Supreme Court, U.S.
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No. __-____

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

PETITION FOR A WRIT OF CERTIORARI

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November 23, 2010

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QUESTIONS 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*, § 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). The questions presented are:

1. Did the Ninth Circuit err in holding that 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?

2. Does such a purchaser 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)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company state the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

LEGISLATIVE MATERIALS

OTHER MATERIALS

Blank Page

First American Financial Corporation (as successor in interest to The First American Corporation) and First American Title Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

Respondent purchased a home and, at her closing, bought title insurance from an agent of petitioner First American Title Insurance Company ("First American Title") at the state-regulated rate. Though she has no complaint about the price or quality of the title insurance or accompanying services she received, she sued – on behalf of a putative nationwide class – under the Real Estate Settlement Procedures Act of 1974 ("RESPA"). She averred that The First American Corporation ("First American Corp."), then the parent company of First American Title, had, several years earlier, invested in the title insurance agency where she purchased the insurance, Tower City Title Agency, LLC ("Tower City"). And she claimed that Tower City's alleged referral of business to First American Title therefore violated § 8(a) of RESPA, which bars "kickback[s]" – payments in exchange for referrals of settlement service business. 12 U.S.C. § 2607(a). Respondent seeks to recover, on behalf of the class, three times *all* settlement service charges (i.e., title insurance policy premiums) that each member of the class paid to title insurance agencies affiliated with First American Corp.

Petitioners moved to dismiss the case for lack of standing under RESPA and Article III of the United States Constitution. But the Ninth Circuit held that RESPA § 8(d)(2) – which provides that any person "who violate[s]," *inter alia*, § 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," 12 U.S.C. § 2607(d)(2) – gives standing to any plaintiff who purchased settlement services based on a referral that allegedly violated RESPA, whether or not the plaintiff suffered any actual harm. The Ninth Circuit further held that the existence of a remedy under RESPA – again irrespective of whether the plaintiff suffered any actual injury – suffices to establish standing to sue under Article III.

The Court should grant review and reverse.

First, the Ninth Circuit's decision deepens a conflict among the courts of appeals regarding the proper interpretation of RESPA and of Article III. The first two circuits to rule on the statutory question presented held that § 8(d)(2) authorizes recovery of *overcharges*, precluding standing for a plaintiff, like respondent, who can demonstrate no such economic harm. *See Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659),[1] *affirming* 233 F. Supp. 2d 819 (E.D. Tex. 2002); *Durr v. Intercounty Title Co.*, 14 F.3d 1183 (7th Cir. 1994). The Ninth Circuit's contrary holding that RESPA allows suits by plaintiffs who have not suffered any actual injury as a result of the alleged statutory violations is consistent with decisions of the Third and Sixth Circuits, which reached the same conclusion on that question in cases decided in 2009.

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[1] The Fifth Circuit's opinion is available at http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf ("5th Cir. Op.").

As for the constitutional issue, the Ninth Circuit's holding that the existence of a (supposed) statutory remedy in § 8(d)(2) suffices to establish standing under Article III conflicts with decisions concluding that, absent an actual injury, an allegation of legal violation alone does not establish standing under Article III. That constitutional issue is an important and recurring one that this Court should resolve.

Second, the Ninth Circuit's rulings on the questions presented are erroneous. RESPA does not provide standing for uninjured private plaintiffs. Section 8(d)(2) states that any person who violates § 8 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*" – i.e., the settlement service involved in the violation. 12 U.S.C. § 2607(d)(2) (emphases added). When, as here, the conduct alleged to violate § 8 did not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged, it makes little sense to say that the settlement services were "involved in" any violation, particularly in light of the difficult constitutional issue that would be presented if the statute were read otherwise. *See Gollust v. Mendell*, 501 U.S. 115, 125 (1991).

Furthermore, the Ninth Circuit's holding that a plaintiff may sue in federal court in the absence of a cognizable "injury in fact" violates Article III. "[T]he requirement of injury in fact 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 the absence of any claim that the alleged statutory violation caused an actual injury to the plaintiff, standing under Article III is lacking.

Third, the questions presented are recurring issues of national importance that warrant this Court's immediate resolution. Even if nothing were at stake beyond the specific RESPA standing question, the impact of the decision below is potentially enormous: the types of arrangements that are at issue here – in which title insurers invest in title insurance agencies and enter into cooperative arrangements with them – are widespread. Many thousands if not millions of transactions have been completed by such agencies. Respondent claims (on behalf of a putative nationwide class) a right to recover hundreds of millions of dollars – an amount that (at least in respondent's case) compensates no one (for respondent admittedly has suffered no loss), but that could impose enormous costs on legitimate business and strain the federal court's limited resources.

More broadly, the standing principle that the Ninth Circuit ignored is of vital importance to maintaining the appropriate roles of the executive and judicial branches. The executive branch has authority to enforce the law; RESPA, for example, specifically grants criminal and civil enforcement authority to the executive branch. Private actions in court, by contrast, provide a remedy for injured parties. To be sure, Congress has authority to create private rights of action under federal statutes – and to expand the scope of compensable injuries – knowing that the threat of liability to private plaintiffs may deter unlawful conduct. But this Court has never allowed the claim that a plaintiff is acting as a "private attorney general" to supplant the principle that a private plaintiff who has no injury cannot sue. The Ninth Circuit's decision disregards that basic requirement.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioners' motion to dismiss for lack of standing (App. 1a-7a) is reported at 610 F.3d 514. The memorandum of the court of appeals addressing the district court's denial of respondent's motions for class certification (App. 8a-11a) is not reported (but is available at 2010 WL 2617588). The order of the district court denying petitioners' motion to dismiss (App. 12a-22a) is reported at 517 F. Supp. 2d 1199. The orders of the district court denying respondent's motions for class certification (App. 23a-30a, 31a-40a) are reported at 251 F.R.D. 449 and 251 F.R.D. 454.

