American Bar Association
www.supremecourtpreview.org

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

BRIEF OF STEWART INFORMATION SERVICES CORPORATION, FIDELITY NATIONAL FINANCIAL, INC., AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

GERARD D. KELLY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

PETER D. KEISLER*
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Amicus Curiae Stewart Information Services Corporation

August 29, 2011

* Counsel of Record

[Additional Counsel Listed On Inside Cover]

JOHN L. KILLEA
PAMELA BUTLER O'BRIEN
STEWART TITLE
GUARANTY COMPANY
1980 Post Oak
Boulevard
Suite 710
Houston, TX 77056
(713) 625-8250
Counsel for Amicus Curiae Stewart Information Services Corporation

MARK E. SCHIFFMAN
CHRISTINE R. MILTON
FIDELITY NATIONAL
FINANCIAL, INC.
601 Riverside Avenue
Building V, 7th Floor
Jacksonville, FL 32204
(904) 854-8901
Counsel for Amicus Curiae Fidelity National Financial, Inc.

ELAINE L. LAYTON
OLD REPUBLIC
NATIONAL TITLE
INSURANCE COMPANY
125 Technology Drive
Suite 101
Canonsburg, PA 15317
(724) 746-2777
Counsel for Amicus Curiae Old Republic National Title Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICI CURIAE*[1]

Amici curiae have a substantial and direct interest in this case because they are three of the nation's four largest title insurers, with Petitioner First American Financial Corporation being the fourth.

Stewart Information Services Corporation and its predecessors have been in the title insurance business since 1893. Today, Stewart is a technology-driven, strategically competitive real estate information and transaction management company. It provides title insurance through a network of 8,500 offices and agencies around the United States and abroad.

Fidelity National Financial, Inc., is the largest title insurance company in the United States. It is also a leading provider of other services for real estate transactions, such as escrow. During 2008, Fidelity's title insurance companies held a 45.7% share of the U.S. title insurance market. Fidelity's customers are served by over 1,600 direct residential title offices and nearly 7,500 agents.

Old Republic National Title Insurance Company traces its beginnings to the early 1900s. Its parent company, Old Republic International Corporation, is now one of the nation's largest shareholder-owned insurance businesses. Old Republic's title insurance

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certify that counsel of record for both Petitioners and Respondent have consented to this filing in letters on file with the Clerk's office.

services are sold through a network of 242 company offices and nearly 10,000 title agents.

Amici sell title insurance throughout the United States and have a variety of ownership interests in, and preferential arrangements with, title agencies. In 2010, almost a quarter of all title premiums—nearly $2.3 billion—were paid for policies issued through title agencies that were affiliated with the insurer. See Am. Land Title Ass'n, *2010 Title Insurance Industry Data Book* 7 (2010). These interests and arrangements are commonplace, lawful, beneficial to purchasers of settlement services, and well known to state and federal regulators.

Further, these interests and arrangements can be vital to small, often family-owned title agencies. Nearly 60% of all title agencies have five or fewer employees, and over half generate less than $500,000 annually in gross revenues. See Am. Land Title Ass'n, *2010 Abstracter and Title Agent Operations Survey* 7, 9 (2011). These small businesses typically have limited cash reserves. They depend on outside capital both to survive major life-cycle events (*e.g.*, death, retirement, etc.) and economic downturns, and also to expand during favorable economic times. Title insurers often meet that need, taking an ownership interest in title agencies in exchange for capital infusions.

The Ninth Circuit's decision, if uncorrected, needlessly threatens to disrupt these lawful, beneficial ownership interests and preferential agreements between insurers and agencies. It would allow plaintiffs to challenge these interests and arrangements under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, even when, as here, the plaintiffs suffered no injury at all. Accordingly, *amici* urge the Court to reverse the Ninth Circuit's decision.

INTRODUCTION

When Respondent Denise Edwards purchased title insurance in 2006, the State of Ohio authorized one uniform schedule of rates. Edwards thus did not pay a single penny more for First American title insurance than she would have paid for insurance offered by any other insurer in the State.[2] She nonetheless filed a putative class action alleging she was injured as a result of First American's partial ownership of, and preferential relationship with, Tower City Title Co., the title agent that sold the policy.

