No. 10-708

IN THE

Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, *et al.*, Petitioners,

v.

DENISE P. EDWARDS, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, AND NATIONAL FAIR HOUSING ALLIANCE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1]

Amici are civil rights organizations committed to the effective enforcement of anti-discrimination laws and the preservation of access to the courts for victims of discrimination.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS, and Washington, D.C. Among its fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory employment, voting, education, housing and lending practices. In the past, the Lawyers' Committee has been involved as amicus curiae in cases before the Supreme Court involving standing issues, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975).

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, *amici* note that on July 11 and August 12, 2011, counsel for Petitioners and counsel for Respondent, respectively, filed blanket consents to the filing of amicus curiae briefs, in support of either or neither party.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization established to assist African Americans in securing their civil and constitutional rights. For more than seven decades, LDF attorneys have represented parties and appeared as amicus curiae in litigation before the U.S. Supreme Court, including appearances in standing cases, such as *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), *Trafficante v. Metropolitan Life Insurance*, 409 U.S. 205 (1972), and *Warth v. Seldin*, 422 U.S. 490 (1975), which have shaped the ability of civil rights plaintiffs to access federal courts. LDF attorneys have also litigated cases under consumer protection laws that inure to the benefit of racial minorities, including *Mourning v. Family Publications Service*, 411 U.S. 356 (1973).

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("The Committee") is a non-profit civil rights organization established to eradicate discrimination and entrenched poverty in the Washington, D.C. metropolitan area, including Maryland and Virginia. Leveraging its own broad expertise in civil rights litigation with the resources of Washington, D.C.'s private bar, the Committee's litigation has a national impact in the areas of housing, lending, employment, public accommodations, education, immigrant and refugee rights, and other aspects of urban life. By litigating fair housing cases for approximately forty years, the Committee has amassed expertise in issues of standing in fair housing cases, as well as in fair housing law generally.

The National Fair Housing Alliance ("NFHA") is a consortium of private, nonprofit fair housing organizations, state and local civil rights groups, and individuals.

NFHA was founded in 1988 to identify and eliminate discrimination in housing markets and ensure equal access to housing for all people protected by national, state, and local civil rights laws. Through education, outreach, policy initiatives, advocacy and enforcement, NFHA promotes equal housing and equal lending opportunities. Relying on the Fair Housing Act and Supreme Court standing decisions interpreting it, including *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and *Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91 (1979), NFHA and its members have undertaken important enforcement initiatives in cities and states across the country, including refusals to lend and other discriminatory practices by lenders. Those efforts have contributed significantly to the nation's efforts to eliminate discriminatory lending practices.

SUMMARY OF THE ARGUMENT

Amici submit this brief in support of the Respondent.

The Parties agree that *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), is correctly decided and no Party or Amicus has asked the Court to reconsider or modify that decision in any way.

The principle affirmed in *Havens,* that Congress can define rights, the invasion of which will constitute injury for purposes of Article III, is well established in this Court's standing jurisprudence. The Court recognized this principle before *Havens* in *Warth v. Seldin*, 422 U.S. 490, 500 (1975), and after it in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), and, more recently, in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). This Court

and lower federal courts have applied it in numerous cases, including *Public Citizen v. Department of Justice,* 491 U.S. 440 (1989), and *FEC v. Akins,* 524 U.S. 11 (1998). The Court has also held in numerous cases that "intangible" injury, which is the type of injury at issue here, can be sufficient for Article III purposes. *See, e.g.*, *Public Citizen v. Dep't of Justice, FEC v. Akins*, and *Massachusetts v. EPA*; *see also* note 8, *infra*. Thus, there is no need for the Court to resolve the differences between the Parties regarding the particular congressionally identified injury recognized in the *Havens* case in order to answer the Question Presented in this Case.

Amici further submit that, while the *Havens* opinion can fairly be read to embrace two congressionally identified injuries (distinct from causes of action) as sufficient to support Article III standing for testers, the Court did not require a showing of injury different from or in addition to those identified by Congress. The injuries recognized were derived from 1) the congressionally created right to truthful information regarding the availability of housing, and 2) the congressionally created right to be free from unequal treatment on the basis of race (i.e. discriminatory misrepresentations) regarding the availability of housing. Either or both congressionally defined intangible injures were sufficient — without allegations of emotional distress or stigma — to support tester standing pursuant to *Havens*. *Accord Public Citizen*, 491 U.S. at 449 (holding that nothing more than the congressionally defined injury was required to be alleged for purposes of standing).

