Housing and Urban Development ("HUD") interpreting the term "thing of value." *Kahrer*, 418 F. Supp.2d at 755 n.9. The regulations provide: "[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." *Id.* (quoting 24 C.F.R. § 3500.14(g)(2)).

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENT OF STANDING.

Article III, Section 2 of the Constitution requires a private plaintiff to demonstrate standing to sue consisting of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and the conduct complained of; and, (3) the likelihood that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. Petitioners argue that, without alleging an "overcharge," Edwards cannot demonstrate an injury-in-fact.

The injury-in-fact element of standing requires a plaintiff to demonstrate the "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks and citations omitted). Here, the Ninth Circuit concluded that a plaintiff bringing an action for a violation of § 2607 has standing under Article III regardless of whether he or she has been overcharged for the settlement services provided. *Edwards*, 610 F.3d at 516-17. That decision brought the Ninth Circuit into agreement with both the Sixth Circuit and Third Circuit. *Id.* at 518 (citing *Carter*, 553 F.3d at 989; *Alston*, 585 F.3d at 755). As explained in those two opinions, a plaintiff claiming a RESPA violation need not allege an "overcharge" to establish an injury in fact sufficient to confer Article III standing.

A. *Amici*, the Carters, previously sought review of this same issue in the Sixth Circuit where the court determined that they had Article III standing despite not alleging an "overcharge." *Carter*, 553 F.3d at 988-89. The appellees in that case relied upon the same argument as that propounded by Petitioners here, i.e., that a plaintiff who does not allege an "overcharge" lacks standing to sue under § 2607. *Id.* at 984.

In analyzing the requirement of Article III standing, the Sixth Circuit recognized that "Congress no doubt has the power to create new legal rights, and it generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right." *Id.* at 988 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). The court also recognized two limitations upon that power. First, it recognized that such authority is not unlimited because "Congress may confer standing to redress injuries only on parties who actually have been deprived of the newly established statutory rights." *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972)). Second, the court stated that even though the "injury need not be economic in nature, it still must cause individual, rather than collective, harm." *Id.* at 989 (citing *Morton*, 405 U.S. at 738).

Continuing its analysis, the Sixth Circuit stated that RESPA (1) "creates an individual right to receive referral services untainted by kickbacks or fee-splitting" and, (2) "authorizes suits only by individuals who receive a loan that is accompanied by an unlawful referral, which is plainly an individualized injury." *Id.* Because the Carters had "pleaded that they themselves were given referrals sullied by kickbacks in violation of RESPA," the court determined that

"they ha[d] Article III standing to bring these claims." *Id.*

The Sixth Circuit analogized its holding to this Court's decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), stating "[j]ust as a violation of the rights of 'testers' to receive 'truthful information' supports standing, so does a violation of the right to receive referrals untainted by conflicts of interest." *Id.* (quoting *Havens Realty*, 455 U.S. at 373-74). Finally, the court made explicit its rejection of the *Moore*, *Morales*, and *Durr* line of cases when it stated that the reasoning used by those courts "overlooks the Supreme Court's teaching that injuries need not be financial in nature to be concrete and individualized." *Id.* (internal citations omitted).

B. The Third Circuit also decided this same issue in *Alston*, 585 F.3d 753, where it reversed the order of the district court and concluded that RESPA Section 8 does not require an overcharge allegation. *Id.* at 755. In determining whether the plaintiffs had Article III standing, the court relied heavily upon the Sixth Circuit's decision in *Carter*, but also noted the comparison of RESPA to the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692-1692p. *Id.* at 763 n.12. The FDCPA authorizes both actual and statutory damages where a debt collector fails to comply with the statute. *Id.* (citing 15 U.S.C. § 1692k(a)(1), (2)(A)). The Third Circuit noted decisions from the Tenth and Ninth Circuits holding that a plaintiff may suffer a cognizable statutory injury based wholly on the invasion of the legal right to fair debt collection treatment, regardless of whether it had a collectable debt. *Id.* (citing *Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208 (10th Cir.

2006); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982)). Based upon those decisions, the Third Circuit concluded that "[s]imilarly, the provision of statutory treble damages in RESPA, based on the total charges paid for the settlement services at issue, obviates an actual damages requirement." *Id.* at 763 n.12.

The FDCPA is just one of many analogous consumer protection statutes. In 2009, the Sixth Circuit held that the Fair Credit Reporting Act's, 15 U.S.C. § 1681, *et seq.* ("FCRA"), "private right of action does not require proof of actual damages as a prerequisite to the recovery of statutory damages…." *Beaudry v. Telecheck Servs., Inc.*, 579 F.3d 702, 703 (6th Cir. 2009). In that case, the district court dismissed the plaintiff's complaint, which sought statutory damages, on the basis that she had not alleged any injury. *Id.* The Sixth Circuit examined a host of case law interpreting FCRA and other consumer protection statutes and specifically concluded that "[n]o Article III (or prudential) standing problem arises" because "Congress 'has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right….'" *Id.* at 707 (quoting *Carter*, 553 F.3d at 988). That conclusion was consistent with the Seventh Circuit's holding, regarding the same issue, that "[a plaintiff] could seek statutory damages 'without proof of injury' in lieu of actual damages." *Beaudry*, 579 F.3d at 706 (quoting *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006)).

