No. 10-708

In the
Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORP., *et al.*,
Petitioners,
v.
DENISE P. EDWARDS, Individually and on Behalf of Others Similarly Situated,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-mail:
jeastman@chapman.edu
caso@chapman.edu

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and the Center for Constitutional Jurisprudence

QUESTION PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," *inter alia*, Section 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id*. § 2607(d)(2).

Does a purchaser of real estate who, without any concrete or actual harm of her own, alleges in a class-action lawsuit technical violations of RESPA by her title insurance company, meet the requirements of Article III's "case or controversy" requirement?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and the Center for Constitutional Jurisprudence respectfully submit this brief amicus curiae in support of First American Financial Corporation.[1]

Pacific Legal Foundation (PLF) was founded over thirty-five years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF advocates limited government, individual rights, and free enterprise. PLF has litigated numerous cases involving Article III standing, as well as the consequences of permitting noninjury class actions. *See*, *e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488 (2009); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Center for Constitutional Jurisprudence was founded in 1999 as the public interest law arm of the Claremont Institute, the mission of which is dedicated to upholding the principles of the American Founding

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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 Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

to their rightful and preeminent authority in our national life, including the proposition that liberty is best protected by adherence to separation of powers and recognition on the limits of the grant of power to each branch of government. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); and *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 1807 (2011).

ARGUMENT

I

CONGRESS CANNOT CREATE INJURY-FREE ARTICLE III STANDING VIA STATUTE WHERE IT OTHERWISE DOES NOT EXIST

The text of Article III gives the federal courts authority to hear only "Cases" and "Controversies" and serves to maintain the constitutional balance between the branches. Indeed, this Court has stated that standing "is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Specifically, courts do not impinge upon the Executive's duties to "take Care that the Laws be faithfully executed" under Article II. U.S. Const. art. II, § 3, cl. 4 (Take Care Clause). Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An*

Arbitrariness Approach, 79 N.Y.U. L. Rev. 1657, 1684 (2004); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983).

The "Take Care" Clause reflects a structure that does not permit Congress to use citizen suits and other private enforcement actions to conscript the courts in its battles with the Executive, which would result in an imbalance among the branches. Heather Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 492-500 (2008). Suits against private entities for violations of the law particularly raise "a lurking issue about private interference with the exercise of prosecutorial discretion, and hence with the President's 'Take Care' power." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 231 n.300 (1992).

The constitutional structure also reflects the fact that courts—lacking independent fact-finding ability—are well equipped to handle actual disputes between adverse parties, but are poorly equipped to handle theoretical disputes. *See* Robert P. Taylor, *Antitrust Standing: Its Growing—Or More Accurately Its Shrinking—Dimensions*, 55 Antitrust L.J. 515, 518 (1986) (noting that "the judicial process is poorly equipped to deal . . . with highly speculative claims of injury"). Put simply, "courts should not make unnecessary decisions, because unnecessary decisions are often bad decisions." Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 Tex. L. Rev. 215, 221 (1998). Rather, courts, "at their best," are "councils of wise elders meditating on real disputes." Richard A. Posner, *The Problematics of Moral and Legal Theory*

257-58 (1999). The standing requirement assures "that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Deciding cases in "an actual factual setting" ensures that a court's decisions "will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id.*

Requiring an actual, concrete injury for a private plaintiff to have standing to sue serves both prudential and constitutional policies. *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 50-51 (2d ed. 2002) (describing policies of conserving judicial resources, optimizing judicial decisionmaking, and promoting fairness as underlying the justiciability doctrines, including standing). This Court has emphasized that parties who have suffered an actual injury-in-fact test present concrete issues more amenable to concrete resolution. *See United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89-90 (1947) (identifying " 'concrete legal issues, . . . not abstractions'" as requisite for constitutional litigation and expressing concern regarding the lack of specific facts about which of plaintiff's activities the challenged Hatch Act prohibited (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940))); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (describing a "justiciable controversy" as a controversy satisfying requirement for a concrete dispute touching a legal relationship between parties).

