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 OF *AMICUS CURIAE* TOYOTA ECONOMIC-LOSS PLAINTIFFS IN SUPPORT OF RESPONDENT

MARC M. SELTZER
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars,
Suite 950
Los Angeles, CA 90067
(310) 789-3102

FRANK M. PITRE
COTCHETT, PITRE
& MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

STEVE W. BERMAN
Counsel of Record
HAGENS BERMAN SOBOL
SHAPIRO LLP
1918 Eighth Avenue,
Suite 3300
Seattle, WA 98101
(206) 268-9320
steve@hbsslaw.com

Counsel for Amicus Curiae

238601

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I. INTEREST OF THE *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the *Toyota* Economic-Loss Plaintiffs respectfully submit this brief as *amicus curiae*.[1]

The *amicus curiae* are plaintiffs asserting breach-of-warranty and other claims to recover their economic losses against Toyota Motor Corporation and its subsidiary, Toyota Motor Sales, U.S.A., Inc. (collectively, "Toyota") in the consolidated multi-district litigation, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 11-80187, C.D. Cal. Case No. 8:10-ML-02151 JVS (FMO). The *Toyota* Economic-Loss Plaintiffs are interested in this appeal as the result of the effort of *amici curiae* Association of Global Automakers, Inc. and the Alliance of Automobile Manufacturers (collectively, the "Automakers") to change the limited question accepted by this Court into a much broader inquiry, not tethered to any particular statutory remedy. The Automakers' substituted question coupled with their brief's skewed portrayal of claims asserted against several of its members, expressly including claims

1. Pursuant to Supreme Court Rule 37.6, the *Toyota* Economic-Loss Plaintiffs *amicus curiae* note that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus* or its counsel contributed monetarily to the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, the *Toyota* Economic-Loss Plaintiffs note that blanket letters of consent to file this and all other *amicus* briefs are on file with the Clerk of the Court.

asserted in the *Toyota* litigation, give rise to the *Toyota* Economic-Loss Plaintiffs' interest in this case.[2]

II. SUMMARY OF ARGUMENT

The core of the question presented in this appeal is whether Congress can create Article III standing for private plaintiffs under RESPA by invoking a long-standing presumption of injury and providing for restitution. The parties' briefs and innumerable *amicus* submissions debate this question. But one *amici curiae* brief, submitted by the Automakers, does not. The Automakers seek to substitute a different question, one that (i) assumes the absence of any injury, (ii) invokes scenarios where the presumption of injury does not apply, and (iii) ignores the RESPA claim's link to unjust enrichment and restitution. Their substitute question asks whether a purchaser of any good or service who, while subjected to a violation of a legal duty, was not harmed has constitutional standing to sue. The Automaker's alternate question is outside this lawsuit. The parties never submitted argument about it; the lower courts never addressed it. And only one *amicus* brief raises it. It is unripe for consideration by this Court.

Further, the Automaker's opportunistic arguments, allowed here solely by dint of the parties' blanket consent to all *amicus* briefs, exemplify why the Court rejects consideration of unripe, extraneous issues. The Automakers' brief provides a completely inadequate foundation for a decision by this Court. The heart of

2. A Toyota affiliate is a member of both of the Automakers *amici*.

the brief is a false premise: that a legion of lawsuits asserting claims on behalf of classes that *suffered no harm* threatens American businesses. The Automakers denounce them as "no-injury" lawsuits and declare themselves targets of such. But their examples are spurious. In their cited vehicle-defect cases, for example, a part defect, while not necessarily manifesting in every vehicle, nonetheless pervaded a vehicle model and posed sufficient risk as to impair every vehicle's value, imposing measurable economic losses on every purchaser. *See, e.g., In re Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 52529, at *104-05 (C.D. Cal. May 13, 2011). The Automaker's "no-injury" label is unwarranted, as are their alarms of "ruinous liability."

More to the point, cases in which plaintiffs' actual economic losses established Article III standing present different considerations from the present appeal. The Court's consideration of the presented question should not extend to the Automaker's alternate, unripe question.