In *Beaudry*, the Sixth Circuit also cited one of its previous decisions in which it reached the same conclusion regarding the Truth in Lending Act

("TILA"), 15 U.S.C. § 1601-1667f. *Beaudry*, 579 F.3d at 706 (citing *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996)). The court in *Purtle* held that "a consumer did not need to show that she 'suffered actual monetary damages' or that she 'was actually misled or deceived' in order to prevail on a TILA claim for statutory damages and attorney fees." *Id.* The Sixth Circuit recognized that the same conclusion was reached by the Fifth Circuit in 1998. *Beaudry*, 579 F.3d at 706 (citing *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 441 (5th Cir. 1998)).

The Ninth Circuit's decision in this case is, therefore, supported by a long line of case law interpreting RESPA and other consumer protection statutes. Petitioners' arguments to the contrary are insufficient to rebut these courts' well-reasoned conclusions in all of those cases.

C. In challenging the decision of the Ninth Circuit, Petitioners attempt to dismiss the determination that Edwards has standing based upon the invasion of her right to receive settlement services free of the taint of prohibited kickbacks and referral fees. Pet. Br. at p. 39. Petitioners classify such a right as "abstract, self-contained, and noninstrumental" claiming that "Congress cannot legislate away Article III's requirement of particular and concrete injury by purporting to convey such a right." Pet. Br., at p. 39 (quoting *Lujan*, 504 U.S. at 573; *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009)).

The Sixth Circuit, however, specifically addressed this concern and concluded that the right to receive settlement services untainted by kickbacks or fee-splitting fits within the limitation that Congress may

empower individuals to sue based only on "personal and individual[ized] injuries." *Carter*, 553 F.3d at 989 (quoting *Lujan*, 504 U.S. at 560 n.1). The court concluded that RESPA "does not authorize suits by members of the public at large; it authorizes suits only by individuals who receive a loan that is accompanied by an unlawful referral, *which is plainly an individualized injury*." *Carter*, 553 F.3d at 989 (emphasis added).

IV. ADOPTING PETITIONERS' POSITION WOULD GUT RESPA OF ITS PURPOSE.

This Court should reject Petitioners' position because it misstates the purpose of RESPA and would grant title insurers in certain states, including Ohio, carte blanche to pay kickbacks, gutting RESPA of its actual purpose.

A. Petitioners claim that "Congress enacted RESPA to protect 'consumers throughout the Nation … from *unnecessarily high settlement charges* caused by certain abusive practices.'" Pet. Br., at p. 40 (quoting 12 U.S.C. § 2601(a)). Based upon that stated purpose, Petitioners argue that it is "the financial injury caused when a settlement service provider takes advantage of an unwitting customer unlawfully referred" that satisfies the injury requirement of Article III standing. *See* Pet. Br., at p. 41. Applying those purported principles to the facts of this case, Petitioners conclude that Edwards lacks standing because she did not claim that she was overcharged for her title insurance. *See* Pet. Br., at p. 14. Petitioners go further claiming that "[a]ny such allegation would in any event fail because, under the state regulatory regime in place in Ohio, [Edwards] had no lower-priced

insurance option." Pet. Br., at p. 14. Petitioners' argument must be rejected for two reasons.

B. First, this Court must reject Petitioners' position because it misstates the purpose of RESPA. The language quoted by Petitioners states Congress's *findings*, not the purpose of Section 8 of RESPA. In fact, Congress's purpose in enacting RESPA was the "*elimination of kickbacks and referral fees* that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b) (emphasis added). As the Fourth Circuit has noted, Section 8(a) of RESPA "prohibits the payment of formal kickbacks or fees for the referral of business and *does not require an overcharge to a consumer*." *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002) (emphasis added). Indeed, Section 8 of RESPA was not intended to eliminate all settlement service overcharges: "Congress chose to leave markups and the price of real estate settlement services to the free market by consider[ing] and explicitly reject[ing] a system of price control for fees." *Id.* at 268 (quoting *Mercado v. Calumet Fed. Sav. & Loan Ass'n*, 763 F.2d 269, 271 (7th Cir. 1985)). Rather, the purpose of RESPA was to prohibit kickbacks and referral fee arrangements. *Boulware*, 291 F.3d at 268.

C. Second, this Court must reject Petitioners' position because it would grant title insurers in certain states, such as Ohio, carte blanche to pay kickbacks and referral fees. The State of Ohio requires all insurers, including title insurers, to file their premium rates with the state superintendent of insurance. OHIO REV. CODE § 3935.04(A). Once that rate is filed, an insurer is prohibited from charging a rate that differs from the filed rate. *Id.* at § 3935.04(H). Furthermore,

Ohio permits its insurers to join state-licensed rating bureaus which file rates for all of their members. *See id.* at §§ 3935.04(B), 3935.06. After the state agency approves the filed rate, the filed rated doctrine bars ratepayers from challenging the reasonableness of the filed rate through judicial proceedings. *See Alston*, 585 F.3d at 763 (citing *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2nd Cir. 1994)).

Armed with the filed rate doctrine and a decision by this Court requiring plaintiffs to allege an "overcharge" to have standing, title insurers in Ohio, and other states with similar insurance laws, would be free to pay kickbacks and referral fees with impunity. Plaintiffs not alleging an "overcharge" would lack standing to sue under RESPA and those that were to allege an "overcharge" would have their claims barred by the filed rate doctrine. Such an absurd result would completely gut the purpose of RESPA.

CONCLUSION

For all of the foregoing reasons, the Carters respectfully request that the decision of the Ninth Circuit be affirmed.

Respectfully Submitted,

October 18, 2011

John T. Murray
Counsel of Record
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
419.624.3000
jotm@murrayandmurray.com

Counsel for Amici Curiae,
Erick and Whitney Carter