No. 10-708

IN THE

# Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION,
SUCCESSOR IN INTEREST TO THE
FIRST AMERICAN CORPORATION, AND
FIRST AMERICAN TITLE INSURANCE COMPANY,
*Petitioners,*

*v.*

DENISE P. EDWARDS, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
*Respondent.*

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

## BRIEF FOR PUBLIC LAW PROFESSORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JONATHAN S. MASSEY
*Counsel of Record*
MASSEY & GAIL LLP
1325 G St., NW
Suite 500
Washington, DC 20005
(202) 652-4511

*Counsel for Amici Curiae*

Dated: October 17, 2011

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES AND RULES:**

**OTHER AUTHORITIES:**

## INTRODUCTION AND INTEREST OF *AMICI CURIAE*

*Amici* are public law professors who teach and write in the areas of constitutional and administrative law and take a professional interest in the development of this Court's justiciability jurisprudence. [1]

*Amici* have an important interest in this case because they are concerned that the position advanced by Petitioners misconstrues this Court's precedent and would violate the separation of powers by unduly restricting Congress' authority to confer judicially enforceable rights by federal statute. The law involved here – the Real Estate Settlement Procedures Act – prohibits real estate professionals and settlement services from making or accepting kickbacks in connection with real estate settlement transactions. The law is a textbook illustration of Congress' power to create new statutory rights to protect consumers. There is nothing constitutionally problematic or remarkable about allowing homebuyers who have been the victims of unfair business practices by real estate professionals to sue to protect their statutory rights. Petitioners' contrary position would undermine a wide range of consumer protection measures and impermissibly limits congressional power to provide

---

[1] The parties have filed blanket consents to the filing of *amici curiae* briefs. In accordance with Supreme Court Rule 37.6, *Amici Curiae* certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than *Amici Curiae*, has made a monetary contribution specifically for the preparation or submission of this brief.

for federal judicial enforcement of individual rights conferred by federal statute. More information about the specific interest of each law professor is provided below.

Todd Aagaard is an Associate Professor at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

Eric Biber is an Assistant Professor of Law at the University of California, Berkeley. He teaches and writes in the fields of environmental law and administrative law.

Erwin Chemerinsky is the founding dean and distinguished professor of law at the University of California, Irvine School of Law, with a joint appointment in Political Science. His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation.

Daniel Farber is the Sho Sato Professor of Law and chair of the Energy and Resources Group at the University of California, Berkeley. He is also the Faculty Director of the Center for Law, Energy, and the Environment. Professor Farber is a member of the American Academy of Arts and Sciences and of the American Law Institute. He teaches and writes in a variety of areas, including environmental law and constitutional law.

Amanda Cohen Leiter is an Associate Professor of Law at American University's Washington College of Law. Her teaching and research interests include torts, administrative law and process, environmental law and policy, and Supreme Court practice.

Michael Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches and writes in civil procedure, federal courts, conflicts of laws, and complex litigation.

Amy Wildermuth is a Professor of Law at the University of Utah's S.J. Quinney College of Law. She teaches and writes in the areas of civil procedure, administrative law, environmental law, property, and Supreme Court practice.

## STATEMENT

**1.** Congress has enacted numerous statutes to protect consumers from unscrupulous business practices. See, *e.g.*, Truth in Lending Act, 15 U.S.C. §§ 1601-1667f (regulating creditor disclosures); Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (regulating consumer credit reporting agencies); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (regulating debt collectors). Many of these statutes contain private rights of action, by which individuals victimized by prohibited business practices may seek redress from the violator. See, *e.g.*, 15 U.S.C. § 1640 (Truth in Lending Act); 15 U.S.C. § 1681n (Fair Credit Reporting Act); 15 U.S.C. § 1692k (Fair Debt Collection Practices Act). Federal consumer protection statutes often provide that victimized consumers may recover an amount based on what they were charged for the unlawful service or an amount specified in the statute. See, *e.g.*, 15 U.S.C. § 1640(a) (violator is liable to victim "in an amount equal to the sum of . . . any actual damage sustained by such person as a result of the failure [and] twice the amount of any finance charge

in connection with the transaction"); 15 U.S.C. § 1681n(a) (violator who obtains a consumer report under false pretenses or knowingly without a permissible purpose is liable to victim in an amount equal to "actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater").