Once the threshold injury is established — here, a conflict of interest in the sale of loan settlement services in the form of a kickback – it does not offend Article III

that Congress has structured a remedial scheme that allows private citizens involved in private transactions (persons who discover kickbacks in their loan transactions) to utilize the courts, but who, because of difficulties of proof, are relieved of making an additional, specific showing of economic harm. Nor has the Court required, in this context, that the remedial scheme adopted by Congress require proof of a precise fit between persons with transactions involving practices prohibited by the statute and all the harms about which Congress expressed concern in enacting the statute. *See Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356 (1973); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-84 (2000) (recognizing selection of an appropriate remedial scheme as a legislative matter). Where Congress has found a systemic effect of kickback schemes on the market, to require under Article III that each person with a transaction involving a kickback prove an actual overcharge, as Petitioners suggest, would disrupt the enforcement scheme selected by Congress, while serving no legitimate interest under Article III.

Finally, because this case involves a dispute between private parties regarding a right defined by Congress in connection with conflicts of interest in private housing transactions and Ms. Edwards was personally involved in such a transaction, it is far from the outer limits of the "case" or "controversy" requirement of Article III to allow Ms. Edwards to use the federal courts to seek the relief authorized by Congress. The Article III injury precedents of this Court almost all involve suits against the government and assertions of generalized grievances or undifferentiated public interests. *Lujan*, 504 U.S. at 573-74, 576-77. This is not such a case.

ARGUMENT

I. Petitioners and Respondent Agree that *Havens Realty Corp. v. Coleman* is Correctly Decided and No Party Has Called for Reconsideration or Modification of that Decision

In a unanimous 1982 decision in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), the Court held that testers and fair housing organizations can have standing to sue under the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*[2] The Court's ruling made possible meaningful enforcement of the Act to address widespread, entrenched racial segregation and discrimination in the nation's housing market.[3] The need for the Act was underscored by Congress's adoption of the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619-39 (1988), strengthening the Act's enforcement provisions and adding protections for persons with disabilities and families with children. For almost thirty years, federal courts have followed the *Havens* decision in cases brought to enforce the fair housing mandate of Congress.[4] Despite

2. The Court defined testers as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373.

3. For the history of housing discrimination in the United States see JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); DOUGLAS MASSEY & NANCY DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

4. *See, e.g., Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003); *Fair Housing of Marin v. Combs,* 285 F.3d 899, 902 (9th Cir. 2002); *Cent. Alabama Fair Housing Ctr., Inc. v. Lowder Realty Co.,* 236

significant efforts by private parties and state and federal governments to combat housing discrimination and some recent reduction in the number of housing discrimination incidences reported, the nation's housing market continues today to be marked by a high degree of segregation and widespread discriminatory practices.[5] This underscores the ongoing critical importance of the *Havens* decision in furthering Congress's goal of a fair, open and non-discriminatory housing market.

Petitioners and Respondent both discuss *Havens* in their briefs.[6] While they differ about the specific congressionally defined injury recognized by the Court in *Havens* and whether it supports a finding of injury in this

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F.3d 629, 639 (11th Cir. 2000); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1497 (10th Cir. 1995); *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 904 (2d Cir. 1993); *Hooker v. Weathers*, 990 F.2d 913, 915 (6th Cir. 1993); *U.S. v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992); *Spann v. Colonial Vill., Inc.,* 899 F.2d 24, 27 (D.C. Cir. 1990).

5. *See generally* Residential Segregation and Housing Discrimination in the United States: Violations of the International Convention on the Elimination of All Forms of Racial Discrimination, A Report to the U.N. Committee on the Elimination of Racial Discrimination (2008), *available at* http://www.nationalfairhousing.org/FairHousingResources/ReportsandResearch/tabid/3917/Default.aspx; Margery A. Turner, et al., Report to the U.S. Department of Housing and Urban Development, Discrimination in Metropolitan Housing Markets: National Results from Phase I HDS 2000 (2002); Debbie G. Bocian, et al., Center for Responsible Lending, Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages (2006).