These constitutional and prudential concerns were at the forefront of the analysis in *Lujan*, 504 U.S. 555, which outlined the essence of current standing doctrine. To have standing, a plaintiff must claim to have suffered an injury-in-fact that was caused by the defendant, which is redressable by some court action. *Id*. at 560-61. The injury must be "concrete and particularized,"[2] *id*., and " 'actual or imminent, not 'conjectural' or 'hypothetical.'" *Id*. (quoting *Whitmore ex rel. Simmons v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citations omitted))). For causation, the injury must be "'fairly . . . trace[able] to the challenged action of the defendant.'" *Id*. at 560 (brackets in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org*., 426 U.S. 26, 41-42 (1976)). In terms of redressability, the requested relief must be reasonably capable of redressing the injury rather than "speculative." *Id*. at 561 (quoting *Simon*, 426 U.S. at 43).

Congress can, by statute, require the federal courts to abandon *prudential* standing requirements. *See*, *e.g*., *Bennett*, 520 U.S. at 163-64 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated."). And Congress may create rights, the

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[2] Amicus Center for Constitutional Jurisprudence has previously urged this Court to lower the "particularized" threshold, but the dispute over whether the "particularized" element is merely a prudential concern or is of constitutional magnitude is not at issue in this case, which instead turns on whether the injury is "concrete" and "actual." *See*, *e.g.*, Center for Const. Jur. Am. Brf. Supporting Petition for Writ of Certiorari, *Schaffer v. O'Neil*, 534 U.S. 992 (2001) (certiorari denied); Richard A. Epstein, *Standing and Spending—The Role of Legal and Equitable Principles,* 4 Chap. L. Rev. 1 (2001).

deprivation of which gives rise to a cognizable Article III injury. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). However, these lines of cases do not alter Article III's outside limit on Congress's authority to grant standing. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (While Congress could eliminate prudential barriers to expand standing to sue under the Fair Housing Act to the full extent permitted by Article III, "in no event . . . may Congress abrogate the Article III minima.") (citing *Warth*, 422 U.S. at 501, and *Simon*, 426 U.S. at 38). *Cf. Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 869 (2011) (declining to interpret Title VII's grant of a private cause of action to any "aggrieved person" as conferring standing coextensive with Article III where such an expansive grant of standing would lead to "absurd consequences").

> Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those "Cases" and "Controversies" that are the business of the courts rather than of the political branches.

Lujan, 504 U.S. at 576. That is, a plaintiff's claim that a defendant failed to follow the law—without more—is insufficient to satisfy Article III. *See also Sierra Club v. Morton*, 405 U.S. 727, 740 n.16 (1972) ("[J]udicial review is effective largely because it is not available simply at the behest of a partisan faction, but is

exercised only to remedy a particular, concrete injury.").

This point was further firmly established as part of constitutional standing doctrine in *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997), holding that "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." *See also Summers*, 555 U.S. 488 (rejecting environmentalist groups' efforts to challenge revised procedures the U.S. Forest Service adopted to streamline timber removal on small parcels affected by forest fires, holding that "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute").

Harmonizing the approaches of both the statutory and constitutional cases, Professor Heather Elliott concludes, "Congress can only identify injuries that the Court would agree are concrete and can only elevate to de jure status injuries that the Court would already recognize as de facto." Heather Elliott, *Congress's Inability To Solve Standing Problems*, 91 B.U. L. Rev. 159, 187 (2011). She explains two inter-related reasons for this limitation on Congress. First, it is unclear whether a statute that "deems" a person to have standing is *factual* finding of the sort typically granted deference by the courts. Second, even if a pronouncement of standing is considered to be a factual one, fact-finding is given only limited deference when it comes to matters implicating constitutional structure. Thus, in *United States v. Morrison*, 529 U.S. 598, 614 (2000), for example, this Court rejected congressional fact-finding that sought to demonstrate that gender violence had a nontrivial effect on

interstate commerce: "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Id*. (alterations, citations, and internal quotation marks omitted). *See also Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) ("The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.").