As part of this pattern of consumer protection measures, Congress enacted the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601-2617, to protect consumers in the market for real estate settlement services. The legislative history of RESPA, including committee reports, hearings, and a report commissioned from the Department of Housing and Urban Development and the Veterans' Administration, documents rampant schemes by which brokers, escrow agents, sellers, and settlement attorneys were paid fees for referring business to settlement service providers, undermining competition for settlement services and harming consumers. S. Rep. No. 93-866, at 6, *reprinted in* 1974 U.S.C.C.A.N. 6546; H.R. Rep. No. 93-1177, at 7 (1974); *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 & Currency*, 92d Cong., at 3, 8, 21-22, 53 (Feb. 22-24, 1972) ("*1972 House Hearings*"); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong., at 14 (Mar. 1-3, 1972); Dep't of Housing & Urban Dev. & Veterans' Admin., *Mortgage Settlement Costs* (Mar. 1972), *reprinted in 1972 House Hearings*, *supra*, at 735-872.

RESPA's stated purposes accordingly include "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2). To effectuate this purpose, RESPA § 8 gives consumers a substantive right to a real estate settlement free from kickbacks or fees for referrals; RESPA 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, oral or otherwise, 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). RESPA § 8 also provides that no portion of the charge for any covered settlement service may go to any person "other than for services actually performed." 12 U.S.C. § 2607(b).[2] Finally, § 8 creates a private right of action for victims of violations of these anti-kickback provisions and holds violators "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).

**2.** This case alleges that Petitioner First American Financial Corporation ("First American") violated RESPA's anti-kickback provisions by paying a real estate settlement firm, Tower City Title Agency ("Tower City") of Cleveland, Ohio, for referrals of title insurance services to First

[2] RESPA establishes limited exceptions to those prohibitions, including allowing certain "affiliated business arrangements" under specified conditions, such as advance disclosure to the consumer. 12 U.S.C. § 2607(c)(4).

American. Petitioner First American Financial Corporation owns, among other holdings, Petitioner First American Title Insurance Company ("First American Title"), which issues title insurance policies nationwide. Pet. App. 50a. In 1998, First American Title entered into an agreement with Tower City in which Tower City agreed to refer title insurance underwriting to First American Title. Pet. App. 51a. In exchange for the referrals, First American Title purchased a minority interest in Tower City. Pet. App. 51a-52a.

Respondent Denise P. Edwards purchased a home in Cleveland, Ohio, in September 2006. Pet. App. 50a. Tower City acted as the settlement agent in the transaction. Pet. App. 51a. Pursuant to its prior arrangement with First American Title, Tower City referred the title insurance to First American Title, which issued a policy to Respondent.

Respondent filed a class action complaint in district court against First American and First American Title, alleging that they violated RESPA § 8, 12 U.S.C. § 2607, by paying individual title companies such as Tower City in exchange for exclusive referral agreements with First American Title. Pet. App. 48a-60a. Petitioners moved to dismiss for lack of subject matter jurisdiction, arguing that Respondent lacked standing to bring her RESPA claim. Pet. App. 13a. The district court denied Petitioners' motion, holding that RESPA gave Respondent "a right to be free from referral-tainted settlement services," the violation of which constituted an injury that established Respondent's standing. Pet. App. 19a.

On appeal,[3] the Ninth Circuit affirmed the district court's holding that Respondent had standing to bring her RESPA claim. Pet. App. 1a-7a. The court of appeals rejected Petitioners' argument that a RESPA plaintiff must allege an overcharge in order to establish standing to sue for violations of RESPA's anti-kickback provisions. The Ninth Circuit noted that the legislative history of RESPA includes findings that violations of RESPA's anti-kickback provision "could result in harm beyond an increase in the cost of settlement services." Pet. App. 4a-7a (citing H.R. Rep. No. 97-532, at 52 (1982)). Accord *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979, 989 (6th Cir. 2009); *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 755 (3d Cir. 2009).