Edwards's suit should be dismissed because she cannot meet constitutional standing requirements. As Petitioners explain, the mere existence of a statutory right of action does not satisfy Article III. Pet. Br. 37-42. Nor does Edwards's amorphous allegation of "informational injury." *Id.* at 29-36. Without repeating them here, *amici* endorse Petitioners' arguments on these issues.

Amici instead address Edwards's alternative argument, raised for the first time in her appellate briefs and entirely absent from the complaint, that she suffered economic injury despite paying only the uniform, state-approved rate for title insurance. Under her theory, which she has barely explained,

---

[2] In this brief, "First American" refers to Petitioner First American Title Insurance Company, except where it refers to actions taken in the litigation, in which case it refers to Petitioners First American Financial Corp. (as successor in interest to The First American Corp.) and First American Title Insurance Company.

preferential arrangements between title insurers and agents "thwart competition" for business from homebuyers, and thus have "systemic" effects on the regulated industry, raising the state-approved rates for everyone. See Resp. Br. in Opp. 22-23. This theory has no merit and should be rejected.

First, Edwards did not allege any economic injury in her complaint—"systemic" or otherwise—despite having the burden to do so, see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is only in subsequent briefing that Edwards introduces a theory of "systemic" economic injury.

Second, Edwards's suggestion of economic harm depends upon hypothetical assumptions that are far too speculative to constitute an injury-in-fact. She assumes that the Ohio superintendent of insurance approved rates that were increased "as a result of a kickback scheme," Resp. Br. in Opp. 22, even though the superintendent has a statutory duty to ensure that title insurance rates are not "excessive," Ohio Rev. Code Ann. § 3935.03(B). She also assumes that eliminating the accused arrangements would lead insurers to "compete . . . by offering homebuyers lower prices," Resp. Br. in Opp. 22, even though rates in Ohio are not simply the product of competition but instead reflect the requirements of state regulation. And, she assumes both that title insurers sought excessive rates (itself an unsupported and erroneous assumption) and that they would not have done so in the absence of the referral arrangements, even though the insurers' economic incentives would remain the same. These speculative assumptions render her injury a "remote possibility, unsubstantiated by allegations of fact," and insufficient for standing. *Warth* v. *Seldin*, 422 U.S. 490, 507 (1975).

Third, Edwards's theory fails because she cannot trace the supposedly excessive premiums to First American's accused arrangement. To the contrary, the premium that Edwards paid resulted from "the unfettered choices made by independent actors not before the courts," *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion), including other title insurers, the Ohio Title Insurance Rating Bureau, and the Ohio superintendent of insurance.

Permitting Edwards's case to proceed under this theory of standing would set a dangerous precedent. It would invite similarly misguided class actions by uninjured plaintiffs who seek to use RESPA as a vehicle to extort settlement payments from insurers. To deter such nuisance suits, preserve state authority over insurance, and enforce the Judiciary's proper limits, the Court should reverse the decision below and order dismissal of Edwards's complaint.

BACKGROUND ON REGULATION OF THE TITLE INSURANCE INDUSTRY

As an initial matter, to put Edwards's argument in context, it is necessary to examine the regulatory background of title insurance.

A. States have long exercised primary authority to regulate insurance, including title insurance. See *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538-39 (1978); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 415-16 (1946). In the early 1900s, States recognized the need to make sure insurance rates were neither too low nor too high. See Kimball & Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran-Ferguson Act in Historical Perspective*, 56 Mich. L. Rev. 545, 546-47 (1958). Throughout the 1800s, the insurance industry experienced periods in which premiums dropped to levels too low to cover losses caused by large disasters, leading to widespread insurer insolvencies. See *id.* at 547-49. In response, insurers sought to collaborate in sharing actuarial information and setting rates through private agreements. *Id.* at 548-49. This, in turn, created the risk that insurers would seek inflated rates. *Id.* at 549-50.