III. ARGUMENT

A. The Court accepted for review a single, narrow question regarding constitutional standing to assert a RESPA violation

On June 20, 2011, the Court granted a petition for a writ of *certiorari* on the following question limited strictly to whether a RESPA violation supports Article III standing to the affected consumer absent evidence of injury:

> Section 8(a) of the Real Estate Settlement

> Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding ... that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." § 2607(d)(2).
>
> The question presented is:
>
> Does a private purchaser of real estate settlement services, in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided, have standing to sue under Article III, § 2 of the United States Constitution, which provides that the federal judicial power is limited to "Cases" and "Controversies" and which this Court has interpreted to require the plaintiff to "have suffered an 'injury in fact,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)?

Petitioners address this issue, as they must. Petitioners appropriately paraphrased the reviewed issue, Petitioners Br. at i, and went on to argue that Respondent (plaintiff

below) did not allege that the RESPA violation caused any "concrete injury," whether pecuniary, informational or other, *id*. at 26-36. Petitioners argue that "[t]he allegations of injury in Edwards's complaint are narrowly circumscribed,… and the complaint carefully avoids any allegation of adverse effect on Edwards personally. The complaint thus does *not* allege that petitioners' conduct "made her worse off economically in any way," or, specifically, that the conduct caused her to overpay or "receive less value for her money than she otherwise would have received." *Id*. at 26-27. Petitioners note that plaintiff Edwards alleges some speculative "systemic effects," but "the complaint does not allege that the price that she paid actually was higher (or quality lower) because of the conduct challenged in this case." *Id*. at 27.

Petitioners identify the sort of allegations that indisputably would confer Article III standing where anticompetitive conduct has manipulated a market: "a plaintiff must allege … that, absent the unlawful conduct, the price plaintiff paid would have been lower (or quality higher) such that the plaintiff has suffered a concrete economic harm." *Id*. at 28.

Respondent likewise addresses only the issue accepted by the Court. Respondent opens with an appropriate paraphrase of the question presented. Respondent's Br. at i. Citing the "no-further-inquiry" rule, Respondent later points to long-standing precedent that a party's interest in receiving service untainted by kickbacks or other conflicting interests is a concrete, legally protectable interest, and that in similar circumstances injury is conclusively presumed and Congress merely applied that rule in RESPA and provided restitution as relief. *E.g.*,

id. at 15-16, 28-31, 34, 35-36. Respondent separately cites Congress's independent authority to define injuries, create new legal rights and provide remedies for violations. *Id.* at 16-17, 38-44.

At this Court's request, the United States Solicitor General submitted a brief that likewise addressed the specific presented issues. The Solicitor General's brief urged the Court to decline certiorari, explaining that Congress viewed corruption that taints a real-estate settlement service as injuring the consumer's RESPA right to information sufficient to support Article III standing even absent proof of impact on the service's price or quality. *E.g.*, *Amicus* Brief of the United States (filed May 19, 2011) at 12-13.

Accordingly, as the presented question provides, this Court is addressing (and the parties are briefing) whether purchasers of real-estate settlement services have standing to assert a RESPA claim for services tainted by kickbacks or other corrupt practices where RESPA presumes rather than requires proof of injury and provides for treble refunds based on unjust-enrichment principles.

B. The Automakers ask the Court to substitute a fundamentally different question

But this is not the question the Automakers want the Court to hear. Fifteen *amici* submit briefs supporting the Petitioners' position. Only one *amici* brief – that filed by the Automakers – proffers a new, fundamentally different question. *See* Automakers Br. at i.[3] The Automakers

3. The brief supporting Petitioners submitted by *amici curiae* Facebook, Inc., *et al,*, reproduces verbatim the question

would untether the presented question from whether Article III standing can arise from a private RESPA claim to recover restitution based on a presumption of injury from a RESPA violation. They would substitute in its place a question (i) reaching to purchasers of *any* "goods or services" (ii) subjected to a violation of *any* "legal duty," whether contractual, common law or otherwise, and (iii) that assumes no harm. To wit:

> Whether a person who in the course of buying goods or services has been subjected to a violation of a legal duty, but has sustained no tangible, emotional, or economic harm as a result, has standing to sue under Article III, § 2. [Automakers Br. at i.]