## SUMMARY OF ARGUMENT

Respondent has standing to vindicate her statutory right to real estate settlement services untainted by kickbacks. Three key characteristics of Respondent's injury highlight the strength of her standing arguments. First, Respondent is asserting the violation of an individual substantive right explicitly created by Congress in a statute. Second,

---

[3] Respondent had moved in the district court for certification of a class of purchasers of First American title insurance, Pet. App. 24a-25a, and a class of customers of Title City, Pet. App. 32a. The district court denied both motions for class certification. Pet. App. 29a, 40a. Respondent appealed the district court's denial of class certification to the Ninth Circuit pursuant to Federal Rule of Civil Procedure 23(f). J.A. 9-10. In an opinion separate from its decision affirming Respondent's standing, the Ninth Circuit reversed the district court's order denying certification of the Tower City class. Pet. App. 8a-11a.

Respondent is asserting an individual right violated by conduct of the Petitioners directed personally at her. Third, the type of injury Respondent suffered as a result of Petitioners' conduct traditionally has been recognized as a legally cognizable harm.

Although constitutional standing doctrine "incorporates concepts concededly not susceptible of precise definition," *Allen v. Wright*, 468 U.S. 737, 751 (1984), and marginal standing cases often divide this Court, there is a core of cases in which standing is clear. This case fits squarely within that core. Petitioners' arguments, on the other hand, would require a significant retreat from this Court's well-established standing precedent and would call into question private rights under a wide range of federal consumer protection statutes.

## ARGUMENT

### I. CONGRESS HAS THE AUTHORITY TO CREATE JUDICIALLY ENFORCEABLE SUBSTANTIVE RIGHTS TO CARRY OUT THE PURPOSES OF CONSUMER PROTECTION SCHEMES.

#### A. RESPA Falls Well Within Congress' Constitutional Power.

Congress explicitly authorized private suits against violations of RESPA's anti-kickback provision by giving consumers of real estate settlement services a substantive statutory right to services untainted by kickbacks, by identifying the consumer's personal interest in protection of that substantive right, and by creating a private cause of action to seek redress for the harm caused by

violations of the statutory right. 12 U.S.C. § 2607(a), (d). These facts are "of critical importance to the standing inquiry." *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 516 (2007); see also *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 22 (1998) (finding standing on the ground that "there is a statute which . . . seek[s] to protect individuals such as respondents from the kind of harm they say they have suffered").

In creating private rights to enforce RESPA, Congress acted well within its constitutional authority. It has long been settled that Congress may "define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant." *Vt. Agency of Nat. Res. v. United States*, 529 U.S. 765, 773 (2000); see also, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'"); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (Congress may "broaden[] the categories of injury that may be alleged in support of standing").

*Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), aptly illustrates the principle. *Havens* involved alleged violations of Section 804(d) of the Fair Housing Act, which makes it 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 plaintiffs in *Havens* were "testers"—"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. The defendant real estate company argued the plaintiffs lacked standing because they approached the defendant expecting to receive false information and without intention to buy or rent a home, and therefore had not been harmed by the defendant's misrepresentations. *Id.* at 374. The Court rejected this argument on the basis that the statute created an "enforceable right to truthful information" and that plaintiffs had been harmed by virtue of their deprivation of that statutory right, thereby satisfying Art. III's injury requirement. *Id.* at 373-74; *see also Akins*, 524 U.S. at 21 ("[T]his Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.") (citing *Havens*); *see also Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").[4]

[4] Petitioners attempt to reconstitute *Havens* by limiting it to situations involving "incorrect information on the basis of race." Pet. Br. 31. *Havens*, however, focused explicitly on the principle that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing." 455 U.S. at 373 (internal quotation marks omitted, alteration in *Havens*). Nothing in *Havens*' reasoning indicates that its result rested on

RESPA creates an enforceable right to receive real estate settlement services untainted by a kickback, just as the Fair Housing Act at issue in *Havens* creates an enforceable right to truthful information regarding the availability of housing (without any further proof regarding the use to which the consumer would put that information). The deprivation of that statutory right is itself an injury, regardless whether the consumer suffers additional consequential damages. Cf. *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (Sutton, J.) (holding that the Fair Credit Reporting Act similarly "does not require a consumer to wait for . . . consequential harm before enforcing her statutory rights").