States began to address these twin problems by empowering state insurance commissioners to guarantee that rates were "adequate but not excessive," while also "authorizing the formation of private rating bureaus but controlling their practices." *Id.* at 551; see *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 414-15 (1914) (affirming States' power to regulate insurance rates because insurance "is of the greatest public concern"). As they do today, rating bureaus facilitated the sharing of actuarial and financial data among insurers in order to seek approval for appropriate rates. See *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 628 (1992).

This Court's decision in *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 553 (1944), called into doubt the viability of state regulation of insurance rates. In particular, the Court held that the Sherman Act prohibited rate-making collaboration through insurance rating bureaus. *Id.* But Congress responded by passing the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. §§ 1011 *et seq.*, to preserve "existing and future state systems for regulating and taxing the business of insurance." *Prudential*, 328 U.S. at 429. To that end, the Act specifies that no federal statute "shall be construed to invalidate, impair, or supercede" any state regulation of insurance. 15 U.S.C. § 1012(b). The Act also provides that federal antitrust laws apply to the business of insurance only "to the extent that such business is not regulated by State law." *Id.*

In the wake of the *South-Eastern Underwriters* decision and passage of the McCarran-Ferguson Act, States became even more active in regulating insurance rates. Kimball & Boyce, *supra* at 554-56. In the late 1940s and 1950s, numerous States adopted comprehensive regimes to review and approve insurance rates filed by insurers or rating bureaus, and many of these regimes extended to title insurance. See Rosenberg, *Historical Perspective of the Development of Rate Regulation of Title Insurance*, 44 J. of Risk & Ins. 193, 200-01 (1977).

B. The Ohio statute at issue in this case is a typical prior-approval regime. Since 1953, Ohio has mandated that all insurers, including title insurers, file their rates with the superintendent of insurance. Ohio Rev. Code Ann. § 3935.04(A). The superintendent reviews the filed rates to ensure they are not "excessive, inadequate, or unfairly discriminatory," *id.* § 3935.03(B), in light of specified criteria, *id.* § 3935.03(C). These criteria are designed partly to see that insurers receive sufficient revenue to remain solvent and able to pay policyholders' claims. See, *e.g.*, *id.* § 3935.03(C)(3) (requiring "[a] reasonable margin for underwriting profit and contingencies"); see also *id.* § 3953.05 (requiring specified "minimum capital and surplus"). An insurer may satisfy its obligation to obtain approval of rates by joining a licensed rating bureau that files rates on behalf of its members. *Id.* § 3935.04(B). "Co-operation" among "rating bureaus and insurers" is expressly authorized, and the superintendent may review "co-operative activities and practices" to halt any practices that are "unfair [or] unreasonable." *Id.* § 3935.06. If the superintendent does not object to the filed rates within 30 days, they take effect. *Id.* § 3935.05(B). "Any person or organization" harmed by a rate filing may petition the superintendent for a hearing to review the filing. *Id.* § 3935.05(D).

Significantly, in 2006, when Edwards purchased the title insurance policies at issue (one covering her lender's interest and another covering her own), every licensed title insurer in Ohio was a member of the Ohio Title Insurance Rating Bureau that obtained state approval for a schedule of rates. See J.A. 38 ¶¶ 5-7. Thus, the only title insurance premium authorized to be charged in Ohio was the premium that Edwards paid.

C. Other States use a variety of similar methods to regulate title insurance rates. Nineteen States, including Ohio, require prior approval of rates. See Nat'l Ass'n of Ins. Comm'rs, *Survey of State Insurance Laws Regarding Title Data and Title Matters* 8 (2010), *available at* http://www.naic.org/documents/committees_c_title_tf_survey_state_laws.pdf (listing 13 "prior approval" States and Puerto Rico, and describing variations used by Alabama, Indiana, Louisiana, Maryland, Missouri, and North Dakota). Nineteen other States use a retrospective approval process. *Id.* (listing 17 "file and use" States, which allow use of rates after filing but before approval; one "use and file" State, which requires use of the rate before filing for approval; and describing Idaho's similar regime). Four States mandate fixed, state-set rates. *Id.* One State, Iowa, mandates use of state-provided title insurance in lieu of private title insurance. *Id.* And, at the other end of the spectrum, seven States and the District of Columbia do not regulate title insurance rates. *Id.*