6. Petitioners' Brief at 12, 15, 21, 30; Respondent's Brief at 38, 39.

case, no Party or supporting *Amicus* questions the Court's ruling in *Havens* or asks that the decision be reconsidered or modified in any way. Because the Court has for over 30 years affirmed the principle that Congress can identify new injuries for purposes of Article III standing and has in many contexts determined that particular intangible injuries are sufficient for Article III purposes, see Section II below, *Amici* submit that there is no need and the Court should not attempt to resolve the Parties' differences about the injury recognized in *Havens* in order to answer the Question Presented here. This is particularly true because that issue is not presented in a concrete factual context nor fully briefed on the merits.[7]

II. The Principle Affirmed in *Havens* and Other Cases that Congress Can Define Legal Rights, the Invasion of Which Constitutes Injury for Purposes of Article III, Is Well-Established in the Court's Standing Jurisprudence

In order to satisfy the "case" or "controversy" requirement of Article III standing "the plaintiff still must allege a distinct and palpable injury to himself." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Congress cannot, by statute, remove the injury in fact requirement. *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1151 (2009). The injury itself, however, is not required to be of a pecuniary or physical nature. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262-63 (1977). It may involve an aesthetic, conservational or recreational interest. *Friends of the Earth, Inc. v.*

7. Nor does this case present any question or cast any doubt on the use of testers to collect evidence of housing discrimination, or on the admissibility of that evidence in fair housing lawsuits.

Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181-84 (2000) (damage to environmental group members' recreational, aesthetic and economic interests because of their reasonable concern over discharges in river, even without showing that environment had actually been harmed); *accord Summers*, 129 S. Ct. at 1149 (it will suffice even if the harm affects the "mere esthetic interests of the plaintiff").[8] The Court has acknowledged a "broadening [of] the categories of injury" that will support Article III

8. This Court has recognized a broad range of largely intangible, noneconomic, nonphysical injuries as adequate bases for Article III standing. *See, e.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 326 (2008) (judicially imposed requirement to undo a sale of land and to sell land to a different buyer, even for same amount of money); *Sprint Commc'ns. Co. v. APCC Servs.*, 554 U.S. 269, 274-75 (2008) (payphone operator's contractual claim for payment from long-distance carrier as assigned to billing and collection agency for flat fee regardless of outcome of suit); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (denial of opportunity to compete on an equal basis without regard to race); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773-74 (2000) (injury suffered by United States in suit by *qui tam* relator); *Meese v. Keene*, 481 U.S. 465, 473 (1987) (damage to personal, political and professional reputation of attorney and politician due to Justice Department's designation of films he wished to show as "political propaganda"); *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (stigmatization and perpetuation of stereotypes due to discriminatory treatment); *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979) (credible threat of prosecution for activity protected by First Amendment); *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 109-115 (1979) (village's loss of racial balance and stability and individuals' loss of social, professional and economic benefits of living in an integrated community); *Trafficante v. Metro. Life Ins. Co.,* 409 U.S. 205, 208-210 (1972) (tenants' loss of social, business and professional advantages and embarrassment and economic damages due to living in a non-integrated apartment complex).

standing, but it has not abandoned the requirement of injury. *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

In recognition of the power of Congress under Article I of the Constitution to make the laws and its status as a co-equal branch of our government, the Court has also repeatedly affirmed that "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth*, 422 U.S. at 500 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973) and *Sierra Club v. Morton*, 405 U.S. at 732). Quoting this passage from *Warth* with approval, and stating that nothing in the opinion contradicts it, the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992), explained:

> Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated community, see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-212 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972), and injury to a company's interest in marketing its product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968)).[9] As we said in *Sierra Club*, "[Statutory] broadening

9. In *Hardin*, the Court held that when a statute "reflect[s] a legislative purpose to protect a competitive interest," the competitor has standing to require compliance with the statute. 390 U.S. at 6.