To require a RESPA plaintiff to show consequential damages to establish her standing would be the equivalent of requiring a Fair Housing Act plaintiff to allege a harm beyond the violation of his statutory rights, a position that *Havens* explicitly rejected. Just as additional harm was not constitutionally required in *Havens*, so it cannot be constitutionally required under RESPA, either.

Congress' authority to define injuries that will establish standing finds additional support in well-established general principles of judicial deference to legislative judgments. This Court has held that "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys. v. Fed. Communications Comm'n*, 512 U.S. 622, 665 (1994) (*Turner I*) (plurality); see also *Holder v. Humanitarian Law Project*, --- U.S. ---, 130 S.Ct.

---

the fact that the statutory right at issue involved information or racial discrimination in particular.

2705, 2728 (2010); *Bartnicki v. Vopper*, 532 U.S. 514, 550 (2001). This deference is due in part because Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Turner I*, 512 U.S. at 665-66 (plurality opinion) (quoting *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985)). "[A]n additional measure of deference [arises] out of respect for [Congress'] authority to exercise the legislative power." *Turner Broad. Sys., Inc. v. Fed. Communications Comm'n*, 520 U.S. 180, 196 (1997) (*Turner II*). In sum, "deference must be accorded to [Congress'] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Id.*[5]

The judgments made by Congress in enacting RESPA are therefore entitled to deference. Those judgments amply support Respondent's standing to pursue her RESPA claim. Specifically, Congress found that kickbacks in real estate transactions harm consumers and that this harm justifies prohibiting all such kickbacks, regardless of an individual consumer's ability to establish an overcharge, a burdensome inquiry that may often be difficult and expensive for an individual consumer to conduct, particularly given the relatively small financial stake typically at issue. RESPA includes an explicit finding that kickbacks and referral fees "tend to increase unnecessarily the costs of certain

[5] On the other hand, even deference will not validate an implausible congressional judgment. See *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 378 (2000).

settlement services." 12 U.S.C. § 2601(b)(2). Congress could have decided to regulate settlement costs directly, but instead intentionally and rationally chose "to regulate the underlying business relationships and procedures of which the costs are a function." S. Rep. No. 93-866, at 3, 1974 U.S.C.C.A.N. at 6548. Congress also decided not to require individual RESPA plaintiffs to prove harm beyond the violation of their statutory right to services free of kickbacks. See Pet. App. 5a; *Alston*, 585 F.3d at 759; *Carter*, 553 F.3d at 989.[6] Congress' chosen approach is consistent with the nature of the systemic, anti-competitive effects of kickbacks, which can become significant in the aggregate even if they are small and difficult to prove individually. That approach is also consistent with common law restitution principles that do not require proof of harm beyond unjust enrichment of the defendant at the hands of the plaintiff, see, *e.g.*, *Restatement (Second) of Agency* § 469 (providing that an unfaithful agent "is not entitled to compensation even for properly performed services").

These principles of deference hardly provide a blank check to the legislature. This Court has explained that, although deference is owed to Congress, its power to define the interests that will support standing is not absolute. In particular, Congress may not "abrogate the Art. III minima." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91,

[6] The petition for certiorari in this case challenged the court of appeals' interpretation of RESPA as not requiring an allegation of an overcharge, but this Court limited certiorari to the constitutional standing question. The case thus comes before this Court on the presumption that RESPA does not require an allegation of an overcharge.

100 (1979). "'Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.'" *Massachusetts*, 549 U.S. 497, 516 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (Kennedy, J., concurring in part and concurring in judgment)); see also Michael E. Solimine, *Congress, Separation of Powers, and Standing*, 59 Case W. Res. L. Rev. 1023, 1054-55 (2009) (arguing that "federal courts should give some level of deference to Congress statutorily addressing the standing of potential plaintiffs" and that deference "does not mean judicial abdication").