JURISDICTION

The court of appeals entered judgment on June 21, 2010, and denied a petition for rehearing on August 30, 2010 (App. 41a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*, are reproduced at App. 42a-47a.

STATEMENT

A. In September 2006, respondent purchased a home in Cleveland, Ohio. App. 50a, 53a (¶¶ 6, 22). Tower City served as the title agent and conducted the closing. App. 53a (¶ 23). In connection with that transaction, respondent and her seller purchased title insurance policies issued by First American Title. App. 53a-54a (¶ 24). Respondent alleges that Tower City "referred the title insurance to First American Title." App. 54a (¶ 25). In Ohio, all title insurers charge identical premiums set by a rating

bureau and approved by state regulators. *See* App. 4a, 14a (respondent "admits that the cost of title insurance in Ohio is regulated so that all insurance providers charge the same price").

Respondent has not alleged that she was overcharged for her title policy or that the policy or her experience with First American Title has been unsatisfactory in any way. App. 48a-59a. Respondent has never identified any difference between the policy she purchased from First American Title and policies that she could have purchased from other insurers. On the contrary, she has testified that, if she had been told that it was "going to cost [her] the same [for her title insurance] whether [she] go[es] to First American or Stewart or Commonwealth or Fidelity because they all have the same rates for title insurance," it would not have mattered to her from which company she purchased a policy.[2] She also has testified as follows:

> Q. . . . [A]s far as the work that Tower City did and the [First American title insurance] policy that it provided to you back in October of 2006, did you have any complaints about any of that?
>
> A. No.[3]

B. In June 2007, respondent filed a complaint against petitioners in federal district court in California. App. 48a-60a. Respondent alleged that, in 1998, eight years before respondent's closing, First American Corp. – then the parent corporation of First American Title – purchased 17.5% of Tower City for $2 million. App. 50a, 51a-52a (¶¶ 7-8, 12,

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[2] Ex. A to Opp. to Mot. for Leave To File Br. *Amicus Curiae* (9th Cir. filed Mar. 24, 2009) (Edwards Depo. Tr. 38:22-39:4).

[3] *Id.* at 41:18-22.

16). She alleged that First American Corp. paid "significantly more than the book value" for its interest in Tower City. App. 52a (¶ 16). Plaintiff characterized First American Corp.'s 1998 investment in Tower City as a "kickback" for future referrals prohibited by § 8(a) of RESPA. App. 51a-52a, 58a (¶¶ 15-16, 41).[4] She pleaded a single cause of action under RESPA § 8(d)(2).[5]

In the complaint, respondent alleged that the arrangement "injured" her in only one way, "by denying [her] critical information about the cost of title insurance." App. 49a (¶ 5). (She has abandoned the claim that she was denied information about the cost of title insurance, the price of which is set at a uniform, state-regulated rate, which was disclosed to plaintiff.) She sought an injunction prohibiting the collection of premiums for title insurance referred by Tower City and other affiliated agents, as well as monetary relief in "an amount equal to three times the amount of any and all payments to title agents owned in part by First American Corporation or its subsidiaries . . . for title insurance in respect of each mortgage loan transaction." App. 58a-59a.

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[4] Section 8(a) 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). That prohibition is subject to several statutory exemptions. *See id.* § 2607(c).

[5] Section 8(d)(2) provides that anyone who violates § 8 "shall be jointly and severally 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).

Respondent also sought to represent a putative class of "[a]ll consumers who from June 12, 2006 to the present entered into mortgage loan transactions using the services of a title agency or similar entity owned in part by First American Corporation" and purchased "title insurance issued by First American Title Insurance Company." App. 54a (¶ 26).[6] Respondent alleged that the proposed class would consist "of thousands and perhaps tens or hundreds of thousands of individuals" and that, if the litigation proceeded as a nationwide class action, it would involve "more than a million" transactions. App. 54a, 57a (¶¶ 28, 37).

C. Petitioners moved to dismiss the complaint, contending that, because respondent had not pleaded that the RESPA violation she alleged affected the terms of the title insurance she purchased, she lacked standing under RESPA and Article III. In October 2007, the district court denied petitioners' motion to dismiss for lack of standing. App. 12a-22a. The court acknowledged that the question of standing to sue for violations of RESPA "has divided federal courts across the country." App. 15a. It held that an alleged RESPA violation was sufficient to "create [an] injur[y] that [is] the basis for standing" under RESPA and Article III, regardless of whether the violation adversely affected the plaintiff. App. 14a (internal quotations omitted).

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[6] First American Corp. and First American Title have made investments in many other title agencies across the country. *See generally* App. 53a (¶ 21). Other underwriters have similar arrangements with title agencies; such investments are common in the industry and are well known to state insurance regulators. *See* C.A. App. 305. No court has adopted respondent's theory that such arrangements violate RESPA.

Respondent moved for certification of a nationwide class of all purchasers of title insurance from any of the 180 title agencies in which First American owned an interest. In December 2007 and June 2008, the district court entered orders denying respondent's motions for class certification and nationwide discovery. App. 23a-30a, 31a-40a.

D. In September 2008, the Ninth Circuit granted respondent permission to pursue interlocutory appeals of the district court's orders denying class certification. C.A. App. 27-28. Petitioners moved to dismiss the appeals for lack of subject matter jurisdiction, on the ground that respondent lacked standing to sue under RESPA and Article III.

