No. 10-708

In The
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION AND FIRST AMERICAN TITLE INSURANCE COMPANY,
Petitioners,

v.

DENISE P. EDWARDS,
Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION SUPPORTING PETITIONERS

NICK CAMMAROTA
California Building Industry Association
1215 K Street, Suite 1200
Sacramento, CA 95814
(916) 443-7933
ncammarota@cbia.org

CHRISTOPHER M. WHITCOMB*
THOMAS J. WARD
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
cwhitcomb@nahb.org
**Counsel of Record*

August 29, 2011

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

QUESTION PRESENTED

In the absence of any claim that the alleged violation of RESPA affected the price, quality, or other characteristics of the settlement services provided, does a private purchaser of real estate settlement services have standing 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)?

TABLE OF CONTENTS

Page(s)

TABLE OF APPENDICES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(cont.)*

Page(s)

CONSTITUTIONAL, REGULATORY AND STATUTORY PROVISIONS

OTHER

INTEREST OF *AMICUS CURIAE*

Blanket consents are on file for the submission of amicus briefs in this matter.[1]

The National Association of Homebuilders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's more than 160,000 members are home builders and remodelers, and its builder members construct about 80 percent of the new homes each year in the United States. The California Building Industry Association ("CBIA") is a statewide, non-profit trade association representing approximately 3,200 businesses involved in all aspects of residential and commercial construction. Its members include homebuilders, architects, engineers, sales agents, title and escrow companies, general and specialty contractors, lenders, attorneys, land planners, material suppliers, insurers and land developers.

---

[1] Under Rule 37.6 of the Rules of this Court, *Amicus* state(s) that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amicus,* its members, or its counsel contributed monetarily to the preparation and submission of this brief. Letters of consent to file this brief are on file with the Clerk of the Court under Rule 37.3.

Collectively, the members are responsible for producing approximately 70% of all new homes built in California annually. First American Financial Corporation is a member of both the CBIA and NAHB.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members. NAHB was a petitioner in *NAHB v. Defenders of Wildlife,* 551 U.S. 644 (2007). It also has participated before this Court as *amicus curiae* or "of counsel" in a number of cases involving landowners aggrieved by excessive regulation under a wide array of statutes and regulatory programs. *See* Appendix A.

The maintenance and clarification of Article III's injury in fact requirement has long been of critical importance to NAHB and the CBIA as our members frequently face lawsuits alleging the violation of federal statutory rights. Because these lawsuits often turn on standing, both NAHB and the CBIA are keenly interested in clarification of the injury in fact requirement impacted in these lawsuits. Toward that end, NAHB has participated in cases before the Court that implicate similar standing issues, including *Am. Elec. Power Co., Inc., et al. v. Connecticut, et al.,* 131 S. Ct. 2527 (2011) and *Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc.,* 210 Fed. Appx. 469 (6th Cir. 2006), *cert. denied,* 128 S. Ct. 880 (2008) (No. 07-421).

Finally, many CBIA and NAHB members are covered by the Real Estate Settlement Procedures Act (RESPA). Thus, they have a direct interest in the degree to which Private Enforcement of the statute will be allowed by Federal Courts.

SUMMARY OF ARGUMENT

The ability of Congress to grant a private plaintiff a statutory right of action in federal courts is always subject to the full limits of Article III. Lower courts have been frequently confused by the distinction between a statutory right of action and the existence of the injury required for standing under the constitution, and this case provides an excellent opportunity to clarify how these separate elements of standing relate to each other and are to be applied.

> Article III is a constraint upon *congressionally conferred*, as well as *judicially inferred*, standing, and that Congress may not bestow standing to sue except where the courts would otherwise find that the basic requirements for 'injury in fact' are already met.

Laurence H. Tribe, *American Constitutional Law* 396 (3d Ed. 2000).

Accordingly, the fact that a statute creates a private right of action, does not mean that an injury in fact "automatically" occurs upon violation of the statute. Under such circumstances, affirmative proof that the *plaintiff* suffered a distinct and

palpable injury is required. This proof is especially important when the plaintiff alleges that it has suffered an injury due to a regulated party's violation of statutory requirements and prohibitions.