RESPA easily satisfies these criteria. In enacting RESPA, Congress explicitly found kickbacks and referral fees paid in conjunction with referrals of real estate settlement services harm consumers of such services. 12 U.S.C. § 2601(b)(2). Consequently, Congress gave consumers the statutory right to real estate settlement services free of kickbacks or referral fees. 12 U.S.C. § 2607(a); see also 12 U.S.C. § 2607(d)(2) (granting a private right of action by which "the person or persons charged for the settlement service" may sue "[a]ny person or persons who violate the prohibitions or limitations of this section"). Congress did not extend that right to every citizen, or even to every potential buyer in the housing market, but only to consumers who actually incur the costs of settlement services. A violation of the right to impartial and unbiased referrals—and, in turn, a cognizable injury—exists as soon as the consumer pays for kickback-tainted real estate settlement services, whether or not the consumer can prove she paid a higher price or received a lower quality of service.

### B. Petitioners' Contrary Arguments Are Wrong.

Contrary to these well-settled principles, Petitioners take the position that, because Art. III's standing requirements are constitutionally derived, Congress's creation of a statutory right has no bearing on whether deprivation of the right causes an injury that establishes standing. Petitioners offer two primary arguments in support of this theory, neither of which is availing.

#### 1. Petitioners' Emphasis on Private Rights of Action Is Misplaced.

First, Petitioners argue that the existence of a statutory private right of action does not itself suffice to establish an injury for standing purposes. Pet. Br. 20-21. That point is indeed well settled, but it has no bearing on the question presented here, for Respondent has pointed to the violation of a substantive statutory right under RESPA, not merely to the existence of a private right of action. Cf. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (distinguishing Congress's creation of a private right from creation of a private cause of action); *Valley Forge Christian Coll. v. Am. United for Separation of Church & State*, 454 U.S. 464, 487 n.24 (1982) (noting that the APA's judicial review provision does not create a substantive legal right); *Wilson v. Garcia*, 471 U.S. 261, 278 (1985) (noting that 42 U.S.C. § 1983 "only provides a remedy and does not itself create any substantive rights"). It is the statutorily created substantive right to participate in real estate settlement transactions untainted by

kickbacks, not RESPA's corollary right of action, that establishes Respondent's standing, because only a substantive right can form the basis for an injury in fact.

The cases Petitioners cite all involve statutory private rights of action without an alleged deprivation of an individual substantive statutory right.[7] Since none of those cases involved a statute that created an individual substantive right, they in no way countermand the long line of cases teaching that violation of a congressionally created, individual, substantive statutory right constitutes an

---

[7] The Line Item Veto Act at issue in *Raines v. Byrd*, 521 U.S. 811 (1997), for example, created a private right of action to challenge the constitutionality of the Act, see Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996), but created no individual substantive rights. Similarly, the plaintiff in *Valley Forge Christian College*, *supra*, sued under the Administrative Procedure Act's judicial review provision, 5 U.S.C. § 702, which this Court noted creates no substantive legal rights and therefore had no bearing on the standing of the plaintiffs. 454 U.S. at 487 n.24. *Lujan*, *supra*, was a suit brought under the Endangered Species Act's citizen suit provision, 16 U.S.C. § 1540(g); this Court held that neither that provision nor the substantive provisions of the Act the defendants had allegedly violated created any " 'individual rights' " and on that basis found no standing. 504 U.S. at 577-78 (quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)). Finally, the plaintiff in *Vermont Agency of Natural Resources*, *supra*, sued pursuant to the False Claims Act, which creates a qui tam right of action, 31 U.S.C. § 3729(a), but gives the plaintiff no "legally protected right." 529 U.S. at 772-73. Petitioners mistakenly also assert that *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 105 (1998), "held that the respondent lacked injury in fact" despite the existence of a private right of action. Pet. Br. 20. In fact, *Steel Co.* expressly "assum[ed] injury in fact," but found that the plaintiffs' complaint "fail[ed] the third prong of standing, redressability." 523 U.S. at 105.

injury in fact. In this case, by contrast, there is no question that RESPA, in addition to creating a private right to sue, creates an individual substantive statutory right to real estate settlement services free of kickbacks. 12 U.S.C. § 2607(a). It is Petitioners' invasion of this right that, under this Court's precedents, creates an injury in fact that establishes standing.