In a published opinion, the Ninth Circuit rejected petitioners' threshold jurisdictional challenge to respondent's standing. The court of appeals acknowledged that a "requirement[] for Article III standing" is that the plaintiff allege an "injury." App. 4a. It also recognized that "Ohio law mandates that all title insurers charge the same price." *Id.* It stated, however, that "[t]he injury required by Article III can exist solely by virtue of statutes creating legal rights." *Id.* (internal quotations omitted). The Ninth Circuit indicated that respondent's Article III standing would therefore depend entirely on whether the statute "gives [her] a statutory cause of action" in the absence of any alleged overcharge. App. 7a.

Turning to that statutory question, the Ninth Circuit quoted language excerpted from several provisions of RESPA. App. 5a. Pronouncing those statutory provisions "clear" (*id.*) – and without addressing the contrary decisions of other courts or petitioners' arguments – the Ninth Circuit held that RESPA provides a cause of action for any plaintiff who pur-

chased a title insurance policy based on a referral that allegedly violated RESPA, regardless of whether that referral resulted in any harm to the plaintiff. The court declared that "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term 'any' demonstrates that charges are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.* On the basis of that analysis, the court concluded that, "[b]ecause the statutory text does not limit liability to instances in which a plaintiff is overcharged, we hold that Plaintiff has established an injury sufficient to satisfy Article III." *Id.*; *see also* App. 7a ("Because RESPA gives Plaintiff a statutory cause of action, we hold that Plaintiff has standing to pursue her claims against Defendants.").

The Ninth Circuit noted that the Third and Sixth Circuits had confronted the same standing issues under RESPA and had reached the same conclusions. *See id.* It did not acknowledge, however, contrary decisions from the Fifth and Seventh Circuits, although those decisions were brought to the court's attention.

In an unpublished memorandum, the Ninth Circuit affirmed in part and reversed in part the district court's orders denying respondent's motions for class certification and nationwide discovery. App. 8a-11a. It held that the district court should have certified a class of Ohio consumers for whom Tower City served as title agent. It also concluded that the court should have permitted respondent to conduct nationwide discovery to support her effort to obtain certification of a nationwide class of purchasers of title insurance

from First American Title under arrangements such as those alleged in the complaint.

Petitioners sought rehearing, which the Ninth Circuit denied on August 30, 2010. App. 41a.

REASONS FOR GRANTING THE PETITION

I. THERE ARE CONFLICTS IN THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED

A. The Statutory Standing Question Under RESPA Has Divided the Circuits

The Ninth Circuit's decision in this case deepens an existing circuit conflict on the question whether a plaintiff can establish standing to sue under RESPA merely by alleging a statutory violation, without any claim that the violation affected the settlement services rendered. The Fifth Circuit has rejected the proposition that an alleged RESPA violation alone establishes standing to sue. And the Seventh Circuit has held that § 8(d)(2) permits recovery only of an overcharge – an interpretation that precludes standing for a plaintiff such as respondent, who does not allege that she would have paid a lower premium without the alleged RESPA violation. By contrast, the Third, Sixth, and Ninth Circuits have recently held that no claim of harm is necessary for statutory standing.

1. The Fifth and Seventh Circuits each have determined that § 8(d)(2) of RESPA does not provide a right of action in the absence of concrete economic injury to the plaintiff.

In *Durr v. Intercounty Title Co.*, the plaintiff purchased a home and hired a title company to perform settlement services, including deed and mortgage recording. 14 F.3d at 1184. He then filed a putative

class action, claiming that the title company overcharged him for recording fees in violation of RESPA § 8(b). *Id.* at 1185.[7] As remedies, the plaintiff requested not only the amount of the alleged overcharge but also "full recovery of the fees" he paid. *Id.* The district court dismissed the RESPA claim because no fee-splitting was alleged, *see* 826 F. Supp. 259, 262 (N.D. Ill. 1993), and the Seventh Circuit affirmed, *see* 14 F.3d at 1187.

The district court also granted the defendant's motion to strike the prayer for relief in the complaint (seeking three times all recording fees paid). *See* 826 F. Supp. at 261. The court explained that the plaintiff had "flouted the statute's plain meaning" by asking for more than "three times the . . . total overcharge." *Id.* at 260. The Seventh Circuit affirmed, explaining that, under RESPA, "there was no basis for" claiming more than the overcharge (trebled). 14 F.3d at 1188. The court thus concluded that RESPA's private right of action does not authorize plaintiffs to seek more than the amount of any overcharge (trebled).

The Fifth Circuit followed *Durr* in *Moore v. Radian Group, Inc.* In *Moore*, the plaintiffs brought a putative class action, averring that lenders and private mortgage insurance providers engaged in an illegal kickback and referral scheme. 233 F. Supp. 2d at 819. As in this case, the plaintiffs in *Moore* sued even though the claimed scheme did not increase their settlement service costs. *Id.* at 822. The district court held that the plaintiffs lacked statutory

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[7] Section 8(b) of RESPA prohibits the giving or acceptance of "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U.S.C. § 2607(b).

standing to sue under RESPA because Congress did not "allow a private plaintiff to sue for an alleged violation of RESPA's anti-kickback provision when the plaintiff has not alleged that the referral arrangement increased any of the settlement charges at issue or that any portion of the charge for the settlement service was involved in the kickback violation." *Id.* at 824.