ARGUMENT

I. Article III Standing Requirements Are Not Obviated By Congressionally Created Interests or Rights

All parties must satisfy Article III requirements for standing in order to have a case or controversy before a federal court. "First, the plaintiff must have suffered an 'injury in fact' . . . which is (a) concrete and particularized . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical' . . . Second, there must be a causal connection between the injury and the conduct complained of . . . [t]hird, it must be 'likely' . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). While these concepts blend together, "the central focus is fixed on the injury requirement." Richard D. Freer Et Al., *Jurisdiction and Related Matters,* 13A Fed. Prac. & Proc. Juris. Section 3531.4 (3d ed. 2011).

While the paramount need for a concrete and particularized injury has been well established, courts continue to be confused over its application in the context of rights and causes of actions created by statute. This case is an excellent platform for this Court to resolve lingering inconsistencies in the lower courts.

There is a clear distinction between the violation of a congressionally created right and the existence of an injury under Article III. "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." *Raines v. Byrd,* 521 U.S. 811, 820 n. 3 (1997).

While Congress can create legal rights through statute, no statute can manufacture a one-size-fits-all injury. The need for all plaintiffs to show a concrete and particularized injury is well established. *Lujan,* 504 U.S. at 581 (". . . the party bringing suit must show that the action injures him in a concrete and personal way."). In other words, the fact that a statute has conferred the right to sue on a particular party does not create standing out of whole cloth. "[T]he requirement of injury in fact is a hard floor of Art. III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst., et al.,* 129 S. Ct. 1142, 1151 (2009).

A. Congressionally Created Rights Still Require Injury in Fact

In the decision below, the Ninth Circuit inappropriately conflates the statutory creation of a right of action with the injury required by Article III. The Ninth Circuit determined that the injury required by Article III exists by virtue of statutes creating legal rights. *See Edwards v. First Am. Corp.,* 610 F.3d 514, 516 (9th Cir. 2010) (citing *Warth v. Seldin,* 422 U.S. 490, 500 (1975). The court

concludes that "[b]ecause RESPA gives Plaintiff a statutory cause of action, we hold that plaintiff has standing to pursue her claims against Defendants." *Id.* at 518. This conclusion, however, misreads this Court's past decisions dealing with injury in fact in the context of statutorily created rights.

While the Court in *Warth* articulated the principle that an injury in fact can exist because of the violation of a statutorily created right, it never eliminated the requirement that an injury be concrete and particularized under Article III. *Warth* clearly states that the standing analysis occurs in two parts. First, when a statute creates a legal right or a cause of action, the violation of that right can provide the basis for a legally cognizable injury. The Court continued to explain that "Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." 422 U.S. at 501.

In fact, only prudential standing requirements were limited by the Court's holding in *Warth*. These requirements are meant "to avoid deciding questions of broad social import where no individual rights would be vindicated." *Gladstone Realtors v. Vill. of Bellwood,* 441 U.S. 91, 99-100 (1979). Where Congress intended to confer standing to the extent of Article III, these prudential barriers to standing do not apply. "If, as is demonstrated in the text, Congress intended standing under [the statute] to extend to the full limits of Art. III, the normal prudential rules do not apply; as long as the plaintiff suffers actual injury . . . " *Gladstone Realtors,* 441

U.S. at 103 n.9 (emphasis in original). In other words, the requirement of a concrete and particularized injury remains sacrosanct.

B. A Statutory Cause of Action Does Not Confer Standing Without Specific Proof of Injury

The creation of a statutory cause of action is unrelated to proof of injury in fact, which is the threshold question before a plaintiff can assert any claim under the statute. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103 (1998). However, statutes that do not confer an individual right must be supported by clear evidence of injury that has personally affected the plaintiff. *See Sierra Club v. Morton,* 405 U.S. 727, 738 (1972) ("[Statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

The District of Columbia Circuit recently recognized this distinction in *Zivotofsky v. Sec'y of State,* 444 F.3d 614 (DC Cir. 2006). Citing *Warth*, the court noted that when congress enacts statutes that unequivocally create legal rights, the violation of those rights will create standing upon specific proof of injury. *Id.* at 617. The court then explained that even where statutes create a clear individual right, the plaintiff must show how a violation of that right has created a concrete and particular injury. *Id.* at 618-19.