Of the States that do regulate title insurance rates, virtually all—38 in total, and Puerto Rico—apply very similar statutory standards, requiring that rates not be "excessive, inadequate, or unfairly discriminatory." *Id.* at 9. Further, many of these States expressly authorize title insurance companies and rating bureaus to cooperate in seeking approval of rates. See, *e.g.*, Alaska Stat. § 21.66.410(c) ("each title insurance company may exchange information and experience data with . . . [other] title insurance companies, and title insurance rating organizations . . . and may consult with them and with each other with respect to rate making and the application of rating systems"); N.J. Stat. Ann. § 17:46B-41 ("authoriz[ing] cooperative action between or among title insurance companies in rate making"); see also, *e.g.*, Del. Code Ann. tit. 18, § 2526; N.Y. Ins. Law §§ 2313(o), 6409. These States permit cooperation, subject to state supervision, on the view that the resulting rates may be more appropriate—neither excessive nor inadequate to permit insurers to remain solvent in economic downturns—than rates proposed by insurers acting alone.

Congress has never disturbed these state regimes governing insurance ratemaking. Rather, it remains Congress's stated policy that state regulation of insurance "is in the public interest." 15 U.S.C. § 1011.

ARGUMENT

Edwards's theory of "systemic" economic injury, which was not even raised in her complaint and is ultimately a challenge to the state-approved rate, must be rejected. The Constitution requires a plaintiff to allege an injury that is not speculative and that is "fairly traceable to the defendant's allegedly unlawful conduct." *Allen* v. *Wright*, 468 U.S. 737, 751, 753 (1984). Edwards has alleged no economic injury at all, let alone any "systemic" injury. Further, her suggestion of injury is entirely speculative and not traceable to the allegedly unlawful conduct. Finally, allowing Edwards's suit to proceed would open the federal courts to other misguided suits and class actions that, in effect, attack insurance rates approved by the States.

I. EDWARDS DOES NOT HAVE STANDING BASED UPON A THEORY OF SYSTEMIC ECONOMIC HARM

A. Edwards Has Not Pleaded A Claim Of Economic Injury

"The party invoking federal jurisdiction bears the burden of establishing" each element of standing. *Lujan*, 504 U.S. at 561; see *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 231 (1990). These elements are "an indispensable part of the plaintiff's case" and "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus, to survive a motion to dismiss, Edwards's complaint must adequately allege each element of her standing. See, *e.g.*, *Warth*, 422 U.S. at 501 (requiring "particularized allegations of fact deemed supportive of plaintiff's standing").

1. Edwards cannot base her standing on a so-called "systemic" economic injury because her complaint fails to allege any such harm. The complaint does not state that Edwards endured any monetary loss, let alone a loss resulting from purported "systemic effects" of "kickbacks" that supposedly inflated the state-approved rate. Indeed, the complaint makes only passing reference to the

premium Edwards paid without even alleging that it was unlawfully high. See Pet. App. 53a-54a.

The closest Edwards comes to claiming an economic injury is her statement that First American's allegedly "exclusive (and secret) referral agreements . . . den[ied] [plaintiffs] critical information about the cost of title insurance, in a way calculated . . . 'to increase unnecessarily the costs' of title insurance.'" Pet. App. 49a (Compl. ¶ 5). She later alleges that the alleged RESPA violation "deprived the consumer of opportunities required by federal law, such as the opportunity to compare prices on the open market." *Id.* at 52a (Compl. ¶ 17). Thus, the crux of Edwards's claim is that she was denied "information" and an "opportunity" to shop around. She does not claim that having this information and opportunity would have saved her any money. Indeed, she cannot make that claim because Ohio authorized only one rate for title insurance.