The Fifth Circuit affirmed. Agreeing with the district court's analysis, the court of appeals held that "the plaintiffs cannot establish standing simply by alleging a violation of the language of § 2607(a)." 5th Cir. Op. 13. It thus concluded that "the provisions of RESPA on which plaintiffs' claims rest cannot be said to grant persons in the plaintiffs' position the right to judicial relief that they claim." *Id.*[8]

The decision below conflicts with both *Moore* and *Durr*. The interpretation of RESPA in *Moore* would have required dismissal of plaintiff's claim here for lack of standing. Furthermore, in concluding that an allegation of a statutory violation sufficed to support standing under § 8(d)(2), the Ninth Circuit interpreted § 8(d)(2) to confer standing regardless of whether the plaintiff was overcharged for the settlement services in question. In *Durr*, however, the Seventh Circuit held that § 8(d)(2) permits plaintiffs to recover *only* an overcharge. This case therefore would have been decided differently in the Seventh Circuit, because

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[8] That the Fifth Circuit did not publish its opinion does not diminish the need for this Court's review, especially because *Moore* followed the Seventh Circuit's published decision in *Durr*. *Cf. Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) ("An unpublished opinion may have a lingering effect in the Circuit[.]") (Blackmun, J., dissenting from denial of certiorari).

respondent has alleged no overcharge and thus would not have standing under RESPA, as interpreted in *Durr*.

2. The Ninth Circuit ignored *Moore* and *Durr*; it instead agreed with recent holdings of the Sixth and Third Circuits. App. 7a (citing *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009)).[9]

In *Carter*, as here, the plaintiffs "d[id] not allege that they were overcharged for the title insurance or settlement services" they received. 553 F.3d at 983. Even so, they filed suit under RESPA and sought to represent a class of all individuals who purchased settlement services from the same title agent and who were referred by the defendant real estate agency. *See id.* The district court held that the plaintiffs "lacked standing to bring a claim under § 2607 because they did not allege any overcharge or other concrete injury." *Id.* at 982.

The Sixth Circuit reversed. Although it failed to acknowledge the Fifth and Seventh Circuits' decisions, the court recognized that "several United States district courts have addressed this issue – and arrived at different conclusions." *Id.* at 983. Unlike the Ninth Circuit, which considered § 8(d)(2) to be "clear," App. 5a, the Sixth Circuit perceived an "arguable ambiguity" in the statutory language, 553 F.3d at 986. Consequently, it relied heavily on "legislative history" and its understanding of "[s]tatutory [p]urpose" in determining that "Congress created a

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[9] The United States filed an *amicus* brief in support of plaintiffs in *Carter* and intervened and filed as a party in *Alston*. It did not participate in this case.

private right of action to impose damages where kickbacks and unearned fees have occurred – even where there is no overcharge." *Id.* at 987-89.

Alston was another "putative class action" of homebuyers alleging "a kickback scheme" in violation of RESPA § 8. 585 F.3d at 755. There, as here, the plaintiffs "paid the same [charges] they would have paid" even in the absence of the alleged statutory violation because the rates were filed with and approved by a state regulator. *Id.* at 757. Like the Sixth Circuit, the Third Circuit acknowledged the division of authority on the statutory question. *See id.* at 760 & n.7 (noting disagreement with *Durr*, among other cases). The Third Circuit held that "RESPA section 8 does not require plaintiffs to allege an overcharge" to be entitled to maintain an action. *Id.* at 759. Although its holding agreed with the Sixth Circuit's, the Third Circuit disagreed with that court's reliance on "statutory purpose and legislative history." *Id.* at 762 n.11.

In sum, the courts of appeals are divided on the question whether RESPA grants standing when the alleged violation does not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged. And even the courts that have reached the same (incorrect) result as the Ninth Circuit have expressed inconsistent understandings of the statutory text.

3. In circuits in which courts of appeals have not yet addressed the issue, district courts have similarly divided on whether an allegation of actual injury is necessary for standing under RESPA. Courts in the Fourth and Eleventh Circuits have reached inconsistent outcomes on the issue; district courts in North Carolina and Florida have held that standing is lack-

ing when the plaintiff cannot show that the violation resulted in an overcharge or had any other effect on the terms of the settlement services provided,[10] whereas district courts in Maryland and Georgia have reached contrary conclusions.[11] A court in the Eighth Circuit has held that a plaintiff need not show any effect on the terms of the settlement services provided to have standing to sue under RESPA.[12] Moreover, district courts in the Third Circuit had reached conflicting decisions on the issue of RESPA standing before *Alston*.[13] Most of those

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[10] *See Mullinax v. Radian Guar., Inc.*, 311 F. Supp. 2d 474, 480-86 (M.D.N.C. 2004) (plaintiffs claiming no "monetary injury" lacked standing under RESPA); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (because plaintiffs "have no legal right to pay anything other than the promulgated rates, they have suffered no cognizable injury by virtue of paying said rates").

[11] *See Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 488-89 (D. Md. 2006); *Patton v. Triad Guar. Ins. Corp.*, No. CV100-132, slip op. 5-6, 12 (S.D. Ga. Oct. 10, 2002); *Pedraza v. United Guar. Corp.*, 114 F. Supp. 2d 1347, 1350-51 (S.D. Ga. 2000).

[12] *See Gomez v. Wells Fargo Bank N.A.*, Civil No. 09-1818 (JRT/FLN), 2010 WL 3463436, at *5, *6 (D. Minn. Aug. 30, 2010).

[13] *Compare Contawe v. Crescent Heights of Am., Inc.*, No. 04-2304, 2004 WL 2244538, *3-*4 (E.D. Pa. Oct. 1, 2004) (no standing), *with Alexander v. Washington Mut., Inc.*, Civil Action No. 07-4426, 2008 WL 2600323, at *6 (E.D. Pa. June 30, 2008) ("failure to allege an overcharge . . . does not preclude a finding of injury in fact for the purposes of Article III [or statutory] standing"), *recon. denied*, 2008 WL 3285845 (E.D. Pa. Aug. 4, 2008); *Capell v. Pulte Mortgage L.L.C.*, Civil Action No. 07-1901, 2007 WL 3342389, at *4 (E.D. Pa. Nov. 7, 2007) (finding standing based on plaintiff's allegation "that [defendant] violated RESPA"); *Kahrer v. Ameriquest Mortgage Co.*, 418 F. Supp. 2d 748, 756 (W.D. Pa. 2006).

opinions have acknowledged explicitly the division of authority on RESPA standing.