Because "it is the Court's special responsibility to mark where Congress has exceeded its constitutional bounds," Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind. L.J. 1 (2003), to the extent Congress can confer standing on a plaintiff, it is limited to "tinker[ing] at the edges," of prudential standing. Jonathan H. Adler, *Standing Still in the Roberts Court*, 59 Case W. Res. 1061, 1063 (2009); *Bennett*, 520 U.S. at 163 (finding plaintiffs had standing under "zone of interests" prudential standing doctrine due to congressional authorization of suit by "any person"). A statute may not "confer" Article III standing on a private person to sue a private defendant for regulatory errors that caused no injury beyond violation of the statute or regulation itself.

II

PLAINTIFFS WITHOUT INJURY LACK STANDING TO PURSUE A CLASS ACTION

A. "Representative" Plaintiffs must Have Suffered the Same Injury as the Class They Seek To Represent

The standing issue presented in this case gains extra importance because the named plaintiff seeks to represent a class. The class action overlay adds complex procedural and policy concerns that impact not only the named parties, but all nonparties similarly situated who would be bound by the case resolution. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23."). In short, class actions are "a special kind of litigation," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978), in which the standing of the named plaintiff assumes even greater importance.

Adjudicating the rights of third parties in their absence without some compelling need is unfair, both to present and future litigants. *See*, *e.g.*, *Warth*, 422 U.S. at 509-10 (denying third party standing when no special relationship existed between the litigants and the third parties and a denial of standing would not harm the third parties).; Gaston, 77 Tex. L. Rev. at 258 ("Standing is about letting the presently affected litigate their adversarial claims, not about binding the countless and unaware to the decisions of lawyers who have only their self-interest at stake."). Thus, class representatives must actually be members of the class.

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (To satisfy standing, the class representative must suffer an injury and must have the "same interest" and the "same injury" as the class members.); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1969) (rejecting a class claim, holding that plaintiffs "cannot represent a class of whom they are not a part").

The representative plaintiffs cannot use the procedural requirements of Federal Rule of Civil Procedure 23 to create standing if it otherwise does not exist. *See Allee v. Medrano*, 416 U.S. 802, 828-29 (1974) ("[A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.") (Burger, C.J., concurring in the result in part and dissenting in part). *See also Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 690, 694-95 (E.D. Pa. 1973) ("[A] procedural rule cannot supply a substantive element" and thereby confer standing upon the plaintiff.). This has not been a controversial principle; both federal and state courts (relying on federal law as persuasive authority) have long demanded standing from lead plaintiffs in class actions. *See Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141 (2005) (plaintiff who cannot state an individual claim for lack

of injury has no standing to represent a class of potentially injured plaintiffs); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707-78 (Tex. 2001) (without actual injury, plaintiff had no standing to bring class action); *Landesman v. General Motors Corp.*, 377 N.E.2d 813, 815 (Ill. 1978) (Where the plaintiff has no individual cause of action, it necessarily follows that any attempted class action must also fail); *Kid's Care, Inc. v. Alabama Dep't of Human Resources*, 843 So. 2d 164, 167 (Ala. 2002) (If named plaintiff has not been injured by wrong alleged in complaint, then no case or controversy is presented and plaintiff has no standing to sue either on his own behalf or on behalf of a class); *Hamilton v. Ohio Sav. Bank*, 694 N.E.2d 442, 450 (Ohio 1998) (to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he seeks to represent); *Savannah R-III School Dist. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 857-58 (Mo. 1997) (Named plaintiffs who represent class must allege and show that they personally have been injured, not that injury has been suffered by other members of class which they purportedly represent); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 746 (Iowa 1985) (While class membership is not expressly required by the Iowa class actions rule, it is implicit in that rule that class representative be class member); *Doe v. Governor*, 412 N.E.2d 325, 327 (Mass. 1980) (If the individual plaintiffs may not maintain the action on their own behalf, they may not seek relief on behalf of class).