It is therefore no surprise that the lower courts did not address whether Edwards had standing based upon a claim of economic harm. See Pet. App. 4a ("Plaintiff does not and cannot make th[e] allegation" that "the charge for title insurance was higher than it would have been without the exclusivity agreement"); *id.* at 14a ("Edwards admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price . . . ."). She simply failed to allege any such injury.

2. Perhaps recognizing that a lost "opportunity" to choose among identical state-approved rates is no loss at all, Edwards has proposed a radically different theory in subsequent briefing. See Resp. Br. in Opp. 22-23. Although her complaint makes no mention of so-called "systemic effects," she has argued in her briefs that the state-approved rate was somehow

inflated by the "systemic effects" of the accused arrangements. *Id.* at 22. In her view, apparently, the title insurance premium approved by Ohio would have been lower if First American had not engaged in the allegedly unlawful arrangements at issue. See *id.*

This contention of economic harm cannot support Edwards's standing because she did not plead it in her complaint. See *Lujan*, 504 U.S. at 561. Her fleeting references to "costs" and "prices," see Pet. App. 49a, 52a (Compl. ¶ 5, 17), are too vague to support this belated assertion of "systemic" injury—particularly because her claim of injury was tied to the absence of "information," not the level of title insurance premiums. Moreover, even if her theory appeared in the complaint, she still would lack standing because she has not articulated "[f]actual allegations . . . enough to raise" her claim of standing "above the speculative level." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (plaintiff must allege more than "an unadorned, the-defendant-unlawfully-harmed-me accusation"). See *infra* I.B.

Quite likely, Edwards has avoided pleading an economic injury for strategic reasons. Claiming that the alleged unlawful arrangements increased the state-approved premium is necessarily a challenge to the premium itself. But an attack on the state-approved premium would immediately be subject to dismissal on several grounds. First, that claim would contravene the McCarran-Ferguson Act, which disallows construing a federal law to "invalidate, impair, or supersede" the Ohio insurance regulatory regime. 15 U.S.C. § 1012(b); see *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 853-54 (N.D. Ohio 2010) (dismissing challenge to Ohio-approved rates as inconsistent with McCarran-Ferguson Act), *appeal docketed sub nom. Katz* v. *Fid. Nat'l Title Ins.*, No. 10-3545 (6th Cir. filed Apr. 30, 2010). Second, the filed rate doctrine provides that once a regulatory agency approves a rate, it becomes legal and beyond challenge in a suit for damages. See *Keogh* v. *Chi. & Nw. Ry.*, 260 U.S. 156, 162 (1922). Courts have repeatedly applied the doctrine to decline review of state-approved insurance premiums. See *In re Title Ins. Antitrust*, 702 F. Supp. 2d at 849 n.7 (collecting cases). Accordingly, the Ohio rate is deemed legal, and Edwards could not claim it is excessive. See, *e.g.*, *Morales* v. *Attorney's Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (dismissing RESPA claim for lack of standing because "the plaintiffs' claims are nothing more than a challenge to Florida's rate structure," barred by the filed rate doctrine). Likely for these reasons, Edwards deliberately avoided alleging any economic injury.

B. Edwards's Theory Of Economic Harm Is Too Speculative To Qualify As An Injury-In-Fact

Nonetheless, even assuming that Edwards had alleged in her complaint that the arrangements at issue led to a "systemic" increase in premiums, she still would lack standing. Judged by this Court's well-settled precedents, Edwards's theory of economic injury is too speculative to constitute an injury in fact.

1. To gain access to a federal court, a "plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation marks omitted). It does not suffice to point to a "remote possibility, unsubstantiated by allegations of fact, that [a plaintiff's] situation might

have been better had [the defendant] acted otherwise." *Warth*, 422 U.S. at 507. The Court has therefore consistently dismissed suits when a plaintiff's alleged injury "requires speculating" about what would happen in the absence of the defendant's accused conduct. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344-45 (2006); see, *e.g.*, *Ariz. Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443-44 (2011) (taxpayers lacked standing to challenge tax credits based on "speculation that Arizona lawmakers react to revenue shortfalls by increasing [plaintiffs'] tax liability"); *Allen*, 468 U.S. at 758 (dismissing challenge to a tax exemption for racially segregated schools because availability of desegregated education depended upon "pure speculation"). An injury-in-fact must rest on more than "hypothetical assumptions." *ASARCO*, 490 U.S. at 614 (plurality opinion).