The Automakers thus would strip from the presented question any aspect of RESPA's premises that purchasers of real-estate settlement services are (i) entitled to receive untainted information about the services they are purchasing, (ii) injured when kickbacks or other RESPA-barred tactics corrupt that information, and (iii) entitled to a treble refund of the amount paid for the services. The substituted question instead encompasses purchases in any context and where presuming injury is plainly inappropriate. The Automakers thus jettison the central inquiry to the presented question: whether Congress can constitutionally allow a home purchaser to assert a private

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presented. The brief submitted by *amici curiae* National Association of Home Builders *et al.* reproduces the single question as paraphrased by Petitioners. The brief submitted by *amicui curiae* Pacific Legal Foundation *et al.* accurately paraphrases the question presented. The remaining *amici* briefs do not state the question.

claim for a RESPA violation by conclusively presuming injury from the purchase of a settlement service tainted by kickback, entitling the purchaser to restitution. 12 U.S.C. § 2607(d)(2).

C. The Court should not address the Automakers' substituted question because it diverges materially from the presented question and is not ripe for this Court's consideration

The question accepted by this Court is fully ripe for consideration. Petitioner and Respondent collectively are submitting thorough and balanced arguments on the presented question, honed by district-court and appellate briefing. Fourteen *amici curiae* have submitted briefs supporting Petitioner's arguments (and an unknown-at-this-time number of *amici* briefs supporting Respondent's). But not so for the Automakers' substituted question. Only the Automakers address it, and their brief makes no attempt at a fair and balanced discussion. Their question is far from ripe for this Court's consideration.

The Automakers' brief is also a poor springboard for a decision on a different question than the one the Court accepted. Indeed, the heart of the brief is a false premise: that a legion of lawsuits asserting claims on behalf of classes that suffered no harm threatens American businesses. The Automakers attempt to link the present appeal to a purported "much wider trend" that "has ensnared many" of their members in "high-stakes litigation" brought by "plaintiffs and putative class members *who have sustained no harm*." Automakers Br. at 4 (emphasis added). According to the Automakers, these plaintiffs assert "a theory of liability that requires

them to prove only their purchases and the defendant's conduct." *Id.* The result, they state, "permits the judiciary to intervene when no one has been … harmed at all," purporting to lead to a "drastic and absurd" result: "the lesser the injury, the broader the class, the greater the damages exposure, and the larger the settlement." *Id.* at 4-5.

The Automakers then bemoan that they are "frequent targets" of such "no-injury" lawsuits, in which they face liability and "ruinous" damages to purchaser classes for defects that never manifested and "did not harm even the representative plaintiff under any definition of 'injury' that is not perfectly circular." *Id.* at 5, 6.

In reality, however, there is no plague of class-action claims threatening enormous damage awards despite the absence of any actual injuries, and the few illustrative vehicle cases cited by the Automakers involved actual, economic harm. The Automakers spotlight a pending litigation, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.*, No. 11-80187, C.D. Cal. Case No. 8:10-ML-02151 JVS (FMO), as "[t]he best-known example" of the so-called no-injury litigation. Automakers Br. at 6-7. Plaintiffs in that consolidated case were injured in various ways by incidents of sudden unintended acceleration ("SUA") in Toyota vehicles with an electronic throttle-control system ("ETCS"), which severs the mechanical link between the accelerator pedal and the engine. *In re Toyota Motor Corp.*, 754 F. Supp. 2d 1145, 1156 (C.D. Cal. 2010) ("*Order 1*"). SUA accidents have injured and killed drivers, passengers and by-standers, wrecked property, and slashed the values of afflicted models as Toyota

toppled from its premier position as the perceived maker of the world's safest, most reliable automobiles.

The Automakers complain about the claims of a subset of plaintiffs – the *Toyota* Economic-Loss Plaintiffs *amicus* – who did not personally experience a SUA event and their proposed class of similarly situated Toyota vehicle purchasers. Automakers' Br. at 7. The Automakers denounce this as a "no-injury" class where plaintiffs need only prove they bought a Toyota vehicle: "buying the product in itself is injury-in-fact – and the only 'injury' requiring proof …." *Id.* at 13.