> [of] categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury." 405 U.S. at 738.

Id. at 578. As a necessary fifth vote for this section of the *Lujan* opinion, Justice Kennedy, joined by Justice Souter in a separate concurrence, stated that the Court "must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . In my view, Congress has the power to define new injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . . ." *Id.* at 580. The Court reaffirmed that Congress has the power to define new injuries for purposes of standing in *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007), discussed more fully below.

Beyond the case examples cited in *Lujan*, the Court has affirmed statutory broadening of legally cognizable injury in other cases. In *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989), two public interest organizations brought an action against the Department of Justice. The organizations sought to make the American Bar Association's Standing Committee on Federal Judiciary, from which the Department regularly sought advice on federal judicial nominations, subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. § 1 *et seq.* *Id.* at 433. The Court found that the refusal to permit scrutiny of the Committee's activities "*to the extent FACA allows* constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449 (emphasis added). The Court relied explicitly on five cases decided

on the merits under the Freedom of Information Act ("FOIA"),[10] emphasizing that it has "*never suggested that those requesting information under [FOIA] need show more than that they sought and were denied specific agency records.*" *Id.* (emphasis added).

FEC v. Akins, 524 U.S. 11 (1998), involved a claim by a group of voters seeking to challenge the Federal Election Commission's ("FEC") determination that a particular entity was not a "political committee" as defined by the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431(4). As a result of the FEC's decision, the target group was not required to disclose its membership, contributions or expenditures, which the FECA would have otherwise required. *Id.* at 13. This Court held that the group of voters had standing to challenge the FEC's determination in court and found injury in fact based on the voters' inability to obtain information that would be required to be publicly disclosed pursuant to the FECA. *Id.* at 21. The Court cited in support of this holding both *Public Citizen,* discussed above, and *Havens Realty,* discussed below. *Id.*

Finally, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), private environmental organizations joined by intervenor states and local governments sought review of an EPA decision refusing to grant their petition to begin rulemaking regarding the emission of greenhouse gases. Citing Justice Kennedy's concurrence in *Lujan,*

10. *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Dep't of Justice v. Julian*, 486 U.S. 1 (1988); *United States v. Weber Aircraft Corp.*, 465 U.S. 792 (1984); *FBI v. Abramson*, 456 U.S. 615 (1982); *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976).

id. at 516, and emphasizing the special status of states in the Article III standing analysis, the Court found that the plaintiffs were litigants to whom Congress had "accorded a procedural right to protect [their] concrete interest — here the right to challenge agency action unlawfully withheld." *Id.* at 517 (internal citations and quotation marks omitted). The Court also found concrete injury in the allegations of harm to states resulting from greenhouse gases. *Id.* at 521-23.

Thus, the congressional creation of legal rights identifying injuries not previously recognized carries great weight in any judicial determination whether a plaintiff has alleged a cognizable injury for purposes of Article III standing.[11]

III. *Havens* Embraces Congressionally Defined Injuries in Support of Tester Standing And Does Not Require the Plaintiff to Allege an Injury Different From or in Addition to that Defined by Congress

The *Havens* decision can be fairly read to embrace two congressionally defined injuries. Either or both of these injuries exemplify the principle of congressional identification of injuy for purposes of standing and the recognition of intangible harm as cognizable under Article III. Contrary to what Petitioners seem to suggest,[12] *Havens* did not require the tester plaintiffs to articulate some injury different from or in addition to the injuries defined by Congress.

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11. As addressed below in Section IV.B, the Court has imposed outer limits on the types of injuries that it will recognize for purposes of Article III standing. This case does not approach those limits.

12. Petitioners' Brief at 15, 30.

Havens presented the question whether testers have standing to sue under Section 804(d) of the Fair Housing Act, 455 U.S. at 373, which provides that it is unlawful:

> [t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

42 U.S.C. 3604(d). The case involved two testers, one white and one black. 455 U.S. at 368. The Complaint alleged that on four separate occasions the black tester had been told (untruthfully) by the defendant that apartments were not available, while the white tester was told (truthfully) that apartments were available. *Id.* at 374 (citing App. 16, para. 13). The Court relied directly on the congressionally defined injuries in analyzing the standing of the two testers.