### 2. Petitioners' Argument Would Impermissibly Restrict Congressional Authority.

Second, Petitioners argue that Respondent's individual statutory right to real estate settlement services untainted by kickbacks has no bearing on whether she has alleged a concrete injury. Pet. Br. 22-25. Such an argument necessarily goes too far, for it would deny to Congress the authority to confer new substantive rights, the violation of which represents injury in fact and supports standing. See *Vt. Agency*, 529 U.S. at 773; *Warth*, 422 U.S. at 500; *Linda R.S.*, 410 U.S. at 617 n.3; *Sierra Club*, 405 U.S. at 738.

Petitioners propose a radical and untenable theory that would require overturning decades of settled precedent. Petitioners would limit Congress to the role of making legally actionable a plaintiff's injury that otherwise independently satisfies standing requirements. Pet. Br. 39. But if Congress' only power with respect to standing were to make an independently existing injury legally actionable, Congress would have no authority at all to confer new rights that create standing, for whether an injury is legally actionable is a question of the merits

of the plaintiff's case—a question independent of constitutional justiciability, *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989); *Warth*, 422 U.S. at 500. Accordingly, Petitioners' theory flies in the face of the principle that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3. Petitioners' position would require every injury in fact to "exist without the statute" to count for standing purposes.[8]

To the extent Petitioners' theory posits that violations of RESPA cannot constitute an injury in fact unless Congress determined that such violations cause an economic harm in every individual case, see Pet. Br. 40-41, its argument is specifically foreclosed by precedent and ignores the need for judicial deference to congressional factfinding. This Court has held that statutes may create rights that establish standing even if they are "directed at avoiding circumstances of potential, not actual, impropriety." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 224 n.14 (1974) ("We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury would be found in an invasion of that right.").

---

[8] Petitioners also argue at some length that Respondent does not have standing under principles of assignee standing. Pet. Br. 25 & n.12. Since Respondent has alleged a direct and personal harm *to herself* from Petitioners' violation of Respondent's rights under RESPA to real estate settlement services untainted by kickbacks, principles of assignee liability are irrelevant, and the Court need not address the issue in deciding this case.

Thus, Petitioners wrongly frame this case as a choice between two opposites. The first option, which Petitioners incorrectly ascribe to Respondent's position, would accord courts no role in deciding issues of standing whenever a statutory cause of action is involved. The second option, which Petitioners advocate, gives Congress no role in the standing inquiry, disregarding Congress's judgment that kickbacks in real estate settlement services cause harms and requiring a completely independent inquiry by courts. This Court's precedents, however, chart a more moderate and wiser alternative to these extremes. Where Congress has identified an injury but *failed* to relate that injury to a narrow class of potential victims who are entitled to bring suit, then courts have a role in enforcing the constitutional requirement that the particular plaintiff in a lawsuit have himself suffered an individualized injury. But where, as here, Congress has "'identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit,'" *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S., at 580 (Kennedy, J., concurring in part and concurring in judgment)), deference is due to Congress's judgment that plaintiffs have suffered a judicially cognizable injury, and a court must recognize the invasion of the substantive statutory right as injury in fact.

Petitioners' standing theories demean the legitimate role of Congress, which this Court repeatedly has recognized, in identifying and defining new injuries that establish constitutional standing. Contrary to Petitioners' assertions, recognizing Congress's role in defining new injuries complements, rather than undermines, the role of

courts in limiting their jurisdiction to the constitutional limits of Art. III's case or controversy requirement. Where Congress makes judgments (as it has in RESPA) that merit deference under this Court's jurisprudence, the judiciary can enforce plaintiff's statutory rights with confidence that Art. III's strictures are being fully effectuated.

## II. RESPONDENT'S STANDING IS DEMONSTRATED BY THE FACT THAT SHE IS ASSERTING AN INDIVIDUAL RIGHT VIOLATED BY CONDUCT DIRECTED PERSONALLY AT HER.

Respondent's standing is confirmed by the fact that she alleges a violation of an individualized right personal to her, a characteristic that places this case well within the heartland of cases traditionally adjudicated in courts. Respondent's complaint arises directly out of a business transaction between Respondent and Petitioners by which Respondent paid Petitioners for services Petitioners were to provide to Respondent. More specifically, Respondent alleges that Petitioners, by paying Tower City for referring Respondent's title insurance to Petitioners, violated Respondent's right under RESPA to real estate settlement services untainted by a kickback.