B. The Courts of Appeals Have Reached Conflicting Decisions Regarding Whether Article III Permits Standing To Sue for a Statutory Violation That Causes No Injury to the Plaintiff

The courts of appeals also are divided – and there is significant confusion – on the question whether an allegation of statutory violation, in the absence of any actual injury, creates standing under Article III.

1. The Ninth Circuit here held that the existence of the RESPA right of action itself supplies the necessary Article III injury in fact. *See* App. 7a. In so holding, the court below again followed the Third and Sixth Circuits' decisions in *Carter* and *Alston*.[14]

At least one other district court in the Ninth Circuit has found RESPA standing in the absence of harm. *See Munoz v. PHH Corp.*, 659 F. Supp. 2d 1094, 1101-02 (E.D. Cal. 2009). In addition to *Moore*, at least one other court in the Fifth Circuit has denied standing under RESPA where the plaintiff did not allege tangible harm. *See Williams v. First Am. Title Ins. Co.*, No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005).

[14] In *Carter*, the Sixth Circuit purported to recognize that congressional authority to confer standing to sue "is not unlimited" and that every plaintiff must establish an "injury-in-fact" or "harm." 553 F.3d at 988-89. It nonetheless held that Congress "has the authority to create a right of action whose *only* injury-in-fact involves the violation of [a] statutory right." *Id.* at 988 (emphasis added). Similarly, in *Alston*, the Third Circuit held that construing RESPA to create a cause of action "without a resultant monetary injury" did not violate Article III because receiving "a loan accompanied by a kickback or unlawful referral . . . is plainly a particularized injury" sufficient to establish standing. 585 F.3d at 762-63.

Those holdings are in conflict with decisions of the Second Circuit and of the Tenth Circuit holding that a plaintiff who has not suffered a concrete injury in fact lacks standing under Article III, even if she has alleged a statutory violation for which Congress has created a private right of action. In *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009), the Second Circuit held that a retirement plan participant and purported class representative lacked constitutional standing to sue under the Employee Retirement Income Security Act of 1974 ("ERISA"), despite the allegation that the plan administrator had breached its fiduciary duty, in the absence of an alleged injury in fact distinct from the statutory violation. The plaintiff had alleged that the defendant "deprived her of her right to a plan that complies with ERISA . . . as a result of [the defendant's] breach of its fiduciary duty." *Id.* at 121. The Second Circuit rejected that argument: "While plan fiduciaries have a statutory duty to comply with ERISA," the plaintiff "must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement." *Id.* "Kendall cannot claim that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for constitutional standing." *Id.*

In *Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996), the plaintiffs sued under the Fair Housing Act ("FHA") to challenge landlords' advertising of gender-segregated housing. The plaintiffs "did not allege the advertisements deterred them from seeking to rent the apartments";

nor did they allege "any other injury stemming from the advertisements." *Id.* at 595. The Tenth Circuit acknowledged that "[s]tanding under the [FHA] is as broad as permitted by Article III." *Id.* at 593. But it concluded that the Constitution does not permit standing to sue for "receipt by plaintiffs of the discriminatory advertisements" because such conduct "could cause only the kind of abstract stigmatic injury . . . insufficient to establish standing" under Article III. *Id.* at 596 (internal quotations omitted). The court explained that "claims of injury that are purely abstract, even if they might be understood to lead to the psychological consequence presumably produced by observation of conduct with which one disagrees, . . . do not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue in the federal courts." *Id.* (internal quotations omitted).

The Tenth Circuit reached a similar conclusion in *Heard v. Bonneville Billing & Collections*, Nos. 99-4092 & 99-4100, 2000 WL 825721 (10th Cir. June 26, 2000) (judgment noted at 216 F.3d 1087). There, the plaintiff alleged that a debt collector violated the Fair Debt Collection Practices Act ("FDCPA") by splitting a statutory attorneys' fee with the attorney it used to pursue a collection action against the plaintiff. *See id.* at *1, *4. The plaintiff "did not allege in her complaint the attorneys' fees were too high or unconscionable or that the attorney did not do any work to justify the statutory award." *Id.* at *5. The Tenth Circuit held that the plaintiff lacked standing under Article III "to invoke the FDCPA . . . as a private attorney general" challenging the fee-splitting. *Id.* at *4. It explained that the plaintiff had not "'alleged such a personal stake in the out-

come of the controversy as to warrant [her] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [her] behalf.'" *Id.* at *5 (quoting *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)).

The Ninth Circuit's holding in this case that respondent has standing "*[b]ecause* RESPA gives [her] a statutory cause of action," App. 7a (emphasis added), cannot be reconciled with *Kendall*, *Wilson*, and *Heard*. Like respondent, the plaintiffs in each of the conflicting cases failed to show any tangible respect in which the alleged statutory violation affected them. Whereas the Second and Tenth Circuits held that the plaintiffs' failure to allege an injury resulting from the alleged statutory violation meant that they lacked standing under Article III, the Ninth Circuit ruled that Congress's creation of a remedy under RESPA alone suffices to establish standing under Article III. The two approaches to the constitutional question are irreconcilable. Nor can the Second Circuit's holding in *Kendall* or the Tenth Circuit's holdings in *Wilson* and *Heard* be squared with the Third and Sixth Circuits' decisions in *Alston* and *Carter*, both of which embraced the notion (which the Second and Tenth Circuits rejected) that a bare statutory violation suffices to confer standing under Article III.