> This congressional intention cannot be overlooked in determining whether testers have standing to sue. As we have previously recognized, "[the] actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth v. Seldin*, *supra* at 500, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973). Accord, *Sierra Club v. Morton*, 405 U.S, 727, 732 (1972); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J. concurring).

Id. at 373. The Court held that the black tester who received false information had standing under Article III

and the white tester who received accurate information did not. *Id.* at 374-75.

One rationale of injury in *Havens* rests on the Court's recognition that "Congress has thus conferred on all 'persons' a legal right to truthful information about available housing." *Id.* at 373 (stated differently – receiving truthful information about the availability of housing is recognized by Congress as a thing of value, the denial of which creates injury).[13] Another rationale of injury present in the opinion and in the express language of Section 804(d) of the Fair Housing Act is the right not to be given false information about the availability of housing *because of* race, national origin or other protected status. *See id.* This can fairly be described as a right to equal treatment on the basis of race or other status protected by the statute. Either or both of these rationales support Respondent's position in this case.[14] Regardless of which

13. It is important to emphasize the difference between cognizable injury sufficient to satisfy the "injury-in-fact" element of Article III standing and the elements of a cause of action. The injury that flows from the right to truthful information about the availability of housing — by itself — would not give a person a cause of action under Section 804(d). The person would also have to show that she was given false information *because of her race.* Thus, if two testers, one white and one black, were both given the same false information about the availability of housing without regard to race — both would suffer an injury, but neither would have a cause of action under Fair Housing Act.

14. In addition to tester standing, *Havens* also recognized the concept of "neighborhood" standing, where a black or white resident might show that the racial steering practices of the defendants deprived her of the benefits of living in an integrated community, which is a cognizable injury for purposes of Article III

is invoked, the Court did not require the testers to allege any injury different from or in addition to those recognized by Congress. *See id.* at 374. Specifically, the tester was not required to allege emotional distress or humiliation upon learning that she had been given false information. *Havens* imposes no such requirement. *See id.*

A. Injury Based on the Denial of the Congressionally Created Right to Truthful Information About the Availability of Housing

The *Havens* Court found that in Section 804(d) Congress had conferred a broad right to truthful information regarding the availability of housing. *Id.* at 373. It reached this conclusion based on the fact that in Section 804(a) of the Act, prohibiting discriminatory refusals to sell or rent, Congress had required that there be a "bona fide offer" to rent or purchase. *Id.* at 374. In contrast, in Section 804(d) Congress "had plainly omitted any such requirement insofar as it banned discriminatory representations. . . ." to "any person." *Id.* The conferral of the Section 804(d) rights to "any person" made clear that Congress intended to include people who were not bona fide purchasers or renters, such as testers, in the coverage of the Section. As such, it appears that Congress sought to allow the use of testers in order to provide effective challenges to one of the key devices by which housing discrimination was accomplished — the provision of false

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standing. 455 U.S. at 375-78. This injury is based on the fact that in the Fair Housing Act Congress identified a valuable interest in integrated neighborhoods, *see* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 2.3 (2010), the denial of which will establish injury in fact. 455 U.S. at 375-78; *see also Gladstone, Realtors v. City of Bellwood*, 441 U.S. 91 (1979).

information. *Id.* at 374 n. 14. Thus, by virtue of Congress's recognition that the provision of such false information constitutes direct, cognizable harm, the individuals who were lied to were afforded the right to enforce the Act and aid in ending discrimination, regardless of whether they actually sought housing.

The Court held that injury in the form of the receipt of false information about the availability of housing — which Congress had recognized as a harm — was sufficient injury for purposes of Article III standing. *Id.* at 373-74; *see also FEC v. Akins*, 534 U.S. at 21 (citing *Havens* for the proposition that "deprivation of information about housing availability constitutes 'specific injury' permitting standing"). The Court did not require a further showing as to how the false information harmed the tester.