Because Respondent is complaining about conduct of the Petitioners directed specifically at her, her complaint against Petitioners for violations of RESPA alleges paradigmatically individual rather than public injuries. See *Carter*, 553 F.3d at 989 ("RESPA does not authorize suits by members of the public at large; it authorizes suits only by

individuals who receive a loan that is accompanied by an unlawful referral, which is plainly an individualized injury."); *Alston*, 585 F.3d at 763 ("RESPA only authorizes suits by individuals who receive a loan accompanied by a kickback or unlawful referral, which is plainly a particularized injury, and the very injury pressed here."). This case thus easily satisfies the "imperatives of a dispute capable of judicial resolution": "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980).

The personalized injury Respondent asserts distinguishes this case from the public rights cases in which this Court has found that plaintiffs lack standing. See, *e.g.*, *Arizona Christian School Tuition Organization v. Winn*, -- U.S. --, 131 S.Ct. 1436 (2011); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). Standing doctrine "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498. "The province of the court is, solely, to decide on the rights of individuals." *Marbury v. Madison*, 1 Cranch 137, 170 (1803). Standing requirements thus rest on "the twin ideas of public control over public rights and private control over private rights." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 694 (2004); see also Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 667 (2006) (observing that standing

doctrine reflects "a constitutional distinction between public remedies and private remedies").

The injury-in-fact requirement ensures that plaintiffs in federal court are asserting their own individual rights as opposed to the kinds of generalized public rights that should be pressed in the political branches. *Allen*, 468 U.S. at 750-52; *Chicago Junction Case*, 264 U.S. 258, 272-73 (1924) (Sutherland, J., dissenting); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights* , 93 Cornell L. Rev. 275, 277 (2008); Woolhandler & Nelson, *supra*, at 723, 733; see also *Lujan*, 504 U.S. at 577 (distinguishing "the undifferentiated public interest in . . . compliance with the law" from "an 'individual right' vindicable in the courts"); *Schlesinger*, 418 U.S. at 224 n.14 (holding that Art. III requires plaintiffs "to allege a specific invasion of [a] right suffered by him").

Thus, cases such as this in which a plaintiff alleges injury arising out of a violation of her individual rights almost always satisfy standing requirements, because violations of individual rights cause injuries personal to the plaintiff. Some commentators have gone so far as to argue that the injury-in-fact requirement is therefore "superfluous in cases alleging the violation of a private right." Hessick, *supra*, at 277. It is more accurate, however, to say that the violation of a private right usually constitutes an injury in fact sufficient for standing. Just as "there is ordinarily little question" that a person who is the object of government action has standing to sue to challenge the legality of the action, *Lujan*, 504 U.S. at 561, a person who is the object of private action that violates her individual

rights generally has standing to sue to challenge the legality of the action. In either situation, plaintiffs have standing to sue to complain about illegal conduct directed at them.[9]

Standing is more questionable, on the other hand, in situations in which the defendant's allegedly unlawful conduct is not directed at the plaintiff. See *Lujan*, 504 U.S. at 562 ("[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish."); *Allen*, 468 U.S. at 755 (noting cases in which the plaintiffs lacked standing to raise their civil rights claims "because [they] were not personally subject to the challenged discrimination"). Such cases may implicate public rights that are arguably less amenable to adjudication by the judiciary. It is thus especially relevant in such cases whether the plaintiff has suffered a particularized injury that can support standing or is merely asserting a generalized

---

[9] In the context of taxpayer standing, plaintiffs have framed their suits as challenges to the collection of taxes from them to be used for government expenditures that violate some constitutional or statutory provision—putatively, the collection of taxes from the plaintiff is conduct directed at him. This Court's precedents in such cases thus require a "nexus" between the government's collection of taxes from the plaintiff and the expenditure the plaintiff is challenging as illegal. See, *e.g.*, *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 606 (2007) (plurality); *Valley Forge Christian Coll.*, 454 U.S. at 506-08; *Flast v. Cohen*, 392 U.S. 83, 102 (1968). In most cases, however—including the present case—the defendant's conduct directed at the plaintiff is the same conduct that is challenged as illegal, therefore obviating the need to identify a nexus between what in the taxpayer cases are two different actions.

grievance based on impacts on him that are "undifferentiated and 'common to all members of the public.'" *United States v. Richardson*, 418 U.S. 166, 177 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937), and *Laird v. Tatum*, 408 U.S. 1, 13 (1972)); see also *Schlesinger*, 418 U.S. at 220 ("[S]tanding to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."). The mere fact that the injury is widely shared, however, does not deprive the plaintiff of standing so long as he or she has identified a particularized injury. *Massachusetts*, 549 U.S. at 522; *Akins*, 524 U.S. at 24.