This Court should not abandon a strong standing requirement and replace it with an open-ended theory

permitting people who are not harmed and who do not claim to be harmed to sue in the name of those who may (or may not) be able to allege such harm. Such a system ignores the plain language of Rule 23, risks damaging individuals who could claim actual injuries, and will clog the courts with lawsuits that seek to redistribute wealth from businesses and actually-injured parties to "bounty-hunting" plaintiffs' lawyers.

B. "Noninjury" Class Actions Are Ripe for Abuse Because They Are Conducted for the Benefit of Lawyers, Not Any Individually Harmed Person

Permitting a noninjury claim to move forward invites abuse of the class action procedure. Even under the best circumstances, most class actions proceed under the leadership of lawyers who have never entered into contractual representation—or even met—the vast majority of the class members whom they purport to represent. Even the "class representative" whose claims are supposed to typify those of absent class members usually is a figurehead who exercises little, if any, meaningful supervision over the litigation. As a practical matter, the class counsel themselves serve as agents for the class. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 150-51 (2003).

Class members need an increased level of protection because they are not there to defend themselves. Their only chance to avoid unfair practices by a "representative" who is not a member of the class is to opt-out, and it is hardly fair to place the "risk and burden on the essentially innocent party who

happens to have the least information." Gaston, 77 Tex. L. Rev. at 244. Because the class action binds these absent and informationally impoverished "litigants," due process requires a class representative both capable of and willing to act in the interest of all the members of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (opining that "the Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members"). Without adequate representation, any judgment obtained through the class action becomes subject to collateral attack. *Id.*

Other courts agree, holding that an adequate representative is one who is "qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative's adequate and fair prosecution." *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). Essentially, this requires that the representative's stake in the case, whatever that may be, rises or falls on the claims of the other class members. Commonality among plaintiff class members is important because individual differences among class members may impair their ability to obtain adequate compensation for their injuries. Class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole. *See*, *e.g.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987). Moreover, the aggregation of claims detracts from the

acknowledgment of each plaintiff's particular injuries, a value some courts and commentators recognize as a legitimate end in itself, apart from the end of compensation for injuries. *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 Harv. L. Rev. 1806, 1812-13 (2000); *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Denying representative status to uninjured, nonclass members is the only way to protect the interests of the class members. "Foremost, they do not get 'sold down the river' by having their future claims devalued and decided before they even accrue." Gaston, 77 Tex L. Rev. at 237. For "it is not obvious that the settling of future plaintiffs' claims—essentially without their knowledge—is desirable, necessary, or worthwhile to anyone except the defendants and possibly the current claimants." *Id*. at 238.

Lawsuits holding the potential only for a small recovery for each class member, such as this one, are particularly susceptible to abuse:

> The plaintiffs' potential recoveries in a small claimant case are, by definition, minimal. Even if the case succeeds, the plaintiff and class members will receive a minute sum. By contrast, the plaintiffs' attorneys, whose fee is determined by reference to the aggregate amount of the recovery, stand to gain immense financial rewards. Consequently, plaintiffs have little incentive to participate in or monitor the litigation. For all practical purposes, plaintiff's lawyers are the real parties in

> interest who initiate, finance, and control the litigation. *See, e.g.*, *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.).

Samuel M. Hill, *Small Claimant Class Actions: Deterrence and Due Process Examined*, 19 Am. J. Trial Advoc. 147, 148 (1995).