This analysis can also be seen in the context of statutes with citizen-suit provisions. Under these circumstances, Article III standing requires a specific showing of how the statutory violation has harmed a plaintiff in "a concrete and personal way." *Lujan,* 504 U.S. at 580-81.

Examples of the proof required can be found in the context of environmental statutes with citizen suit provisions. *See Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.,* 528 U.S. 167 (2000). The issue in *Laidlaw* arose under the citizen suit provision of the Clean Water Act, which authorizes federal district courts to review suits initiated by "a person . . . having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365 (a), (g). Under *Laidlaw,* the Court explained that plaintiffs utilizing a statute's citizen suit provision must clearly show that injury complained of was concrete and particularized. *Id.* at 180-81.

Alleging a violation of the statute alone was insufficient to show injury in fact. The plaintiff in *Laidlaw* had to make an affirmative showing that the regulated party's actions had an adverse affect on its interests. *See also Interfaith Cmty. Org. v. Honeywell Int'l, Inc.,* 399 F.3d 248, 255-56 (3d Cir. 2005) (plaintiffs proved particularized injury under citizen suit provision of the Resource Conservation and Recovery Act). By contrast, where citizen suit claimants have failed to show that the manner in which another is regulated will cause a direct and quantifiable injury, they do not have standing under Article III. *See Texas Indep. Producers and Royalty*

Owners Ass'n, et al. v. E.P.A., 410 F.3d 964, 971 (7th Cir. 2005).

Similarly, the Third Circuit recently applied this principle in the context of the Lanham Act, which imposes civil liability for damages sustained by a person injured as a result of the procurement of the registration of a mark by a false or fraudulent declaration. *Joint Stock Soc'y v. UDV North America, Inc.,* 266 F.3d 164 (3d Cir. 2001); 15 U.S.C. § 1120. The court determined that the plaintiffs did not show Article III standing because no evidence was presented that they lost business because of the false use of its trademark, the court held that they did not show an injury in fact sufficient for standing. *Id.* at 176.

The facts and posture of *Joint Stock Soc'y* are strikingly similar to those in the case below. As the Ninth Circuit noted, Section 8(d) of RESPA grants a statutory cause of action when a plaintiff has purchased a settlement service "involved in" a regulated party's violation of the statute. What the Ninth Circuit ignored is that plaintiff must still plead with particularity how the claimed violation of Section 8(a) of RESPA actually injured her.

Thus, Ms. Edwards was required to show a distinct injury in addition to claiming a violation of RESPA. While RESPA creates a specific cause of action, a violation of its provisions does not necessarily result in an injury. Like plaintiffs exercising their statutory cause of action under an environmental citizen suit provision or the Lanham

Act, the plaintiff here must plead distinct and particularized injury stemming from First American's actions.

CONCLUSION

For the reasons state above, the Court should grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully Submitted,

NICK CAMMAROTA
California Building Industry Association
1215 K Street,
Suite 1200
Sacramento, CA 95814
(916) 443-7933
ncammarota@cbia.org

CHRISTOPHER M. WHITCOMB*
THOMAS J. WARD
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 266-8200
cwhitcomb@nahb.org
**Counsel of Record*

August 29, 2011

TABLE OF APPENDICES

Page(s)

APPENDIX A

Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include:

Agins v. City of Tiburon, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987); *Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Yee v. City of Escondido,* 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council,* 505 U.S. 1003 (1992); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.,* 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Franconia Assocs. v. United States,* 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.,* 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me.*

Bd. of Envtl. Prot., 547 U.S. 370 (2006); *Rapanos v. United States,* 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation,* 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted* 130 S. Ct. 2097 (2010) (No. 09-846); *Am Elec. Power Co., Inc. v. Connecticut,* 582 F.3d 309 (2d Cir. 2009), *cert. granted,* 131 S. Ct. 813 (2010) (No. 10-174); *Sackett v. United States Envtl. Prot. Agency,* 622 F.3d 1139 (9th Cir. 2010), *cert. granted,* 2011 WL 675769 (June 28, 2011) (No. 10-1062).