Edwards's theory of economic harm cannot support her standing. Her burden is to show that the price she paid for title insurance would have been lower if First American had not entered allegedly unlawful referral arrangements. But this calls for "pure speculation," *Allen*, 468 U.S. at 758, about several "hypothetical assumptions," *ASARCO*, 490 U.S. at 614 (plurality opinion).

First, Edwards assumes that the Ohio superintendent of insurance approved inflated prices in violation of his statutory duties. The superintendent is obligated to prohibit "excessive" rates and unfair cooperation by insurers. Ohio Rev. Code Ann. §§ 3935.03(B), 3935.06. In this case, the superintendent reviewed an extensive rate submission by the rating bureau and had the power to require additional information, *id.* § 3935.04(A). Edwards offers no allegation that this process was corrupted.

By contrast, after extensive analysis, a federal district court recently held that the Ohio rate-setting process for title insurance involves meaningful review. See *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d at 853-54 (holding that the filed rate doctrine precluded antitrust challenge to Ohio title insurance rates).

Second, Edwards assumes that eliminating the accused arrangements with title agents would have led to lower premiums. But she never explains why, other than badly asserting that, in the absence of such arrangements, insurers "will have to compete . . . by offering homebuyers lower prices." Resp. Br. in Opp. 22. This assertion is ill-founded. Regardless of the accused arrangements, insurance rates in Ohio are not simply the product of competition, but instead reflect the requirements of state regulation. In regulating these rates, Ohio, like most States, takes into account a variety of considerations, including the public interest in guaranteeing insurer solvency in economic downturns. See Ohio Rev. Code Ann. §§ 3935.03(C), 3953.05; see also *supra* 7-9.

In addition, title insurers' incentives and ability to obtain a particular rate permitted by state law does not depend upon the presence or absence of alleged referral fees to title agents. There is no reason to believe that, in the absence of the alleged arrangements, First American (or the rating bureau) would have sought a lower rate than the one currently approved by the State as a reasonable rate.[3]

[3] Edwards apparently admits as much, suggesting elsewhere that her alleged injury resulted not from an alleged RESPA violation, but from the unsupported accusation that "the state

Edwards's assumption that insurers would have voluntarily sought lower premiums is, at best, speculative.

Further, Edwards provides no explanation for why the accused arrangements between insurer and agent would diminish competition for sales to homebuyers, who are the ultimate purchasers. Currently, agents compete on the basis of service, reliability, and financial strength to win these sales (whether made directly to homebuyers or through referrals by realtors and mortgage brokers). In addition, when permitted by state regulations, insurers and agents compete for business on the basis of price. Edwards offers no reason why the accused arrangements with agents would affect such competition for homebuyers.

2. Edwards's standing is not helped by the fact that she alleges a statutory violation. To be sure, Congress has the power to "broaden[] the categories of injury that may be alleged in support of standing." *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972). Congress thus may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578; see also *Massachusetts* v. *EPA*, 549 U.S. 497, 516 (2007). But Congress does not have the power to abrogate the constitutional requirement of an injury-in-fact. It is "a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). In every case, the plaintiff must allege a "concrete and particularized" injury that is "'actual or imminent, not "conjectural" or "hypothetical."'" *Lujan*, 504 U.S. at 560.

---

rate-setting scheme . . . allow[s] the dominant insurers to set prices at monopoly levels." Resp. Br. in Opp. 6 n.3.

Consequently, Edwards's suggestion of economic injury fares no better just because she alleges a RESPA violation. Edwards's argument is entirely speculative and premised upon hypothetical assumptions. It should be rejected.