Permitting claimants who lack standing to represent a class of claimants who may (or may not) have standing will open the floodgates to "lawyer's lawsuits" and clog the courts with dozens of similar claims. The Seventh Circuit correctly surmised that plaintiffs "would be tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it." *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). How much more so when plaintiffs who have not even been injured may sue? For "[i]f passionate commitment plus money for litigating were all that was necessary to open the doors" of the courts, they "might be overwhelmed." *People Organized for Welfare & Employment Rights v. Thompson*, 727 F.2d 167, 172 (7th Cir. 1984).

These concerns are compounded and especially worrisome in the context of class action litigation.

> The filing of one class action is often the harbinger of more class action filings. As Professor Mullenix has observed, "Class-action litigation has the propensity to propagate, spreading amoeba-like across federal and state courts. No sooner has an attorney filed a class action than, within days, 'copycat' class actions crop up

> elsewhere. This spontaneous regeneration of class litigation presents challenging issues for litigants and the judiciary."

Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 Tul. L. Rev. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, Nat'l L.J., Apr. 26, 1999, at B18). "Noninjury" standing, combined with the class action procedure, would result in targeted businesses facing what federal appellate judges bluntly term, "blackmail." *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002); *In Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995); *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *Gen. Motors Corp.*, 55 F.3d at 784-85, 789.

The "blackmail" charge comes from the fact that few class actions actually proceed to judgment—the vast majority settle. In fact, counsel on both sides of class action litigation recognize the decision to certify as the most defining moment in the litigation. As this Court noted, "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers*, 437 U.S. at 476. *See also Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (Once the class is certified, defendant companies are under

"hydraulic pressure" to settle).[3] "In short, class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis." Nagareda,, 103 Colum. L. Rev. at 151.

With little to gain from representing the interests of the class, such litigation will be used not to redress injury but as a sham to "line lawyers' pockets despite the absence of any substance to the underlying allegations." Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 Cornell J.L. & Pub. Pol'y 239, 266 (1999). These "suits are not, in any realistic sense, brought either by or on behalf of the class members," but by "private attorneys who initiate suit and who are the only ones rewarded for exposing the defendants' law violations." Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 77. Injured parties "neither make the decision to sue . . . nor receive meaningful compensation." *Id*. Rather, the prospect of significant

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[3] This pressure to settle was a key factor for courts denying certification in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002); *West*, 282 F.3d at 937 (Easterbrook, J.); *Parker v. Time Warner Entertainment Co.*, 331 F.3d at 26 (Newman, J., concurring); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting); *Castano*, 84 F.3d at 746; *Gen. Motors Corp.*, 55 F.3d at 784-85, 789; *Griffin v. GK Intelligent Sys., Inc.*, 196 F.R.D. 298, 305 (S.D. Tex. 2000); *Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998); *Mitchell v. H & R Block, Inc.*, 783 So. 2d 812, 820 n.6 (Ala. 2000) (Hooper, C.J., dissenting); *Ex parte Masonite Corp.*, 681 So. 2d 1068, 1086 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part); *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 720-21, 752 A.2d 200, 217 (2000).

attorneys' fees "provide[ ] the class lawyers with a private economic incentive to discover violations of existing legal restrictions on corporate behavior." *Id.* Thus, noninjury class actions to recover compensation simply permit the "private attorneys [to] act[ ] as bounty hunters." *Id.* This would be a gross misuse of the justice system, and this Court should reject it.

CONCLUSION

The requirement that a litigant have standing recognizes that courts are not super-legislatures deciding broad questions of policy but rather tribunals best equipped to resolve individual disputes and clearly defined questions of law and fact. Article III requires an actual injury in fact to maintain standing. "No harm" lawsuits—particularly "no harm" class actions, as in this case—are a drain on both economic and judicial resources, to no one's benefit except the plaintiffs' bar.

The judgment of the Ninth Circuit Court of Appeals should be reversed.

DATED: August, 2011.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Center for Constitutional Jurisprudence
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-mail:
jeastman@chapman.edu
caso@chapman.edu

DEBORAH J. LA FETRA
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: djl@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and the Center for Constitutional Jurisprudence