2. The confusion in the lower federal courts on the constitutional question is further demonstrated by the fact that, despite upholding standing without injury in *Alston*, the Third Circuit has in other cases rejected the notion that merely experiencing a statutory violation suffices to establish standing. One such case, *Fair Housing Council of Suburban Philadelphia v. Main Line Times*, 141 F.3d 439, 443-44 (3d

Cir. 1998) ("*FHC II*"), involved the FHA, which (as noted) prohibits the publication of discriminatory advertising and grants standing to sue to the limits to Article III. *See id.* at 440 n.1; *Fair Hous. Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 75 (3d Cir. 1998) ("*FHC I*"). The plaintiff in *FHC I* and *FHC II*, an organization opposing discrimination in housing, argued that, "because it holds the status of a private attorney general, it need show nothing more than a violation of [a statute] in order to establish Article III standing." *FHC II*, 141 F.3d at 443. The court "disagree[d]," explaining that "a violation of the Act does not automatically confer standing on any plaintiff." *Id.* at 443-44. Rather, the plaintiff must "demonstrat[e] [a] legally cognizable injury." *Id.* at 444; *see FHC I*, 141 F.3d at 78 (holding that the same plaintiff lacked standing because it failed to show that it "suffer[ed] *actual injury* as a result of the defendant's conduct") (internal quotations omitted); *see also Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 176 (3d Cir. 2001) (Alito, J.) (holding that plaintiffs lacked standing for violations of the Lanham Act because they failed to allege that defendants' alleged misconduct "harmed" them and thus could not show the required "injury in fact"); *Doe v. National Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999) ("The proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.").

II. THE NINTH CIRCUIT'S DECISION IS ERRONEOUS

A. The Ninth Circuit Misinterpreted the Statute

1. Section 8(d)(2) states that any person who violates § 8 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*," i.e., the settlement service involved in the violation. 12 U.S.C. § 2607(d)(2). Under that provision, a plaintiff has standing to sue only when she has been charged for settlement services involved in a violation of § 8. When, as here, the alleged violation of § 8 did not affect the price, quality, or other characteristics of the settlement services for which the plaintiff was charged, the settlement services were not "involved in" the violation within the meaning of § 8(d)(2), and statutory standing is absent.

That reading of RESPA comports with the Act's purposes, as articulated in the statute. Congress found that consumers should be "protected from *unnecessarily high* settlement charges." *Id.* § 2601(a) (emphasis added). It accordingly stated that "[i]t is the purpose of this [Act] to effect certain changes in the settlement process for residential real estate that will result . . . in the elimination of kickbacks or referral fees *that tend to increase unnecessarily the costs* of certain settlement services." *Id.* § 2601(b)(2) (emphasis added).[15]

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[15] Congress articulated additional purposes when it enacted RESPA. *See* 12 U.S.C. § 2601. But those purposes are addressed in other provisions of the Act and would not justify expansively interpreting § 8(d)(2) to address harmless violations of § 8.

Interpreting § 8(d)(2) to provide standing to a plaintiff who has suffered no injury, as the Ninth Circuit did here, does nothing to address "unnecessarily high" settlement charges or practices that "increase[d] unnecessarily" those charges. *Cf. Doe v. Chao*, 540 U.S. 614, 621 (2004) (rejecting construction of statute that would authorize recovery of statutory damages in the absence of actual damages as "at odds with the traditional understanding that tort recovery requires not only wrongful act plus causation . . . , but proof of some harm for which damages can reasonably be assessed"). Congress provided other enforcement mechanisms to address statutory violations that cause no injury; specifically, it provided for criminal prosecutions and authorized civil-enforcement proceedings by federal and state regulators, all without requiring a showing of harm to any private party. *See* 12 U.S.C. § 2607(d)(1), (4).

To the extent there is any ambiguity in § 8(d)(2), it should not be interpreted to authorize standing to sue absent an injury in fact, because that interpretation would raise grave concerns regarding the provision's constitutionality as applied to plaintiffs such as respondent. *See Gollust*, 501 U.S. at 125 (rejecting statutory interpretation that would raise "serious constitutional doubt whether [the] plaintiff could demonstrate the standing required by Article III's case-or-controversy limitation on federal court jurisdiction"); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is

plainly contrary to the intent of Congress."); *infra* Part II.B.[16]

2. The Ninth Circuit did not address petitioners' arguments regarding the interpretation of the statute. Instead, it began its analysis by quoting the text of § 8(d)(2) and italicizing the phrase "any charge paid" in the final clause of that provision, which states that a defendant is liable "in an amount equal to three times the amount of any charge paid for such settlement service." App. 5a (quoting 12 U.S.C. § 2607(d)(2)). It then stated that "[t]he use of the term 'any'" in the final clause of § 8(d)(2) "demonstrates that" the "charges" for which a defendant is liable under § 8(d)(2) "are neither restricted to a particular type of charge, such as an overcharge, nor limited to a specific part of the settlement service." *Id.* Based on that understanding of the measure of damages under RESPA, the court concluded that RESPA "gives Plaintiff a statutory cause of action" regardless of whether she has been "overcharged." App. 7a.

The Ninth Circuit's statutory construction is incorrect because the court erroneously looked to the *measure of damages* recoverable in a private action under RESPA to determine who has standing to sue. Even if a plaintiff *who has standing* under RESPA may recover three times the charge she paid, that does not answer the question what must be shown to establish statutory standing. Standing under § 8(d)(2) is available only when the plaintiff was

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[16] There is no barrier to considering statutory standing before Article III standing. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) ("statutory standing . . . may properly be treated before Article III standing"); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 92 (1998).

charged for settlement services "involved in [a] violation" of § 8, and the Ninth Circuit offered no explanation of how that requirement could be met when the alleged violation had no effect on the charge for, or other terms of, the settlement service transaction.[17]

B. The Ninth Circuit's Decision Grants Standing Without Injury, in Violation of Article III

The Ninth Circuit's decision conflicts with this Court's decisions on constitutional standing because it authorizes suit in federal court in the absence of a cognizable "injury in fact," in violation of Article III.