C. Edwards's Theory Of Economic Harm Is Not Traceable To Tower City's Accused Arrangement With First American

Edwards's bid for standing also fails because her supposed economic injury is not traceable to First American's allegedly unlawful arrangements.

1. Constitutional standing requires "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" *Lujan*, 504 U.S. at 560 (alteration and omissions in original). Causation cannot be shown if the alleged injury resulted from "the unfettered choices made by independent actors not before the courts." *ASARCO*, 490 U.S. at 615 (plurality opinion), *quoted in Lujan*, 504 U.S. at 562. Thus, a plaintiff lacks standing if the claimed injury "is highly indirect and 'results from the independent action of some third party.'" *Allen*, 468 U.S. at 757 (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976)); see also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973) (holding that plaintiff-mother could not challenge the State's non-enforcement of a child-support requirement because she could not "show[] that her failure to secure support payments results from nonenforcement, as to her child's father").

As detailed above, Edwards contends she suffered an economic injury only as a result of multiple third parties' independent choices. The Ohio superintendent of insurance approved the rates. Other title insurers besides First American are members of the Ohio Title Insurance Ratings Bureau and contributed to its submission of proposed rates. J.A. 38 ¶¶ 5-7. Even absent the accused arrangements, the title insurers may still have sought approval for the same rates, and the superintendent of insurance may still have approved them. Thus, there simply is no causal connection between the accused referral arrangements and the premium Edwards paid. Edwards's standing theory is even weaker than claims previously found lacking by this Court. See, *e.g.*, *Allen*, 468 U.S. at 759 ("The links in the chain of causation between the challenged . . . conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing.").

2. Edwards's allegation of a RESPA violation does not excuse her inability to trace the supposed economic harm to First American's accused arrangements. Congress may "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Massachusetts*, 549 U.S. at 516. In so doing, however, "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'" *Id.* Thus, when a statute confers upon a class of persons an interest in enforcement of its provisions, and an individual within that class suffers a concrete harm "of a kind" the statute was "designed to protect [against]," that individual may have standing to bring suit as a means of vindicating the statutorily protected interest, even if the individual cannot "'meet[] all the normal standards for redressability and immediacy'" that would apply in the absence of the statute. *Id.* at 517-18; see *FEC* v.

Akins, 524 U.S. 11, 20 (1998); *Lujan*, 504 U.S. at 572-73 & nn.7-8, 578.

Edwards's theory does not satisfy those criteria. In enacting RESPA, Congress did not "identify" payment of title insurance rates approved by state regulators as an injury to be redressed by title insurance purchasers. Nothing in the text of RESPA remotely suggests that Congress had such injuries in mind. To the contrary, Congress left undisturbed the McCarran-Ferguson Act, the filed rate doctrine, and the long-standing authority of States to regulate insurance rates. Indeed, while debating RESPA, Congress rejected a proposal to establish federal control over rates "because to do so would infringe on an area that historically has been governed by the states." Palomar, *Title Insurance Law* § 21:11 (2010); see S. Rep. No. 93-866, at 4 (1974). Given this history, Edwards's theory of economic injury should be rejected.

II. IF ACCEPTED, EDWARDS'S THEORY OF STANDING WOULD FLOOD THE TITLE INSURANCE INDUSTRY WITH MERITLESS LAWSUITS

The practical consequences of Edwards's theory of standing, if accepted, are serious and further counsel in favor of dismissal. Affirming the decision below would likely open the floodgates by encouraging other uninjured plaintiffs to file similar meritless lawsuits.