In sum, the individualized nature of Respondent's injury shows injury in fact. *United States v. Hays*, 515 U.S. 737, 744 (1995); *Sierra Club v. Morton*, 405 U.S. 727 (1972).[10] Where, as here, a

[10] It is possible that a plaintiff alleging violation of a private right could nonetheless lack injury-in-fact. The harm necessary to satisfy the injury-in-fact requirement generally must have a direct impact on the plaintiff, not merely a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Sierra Club*, 405 U.S. at 734-35. In addition, conduct by a defendant that violates the terms of a contract with the plaintiff, but in a way that benefits the plaintiff, also would not create injury-in-fact. But the Court's precedent defines "injury" expansively—far more broadly than the quantifiable damages Petitioners' theory would require—to include an array of economic, non-economic, and informational harms that would easily encompass the injury that Congress found when it enacted RESPA and that Respondent has alleged in her complaint. See *Sierra Club*, 405 U.S. at 734; *Ass'n of Data Processing Serv. Org'ns v. Camp*, 397 U.S. 150 (1970); see also, *e.g.*, *Public Citizen*, 491 U.S. at 449-51 (denial of access to information represents Art. III injury); *Baker v. Carr*, 369 U.S. at 206 (holding that plaintiffs "who

plaintiff complains of conduct of the defendant that is directed personally at her, the injury is necessarily individualized.

## III. RESPONDENT'S INJURY IS OF A TYPE TRADITIONALLY RECOGNIZED AS A LEGALLY COGNIZABLE HARM.

In the end, Petitioners' argument reduces to an assertion that they violated Respondent's statutory right to real estate settlement services untainted by kickbacks without harming her, a point rebutted in detail in Respondent's brief.

In any event, for present purposes, it suffices to note that Petitioners' argument depends on ignoring characteristics of Respondent's injury that this Court's precedent deems crucial: that Petitioners' conduct deprived Respondent of her substantive statutory right to real estate settlement services untainted by kickbacks, and that Petitioners' conduct was directed personally at Respondent. In enacting RESPA, Congress recognized that the victim of a kickback-tainted real estate settlement suffers an injury from the kickback—albeit one that may be difficult to prove in a particular case—and created a statutory remedy to compensate for that injury. Enforcement of the substantive right to untainted referrals does not require plaintiffs to

---

allege facts showing disadvantage to themselves as individuals have standing to sue"). Petitioners' attempts to argue that their conduct did not harm Respondent, despite the violation of her individual right to real estate settlement services untainted by a kickback, adopt a far too penurious view of both the facts of the case and of the scope of judicially cognizable injuries. See Part III, *infra*.

demonstrate the market effects that Petitioners demand.

Moreover, the rights and remedies Congress created in RESPA are of a type traditionally recognized in the common law of restitution without regard to proof of damages. For example, in discussing principles of agency law, this Court has flatly rejected the argument that a principal must demonstrate consequential losses from an agent's conflict of interest as a prerequisite of suit:

> It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency.

*United States v. Carter*, 217 U.S. 286, 305-06 (1910); *see also Michoud v. Girod*, 45 U.S. 503, 553, 557, 559 (1846); *Restatement (Third) of Agency* § 8.01; George

G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 543(P), at 382-83 (2d rev. ed. 1993).

*Amici* therefore urge the Court to reject Petitioners' unwarranted departure from well-established and fundamental principles of standing doctrine.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JONATHAN S. MASSEY
*Counsel of Record*
MASSEY & GAIL LLP
1325 G St., N.W., Suite 500
Washington, DC 20005
(202) 652-4511
jmassey@masseygail.com

Dated: October 17, 2011