1. This Court's cases "have established that the irreducible constitutional minimum of standing contains three elements," the first of which is "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 v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations, citations, and footnote omitted).

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[17] The legislative history on which the Ninth Circuit relied, *see* App. 5a-7a, does not support its interpretation. The 1983 amendments to § 8(c) did not prohibit "controlled business arrangements," as the Ninth Circuit suggested, but rather *exempted* them from § 8(a)-(b). *See* Domestic Housing and International Recovery and Financial Stability Act, Pub. L. No. 98-181, tit. IV, § 461(b), 97 Stat. 1153, 1155, 1231 (1983); H.R. Rep. No. 98-123, at 75 (1983) (explaining that the "Committee bill amends" RESPA "to clarify that controlled business arrangements . . . are a permissible method of doing business so long as" certain requirements are met); *see also* 12 U.S.C. § 2607(c)(4) (current provision). Further, nothing in the legislative history suggests that the amendments regarding controlled business arrangements had any relation to the changes in the wording of § 8(d)(2), as the Ninth Circuit also implied.

Respondent's claim of standing founders on that injury-in-fact requirement. She has not alleged that she was overcharged for her title policy or that the policy or her experience with First American Title has been unsatisfactory in any way. Nor has she alleged that she would have been better off had she purchased a policy from a different insurer or that the identity of the insurer mattered to her. There is no claim here that any alleged violation of RESPA operated to her detriment. Without any allegation of an actual injury to herself, respondent cannot establish standing under Article III. *See, e.g., Raines v. Byrd*, 521 U.S. 811, 818 (1997) (members of Congress lacked standing to challenge constitutionality of legislation, despite having statutory authority to sue, because they failed to show a "personal injury") (internal quotations and emphasis omitted).

2. The Ninth Circuit held that the supposed existence of the treble damages *remedy* in § 8(d)(2) suffices to create standing to sue under Article III, regardless of whether the plaintiff suffered any distinct and concrete injury. But Congress cannot create a statutory remedy and authorize private actions in federal court to obtain that remedy in the absence of a showing of injury. As this Court explained in *Raines*, "[i]t 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." 521 U.S. at 820 n.3. "Unlike redressability, . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers*, 129 S. Ct. at 1151. Thus, "[a]lthough Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules,

Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself." *Gollust*, 501 U.S. at 126 (internal quotations and citation omitted); *see also Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment) ("a direct and necessary consequence of the case and controversy limitations found in Article III" is that there is "an outer limit to the power of Congress to confer rights of action").

As the Ninth Circuit noted (*see* App. 4a), Congress does have authority to "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law" – such as "an individual's personal interest in living in a racially integrated community" or "injury to a company's interest in marketing its product free from competition." *Lujan*, 504 U.S. at 578; *see also Warth*, 422 U.S. at 500 (dictum). *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), illustrates the principle. There, a landlord falsely told the plaintiff, an African-American woman, that no apartment was available for her to rent, in violation of the FHA, which "establishe[d] an enforceable right to truthful information concerning the availability of housing." *Id.* at 373. The plaintiff alleged that, as a consequence of that violation, she "suffered 'specific injury,'" *id.* at 374, and she sought $1,000 in "actual damages," Joint Appendix at 20, *Havens Realty Corp. v. Coleman*, *supra* (No. 80-988). On those facts, the Court held that "the Art. III requirement of injury in fact is satisfied." *Havens*, 455 U.S. at 374. *Havens* shows that Congress can create a private right of action based on the invasion of a statutory right *when that*

invasion causes actual injury.[18] The plaintiff in this case, however, neither alleged nor suffered such "legally cognizable injur[y]" (*Lujan*, 504 U.S. at 578).

The Ninth Circuit suggested that the mere possibility of recovery of damages was sufficient to create standing, but this Court has rejected the notion that a plaintiff's interest in receiving a "bounty" – such as three times her title insurance premium – suffices to create standing. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). In *Vermont Agency*, the Court explained that the False Claims Act's provision granting a successful *qui tam* relator a portion of the government's recovery in the litigation "is insufficient to give [the relator] standing." *Id.*[19] An interest "that is merely

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[18] Similarly, in *FEC v. Akins*, 524 U.S. 11 (1998), the plaintiffs claimed that being deprived of information about the membership, contributions, and expenditures of the American Israel Public Affairs Committee ("AIPAC") that they asserted federal law required AIPAC to disclose harmed them by hindering their ability "to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Id.* at 21. The Court concluded that "the informational injury at issue [there], directly related to voting, the most basic of political rights, [was] sufficiently concrete and specific." *Id.* at 24-25; *see also Akins v. FEC*, 101 F.3d 731, 737 (D.C. Cir. 1996) (en banc) ("If a party is denied information that will help it in making a transaction – and a vote can be thought of as a kind of transaction – that party is obviously injured in fact."), *vacated on other grounds and remanded*, 524 U.S. 11 (1998). Respondent does not claim that she had any right to information under § 8(a) (which is not about disclosure); in any event, respondent cannot claim that she was deprived of information that would have affected her choice of title insurer or the terms of the insurance she obtained.