There are undoubtedly millions of title insurance purchasers who could draft a complaint like Edwards's.[4] Many of Edwards's allegations concern

[4] Indeed, multiple cases involving allegations similar to Edwards's are currently pending in the district courts. *See*, e.g., *Toldy* v. *Fifth Third Mortgage Co.*, No. 09-cv-377 (N.D. Ohio

structures and practices that are commonplace in the title insurance industry. Title insurers often invest in title agencies. Likewise, title insurers and title agencies frequently form preferential arrangements. These ownership interests and preferential arrangements serve legitimate business purposes.[5] They are legal under RESPA so long as they are not "shams" that conceal payments for referrals. See 12 U.S.C. §§ 2602(7), 2607(c)(4); 24 C.F.R. § 3500.14(g)(2). Yet, it is "'easy to allege and hard to disprove'" a sham, *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998), because the truth of the matter turns on the minutia of the companies' finances and operations. See HUD Statement of Policy 1996-2, 61 Fed. Reg. 29,258, 29,262 (June 7, 1996) (listing ten fact-intensive factors used to identify sham arrangements).

As a result, even meritless complaints alleging sham arrangements may not be "amenable to summary disposition" on the merits. *Crawford-El*, 523 U.S. at 585. In cases like this one, in which a plaintiff paid a state-approved rate for title insurance, the complaint can and should be dismissed for lack of standing at the outset. If, however,

---

filed Feb. 18, 2009); *Minter* v. *Wells Fargo Bank, N.A.*, No. 07-cv-3442 (D. Md. filed Dec. 26, 2007).

[5] Vertical integration of the title insurer and title agent can lower transaction costs by eliminating duplicative services, decreasing the frequency of costly mistakes, and reducing marketing expenses. *See* Martin & Ludwick, CapAnalysis Group, LLP, *Affiliated Business Arrangements and Their Effects on Residential Real Estate Settlement Costs: An Economic Analysis* 8-9 (2006), *available at* http://www.respro.org/docs/CAP%20RESPRO%20Study%20(2).pdf. Likewise, a preferential relationship may simplify the agent's process, build familiarity with a title insurer, and provide better access to advice on title issues, all of which reduces transaction costs. These lower costs may be passed on to the purchaser. *Id.*

Edwards's theory of "systemic effects" were sufficient to provide standing, title insurers would be left to defend against countless identical suits raising copycat claims that are difficult to disprove.

Even more problematic, where, as here, the complaint is styled as a class action, the inevitable result will be to put intense pressure on title insurers to settle. In enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, members of Congress expressed considerable concern that, "[b]ecause class actions are such a powerful tool, they can give a class attorney unbounded leverage." S. Rep. No. 109-14, at 20 (2005). "Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." *Id.* Needless to say, "when plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21; see also *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable."); *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-64 (2008) (explaining how the prospect of "extensive discovery" can enable "plaintiffs with weak claims to extort settlements from innocent companies").

This potential for suits that "extort settlements" demonstrates why it is imperative for this Court to reject Edwards's flawed standing theory. "In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so." *Winn*, 131 S. Ct. at 1449. States exercise authority to regulate insurance premiums, and Edwards's conjecture that those rates were somehow inflated does not give her standing to sue. The decision below should be reversed.

CONCLUSION

For these reasons, and those stated by Petitioners, the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

GERARD D. KELLY
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

PETER D. KEISLER*
JONATHAN F. COHN
MATTHEW D. KRUEGER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
pkeisler@sidley.com

Counsel for Amicus Curiae Stewart Financial Services Corporation

JOHN L. KILLEA
PAMELA BUTLER O'BRIEN
STEWART TITLE GUARANTY COMPANY
1980 Post Oak Boulevard
Suite 710
Houston, TX 77056
(713) 625-8250
Counsel for Amicus Curiae Stewart Information Services Corporation

MARK E. SCHIFFMAN
CHRISTINE R. MILTON
FIDELITY NATIONAL FINANCIAL, INC.
601 Riverside Avenue
Building V, 7th Floor
Jacksonville, FL 32204
(904) 854-8901
Counsel for Amicus Curiae Fidelity National Financial, Inc.

ELAINE L. LAYTON
OLD REPUBLIC
NATIONAL TITLE
INSURANCE COMPANY
125 Technology Drive
Suite 101
Canonsburg, PA 15317
(724) 746-2777
Counsel for Amicus Curiae Old Republic National Title Insurance Company

August 29, 2011

* Counsel of Record