B. Injury Based on the Denial of the Congressionally Created Right to Equal Treatment on the Basis of Race Regarding Information About the Availability of Housing

There is a second independent rationale supporting the finding of injury to the tester in *Havens.* It is the denial of equal treatment on the basis of race — an injury that also presents itself on the face of the statute. Section 804(d), which, in its terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. The black tester who was lied to about the availability of apartments was lied to "because of" her race. This injury is as real as that experienced by a tester who presents himself at a lunch counter and is told he cannot be served because of his race. He will not be required to prove that he truly wanted a

sandwich in order to show injury for purposes of Article III standing.

The *Havens* opinion states that the fact that the tester may have approached the real estate agent expecting to be given false information without an intention of purchasing or renting "does not negate the simple fact of injury within the meaning of § 804(d)." *Id.* at 374. The opinion then cites cases involving testers from the mid-20th Century civil rights sit-ins, specifically, *Pierson v. Ray*, 386 U.S. 547, 558 (1967), and *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam). *Id.* While *Pierson* involved an illegal arrest following a sit-in at a bus terminal in Jackson, Mississippi, and is therefore distinguishable, *Evers* involved a black person who attempted to ride at the front of a bus, but who was told "to go to the back of the bus, get off, or be arrested," whereupon he left the bus. 358 U.S. at 204. The Court stated that the bus rider was not "bound to continue to ride . . . at the risk of arrest" if he refused to sit in the back, in order to show an "actual controversy." *Id.* The Court further held that the fact that the bus rider "may have boarded this particular bus for the purpose of instituting this litigation is not significant." *Id.* The Court has ruled that the denial of equal treatment on the basis of race constitutes a cognizable injury regardless of whether the plaintiff can show that he ultimately would have received the benefit absent the discriminatory treatment. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

In enacting the Fair Housing Act, the record before Congress showed that the use of discriminatory misrepresentations about the availability of housing were a particularly widespread and effective device used to maintain segregation. It had the effect of not only denying particular individuals housing, it also had a broader

deterrent effect on blacks in the housing market. The Court noted in footnote 14 of the *Havens* decision that Congress was aware that "[v]arious witnesses testifying before Congress recounted incidents in which black persons who sought housing were falsely informed that housing was not available." 455 U.S. at 374 n.14. Robert Weaver, Secretary of the U.S. Department of Housing and Urban Development, testified before Congress that there was a great problem with people being lied to about the availability of housing and that this had the effect of deterring black people from continuing to seek housing outside of "ghetto" areas. "You know, after a man hits his head up against a brick wall time and time again, he then even doubts when he sees a little opening in that wall lest it be a snare and a delusion."[15]

Thus, Congress identified differential treatment on the basis of protected status as a concrete injury and sought to eliminate that treatment through the Fair Housing Act. Consistent with that approach, the Court did not require the black tester in *Havens* to allege an injury different from or in addition to the unequal treatment itself to establish injury under Article III. While she likely experienced humiliation, embarrassment and distress, or racial insult and stigma as Petitioners describe it,[16] the *Havens* opinion on tester standing makes no reference to such injury or to any allegation thereof. The Court, however, certainly has recognized this injury exists. *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984) (explaining that discrimination itself can create serious

15. *Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess., 43 (1967) (statement of Robert Weaver, Sec. of U.S. Dep't of Housing and Urban Dev.).

16. Petitioners' Brief at 15.

noneconomic injuries and citing *Havens*). But the courts have not required such an additional showing for purposes of standing. *See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) (housing testers were treated in a "racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself") (quoting *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990)).

IV. The Congressional Decision to Allow Parties to the Conflicted Transactions to Enforce the Statutory Prohibition on Harmful Practices in the Market Does Not Offend Article III

A. Once Threshold Injury is Established, It Does Not Offend Article III That Congress Has Structured an Enforcement Scheme That Allows Involved Parties to Sue, But Because of Difficulties of Proof Relieves Them of Making an Additional, More Specific Showing of Financial Harm