[19] The Court went on to hold that the False Claims Act "can reasonably be regarded as effecting a partial assignment of the

a byproduct of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes." *Id.* at 773 (internal quotations omitted).[20]

It is no answer to the Article III objection to argue that "plaintiffs in a RESPA section 8 case who allege that their settlement was tainted by unlawful kickbacks have sufficient injury for standing purposes." Brief for Intervenor United States at 26, *Alston v. Countrywide Fin. Corp.*, *supra* (No. 08-4334), 2009 WL 1576784. That assertion would render the "Cases" or "Controversies" requirement mere wordplay. A plaintiff can always allege an interest in avoiding the "taint" of unlawful behavior in connection with her activities. Unless such behavior causes actual injury distinct from the mere fact of the violation, a plaintiff may not sue.

Government's damages claim" to the plaintiff, which partial assignment was an "adequate basis for the relator's suit for his bounty" because "the United States' injury in fact suffices to confer standing on" the relator. *Vermont Agency*, 529 U.S. at 773-74; *see also id.* at 777-78. (Here, of course, there is no claim that RESPA effects any sort of assignment of an injured party's claim to respondent.)

[20] Thus, under *Vermont Agency*, a plaintiff has standing to sue for statutory damages, such as are available under the FDCPA, 15 U.S.C. § 1692k(a)(2)(A), and the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A), only when she has suffered an injury in fact. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) (holding that "a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit" has standing to seek civil penalties payable to the government); *cf. also Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665-66 (7th Cir. 2001) (Posner, J.) (suggesting that a plaintiff has standing under Article III to pursue statutory damages only in the circumstances recognized in *Friends of the Earth* and *Vermont Agency*).

III. THE QUESTIONS PRESENTED ARE RECURRING ISSUES OF NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S IMMEDIATE RESOLUTION

The Ninth Circuit's holdings in this case raise issues of great practical importance and constitutional significance meriting this Court's intervention.[21]

A. The Ninth Circuit's interpretation of § 8(d)(2) threatens petitioners with enormous liability, despite the absence of any claim that their conduct has caused harm to respondent. As noted, respondent seeks to recover on behalf of a class of many tens of thousands of individuals. Respondent's complaint alleges that, in less than a year and a half, First American Title entered into "*more than a million*" transactions like the one she challenges here. App. 57a (¶ 37) (emphasis added). If, as respondent argues, all of those class members are entitled to recover three times the title insurance premiums they paid to First American Title, the threatened liability would be enormous.

This statutory issue has arisen, and is likely to recur, with frequency. The types of arrangements that are at issue here – in which title insurers invest in title insurance agencies – are widespread. Moreover, the sheer volume of reported decisions on RESPA standing (*see supra* Part I.A), including three circuit court decisions in the last two years, demonstrates that these questions are arising with increasing frequency.

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[21] Because the petition presents a threshold, dispositive question of plaintiff's standing, the interlocutory posture of this case is no reason to deny review. *See, e.g., Sprint Communications Co. v. APCC Servs., Inc.*, 128 S. Ct. 2531, 2534-35 (2008) (reviewing interlocutory decision on standing).

The Ninth Circuit's ruling will encourage the filing of class actions such as this one that impose extraordinary costs – including the costs associated with *in terrorem* settlement value and the discovery process. Such litigation would not compensate any victim because, by definition, there is no injured plaintiff. This Court repeatedly has warned against the dangers of uncontrolled litigation threatening massive liability. *See, e.g.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) ("extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies") (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975)); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (same); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (same); *see also Thorogood v. Sears, Roebuck & Co.*, — F.3d —, No. 10-2407, 2010 WL 4286367, at *6-*7 (7th Cir. Nov. 2, 2010) (Posner, J.) (detailing abuses to which the class-action device is subject); *Durr*, 826 F. Supp. at 264 (observing that there is "no *public* benefit in converting RESPA into some type of Attorneys' Relief Act where the public weal is really not being served at all").

B. The implications of the Ninth Circuit's holdings for standing jurisprudence are equally profound. Under the principle adopted in this case, there is no constitutional barrier to an uninjured plaintiff availing herself of a statutory remedy. That would afford Congress unfettered power to confer standing in private litigation, would impermissibly expand the limits of federal-court jurisdiction, and would render meaningless this Court's admonition that "the require-

ment of injury in fact . . . cannot be removed by statute." *Summers*, 129 S. Ct. at 1151.

The Ninth Circuit's decision also undermines the separation-of-powers principles animating the constitutional standing requirement. The executive branch has authority to enforce the law – without establishing standing – and Congress granted both federal and state regulators enforcement authority under RESPA. *See* U.S. Const. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); 12 U.S.C. § 2607(d)(1), (4). Notwithstanding the frequent invocation of the notion of a "private attorney general," the Constitution does not grant standing to private individuals who – despite having suffered no individual harm from a violation of the law – stand to recover a bounty if they win their lawsuit. *See Vermont Agency*, 529 U.S. at 772-73; *see also* Harold J. Krent & Ethan G. Shenkman, *Of Citizen Suits and Citizen Sunstein*, 91 Mich. L. Rev. 1793, 1821-22 (1993) (arguing that considerations of political accountability, implicit in Article II, forbid congressional licensing of private attorneys general when the plaintiff has not suffered "individuated injury"). The bedrock "Cases" or "Controversies" requirement in Article III means that the doors to the courthouse are open to private civil claimants only when a plaintiff is seeking to "obtain[] compensation for, or [to] prevent[], the violation of a legally protected right." *Vermont Agency*, 529 U.S. at 772-73.

As noted above, this does not mean that Congress cannot create a private right of action based on the invasion of purely statutory rights *when the invasion of those rights causes actual injury*. "[I]n creating legal rights the invasion of which will create standing,"

however, "Congress' power is solely one of 'elevating to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'" *Hart & Wechsler's The Federal Courts and The Federal System* 144 (Richard H. Fallon, Jr. et al. eds., 6th ed. 2009) (quoting *Lujan*, 504 U.S. at 578). Because respondent here suffered no such concrete, de facto injury, she lacks standing to maintain her suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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