Prompted by evidence that widespread discriminatory misrepresentations regarding the availability of housing were causing discrimination and segregation in the housing market, Congress adopted Section 804(d) of the Fair Housing Act. In doing so, it recognized a class of persons who actually received false information about housing, including testers, who could sue to enforce the Act. Similarly, in enacting the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, Congress had before it evidence that widespread kickback schemes in the sale of residential real estate settlement services were adversely affecting the price and quality of

services.[17] The record also showed that it was difficult to get accurate information about these practices and that they were hard to deter or police.[18] This, too, is similar to the problem of discriminatory misrepresentations about housing availability – without testers it was hard to identify or police. With RESPA's statutory goal of eliminating kickbacks and referral fees,[19] in Section 8(d)(2) Congress established a right for persons who actually purchased settlement services involving kickbacks to be the recipients of a statutory civil penalty. Congress did not require proof of actual economic harm,[20] as unwinding the effect of kickbacks on the market and amount of an overcharge would be a difficult if not insurmountable

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17. *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 92d Cong., 1-3, 332, 339 (Feb. 22-24, 1972); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong., 73-74 (Mar.1-3, 1972).

18. *See* Peat, Marwick, Mitchell & Co., Research on Real Estate Settlement Practices and Costs: Baseline Study of Title Insurance Industry (Feb. 1980) (Congressionally-authorized study describing the difficulty of proving the cost impact of kickbacks).

19. "It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result . . . (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b).

20. *See Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759-62 (3d Cir. 2009).

hurdle, effectively defeating Congress's goal of penalizing and deterring wrongdoers through strong enforcement.[21]

The injury here — a conflict of interest in the sale of loan settlement services in the form of a kickback[22] — identified by Congress based on findings that these kickbacks "prejudice the kind of disinterested advice . . . the consumer deserves,"[23] are likely to result in "poor service or … faulty title examinations,"[24] and "tend to increase the costs of settlement services without providing any benefits to the home buyer,"[25] is sufficiently concrete to establish a controversy for judicial resolution. Courts historically have adjudicated this type of injury,[26] and it should be approved here. To hold otherwise would invite a radical change in the relationship between the Courts and Congress and threaten many statutes adopted for the protection of common citizens involved in everyday transactions in contexts rife with hidden manipulations,

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21. *See supra*, note 17 and 12 U.S.C. § 2607(d) establishing penalties for violations.

22. See Respondent's Brief at 19.

23. *Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs*, Ser. No. 97-24, 159 (Sept. 15-16, 1981) ("1981 House Hearings").

24. U.S. Dep't of Justice, Antitrust Division, Report on The Pricing and Marketing of Insurance (1977) *reprinted in part in* 1981 House Hearings 221-83, 273.

25. S. Rep. No. 93-866, at 6 (1974); see also 12 U.S.C. § 2601(b).

26. See Respondent's Brief at 19-25, for a discussion of the historical recognition of injury in conflicted transactions.

risks and harm.[27] Where Congress has, on the basis of a substantial record, identified this harm, adopted prophylactic measures, and empowered actual home buyers with conflicted transactions to seek a legal remedy, affirming standing to pursue a claim in no way offends Article III.

Further, Article III does not mandate that after the identification of a threshold injury, the enforcement scheme adopted by Congress must nonetheless require proof of a precise fit between the plaintiff and other harms about which Congress expressed concern in enacting the statute. The Court has approved enforcement schemes utilizing individuals who were parties to transactions involving practices targeted by Congress, but who, because of difficulties of proof, are not required to make a showing of actual financial harm. In *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), Family Publications Service (FPS) objected to the application of the "Four Installment Rule" under the Truth in Lending Act, 15 U.S.C. § 1604, *et seq.* (2011). The Rule required certain disclosures to the consumer whenever there was a finance charge or where there was an agreement that the amount owed could be paid in more than four installments. 411 U.S. at 358, 362. The district court found that FPS violated the Rule because it had extended credit under an agreement that was payable in more than four installments, but had failed to make the disclosures required under the Act. *Id.* at 362. FPS challenged the Rule, essentially objecting to being subjected to the disclosure requirements and the statutory penalty for failure to comply with them, when it contended that —

27. *Id.* at n.10.

despite more than four installments in its agreement with the plaintiff — there was not in fact a finance charge. *Id.* at 362. Congress found that distinguishing transactions with and without finance charges was difficult as these charges were often hidden by various means. *Id.* at 365-66.

The Court upheld the Rule stating:

> A similar rule applies when a remedial provision requires some individuals to submit to regulation who do not participate in the conduct the legislation was intended to deter or control. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-389 (1926), the Court held that, in defining a class subject to regulations, "the inclusion of a reasonable margin to insure effective enforcement, will not put upon a law otherwise valid, the stamp of invalidity." See also *North American Co., v. SEC*, 327 U.S. 686 (1946). Nothing less will meet the demands of our complex economic system. Where, as here, the transactions or conduct which Congress seeks to administer occur in myriad and changing forms, a requirement that a line be drawn which insures that not one blameless individual will be subject to the provisions of an act would unreasonably encumber effective administration and permit many clear violators to escape regulation entirely. That this rationale applies to administrative agencies as well as to legislatures is implicit in both *Gemsco* [*Inc. v. Walling*, 324 U.S. 244 (1945)] and *American Trucking Assns.* [*v. United States*, 344 U.S.

> 298 (1953)]. In neither case was every individual engaged in the regulated activity responsible for the specific consequences the agency sought to eliminate.

Id. at 374. In *Friends of the Earth*, the Court quoted approvingly Justice Frankfurter's opinion in *Tigner v. Texas*, 310 U.S. 141, 148 (1940), acknowledging Congress's core legislative function in the selection of remedial schemes.:

> How to effectuate policy — the adaptation of means to legitimately sought ends — is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice.

528 U.S. at 186-87. Requiring under Article III that Ms. Edwards and every other plaintiff prove an actual overcharge in addition to injury to the right to be free from conflicted settlement transactions, as Petitioners seek, would disrupt the statutory enforcement scheme, while serving no legitimate interest under Article III.

B. This Case is Far from the Outer Limits of Judicially Cognizable Injuries as Plaintiff Alleges that She Was a Party to a Transaction Involving a Kickback Prohibited by Congress and She Wishes to Sue about that Transaction

The outer limits of cognizable injuries defined by Congress for purposes of Article III have been clearly articulated by the Court. In *Lujan* the Court held that Article III standing does not extend to the elevation of injuries and enforceable rights for undifferentiated public interests, generalized grievances about the operation of government, or the promotion of every citizen's right to the proper application of the laws. *Lujan*, 504 U.S. at 573-74, 575-77. Further, the opinion in *Lujan* recognizes that suits involving the government, as distinguished from disputes between private parties, such as this, raise more troubling considerations for purposes of Article III standing, implicating core separation of powers concerns. *Id.* at 576-77. The Court is explicit that *Lujan*'s holding focuses on these public rights issues, stating in the penultimate paragraph, "[I]t is clear that *in suits against the Government*, at least, the concrete injury requirement must remain." *Id*. at 578 (emphasis added).

Federal courts, including this Court, have long acknowledged the significant differences for purposes of standing between suits against the government and suits involving "private actors suing other private actors, [which is] traditional grist for the judicial mill." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Ginsburg, J.). The U.S. Court of Appeals for the District of Columbia Circuit explained:

> The ideological or undifferentiated injury cases, unlike this case, characteristically are suits against the government to compel the state to take, or desist from taking, certain action. Such cases implicate most acutely the separation of powers, which the Supreme Court instructs, is the "single basic idea" on which the Article III standing requirement is built. *See Allen v. Wright*, [468 U.S. 737, 752 (1984)]; *Valley Forge Christian College* [*v. Ams. United for the Separation of Church and State,* 454 U.S. 464, 472 (1982)]. The standing barrier, as it operates in undifferentiated injury cases, prevents the courts from interfering in questions that "our system of government leaves . . . to the political processes." [*Schlesinger v.*] *Reservists to Stop the War,* [418 U.S. 208, 227 (1974)].

Id. This case simply does not raise the types of separation of powers concerns present in suits against the government. It involves a home buyer who actually paid a charge for a settlement service in a transaction that allegedly involved a kickback prohibited by Congress.[28] As a suit between private parties — the parties to the alleged kickback and the home buyer who paid for the service — it is "traditional grist for the judicial mill." *Id.*

28. *See* 12 U.S.C § 2607(d)(2).

CONCLUSION

Amici urge the Court to affirm the judgment below.

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