Nonsense. The Automakers ignore the facts actually alleged in that case, as well as the district court's determinations that the plaintiffs have adequately alleged actual economic harm. After investigation by the National Highway Transportation Safety Administration revealed that "SUA tended to be significantly higher in Toyota vehicles with an ETCS rather than a mechanical throttle system" and "pursuant to a congressional investigation, Toyota disclosed that it had received over 37,900 complaints regarding SUA," after which "the value of Toyota cars diminished." *Order 1*, 754 F. Supp. 2d at 1157, 1158, 1160. Specifically, the plaintiffs detailed how the "Kelley Blue Book and NADA Used Car Guide Values lowered the values of Toyota vehicles subject to recalls." *In re Toyota Motor Corp.*, 2011 U.S. Dist. LEXIS 52529, at *94 (C.D. Cal. May 13, 2011) ("*Order 2*"). Moreover, even after recalls, "incidents of SUA persisted." *Order 1*, 754 F. Supp. 2d at 1158.[4]

4. The Automakers protest that the plaintiff class includes buyers whose vehicles were recalled and retrofitted. Automakers

The district court reasoned that, to have Article III standing, plaintiffs alleging actual economic loss need not also have actually experienced the terror of being stuck in a runaway vehicle, property damage, personal injury, or death. *Id.* at 1161. The court instead found that the plaintiffs had alleged that "every Toyota vehicle with ETCS is defective and has a statistically significant propensity for SUA." *Id.* at 1162; *see also Order 2*, 2011 U.S. Dist. LEXIS 52529, at *93-94 (summarizing allegations of lack-of-brake-override defect). And it found that the plaintiffs had adequately alleged injury-in-fact, because "defective cars are simply not worth as much." *Id.* at *108. Specifically, plaintiffs who "contracted for safe vehicles that start and stop upon proper application of the accelerator and brake pedals" but "received defective vehicles subject to dangerous SUA events, meaning that Plaintiffs' vehicles sometimes do not start and stop as promised," suffered economic loss at the time of purchase. *Order 1*, 754 F. Supp. 2d at 1165; *see also Order 2*, 2011 U.S. Dist. LEXIS 52529, at *113-14. In short, the court found that allegations of "overpayment for the defective, unsafe vehicle constitute[d] the economic-loss injury that is sufficient to confer standing." *Id.* at *119 (denying motion to dismiss for lack of Article III standing).

Further, circuit courts agree that in such cases, where plaintiffs plead actual economic injury, they establish Article III standing without also being required to plead that their vehicles manifested the defect. For example, in *Cole v. GMC*, 484 F.3d 717, 723 (5th Cir. 2007), *cited*

Br. at 7. But the *Toyota* Economic-Loss Plaintiffs adequately allege that the retrofits in question were ineffective. *E.g.*, 2011 U.S. Dist. LEXIS 52529, at *108-09, *113-14.

in Automakers Br. at 17, the court ruled that plaintiffs established Article III standing by allegations of economic injury:

> [Plaintiffs] do assert their own actual economic injuries…. Plaintiffs seek recovery for their actual economic harm (*e.g.*, overpayment, loss in value, or loss of usefulness) emanating from the loss of their benefit of the bargain…. [I]t is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they allege they have suffered.

See also Daffin v. Ford Motor Co., 458 F.3d 549, 554 (6th Cir. 2006); *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175, 1176 (9th Cir. 2010); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002-03, 1007 (D.C. Cir. 1986) (referring to economic-loss claims). By contrast, courts dismiss claims where plaintiffs cannot plead such injury. *See Briehl v. General Motors Corp.*, 172 F.3d 623, 623, 628-29 (8th Cir. 1999) (finding "conclusory" assertions of injury were "simply too speculative" to state a claim because there were no allegations supporting plaintiffs' claim that their vehicles' resale value had diminished); *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304, 306 (Tex. 2008) (observing that "[a] person who buys a defective product can sue for economic damages, but the law is not well developed on the degree to which the defect must actually manifest itself before it is actionable" (footnote omitted), and dismissing for lack of standing

because injury was too remote where defect rarely manifested).[5]

These cases – where plaintiffs' allegations of economic injury established their Article III standing or helped state a claim – accordingly present very different considerations from the present appeal. Here, of course, the parties agree that RESPA does not require plaintiff Edwards to prove economic or other tangible injury, which became the premise of the question presented. In place of proof of direct injury to support a private plaintiff's Article III standing, Congress substituted a conclusive presumption of injury and unjust-enrichment-based relief in the form of a treble refund. *See* Respondent's Br. at 28-31, 34, 35-36. Edwards did not submit proof of injury for this reason. *See id.* at 36 & n.7.

The Automakers' brief buries these crucial distinctions, revealing itself as a special pleading about a fabricated issue intended to invite the Court to address a far different question than the one on which it granted its writ of *certiorari*.

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5. The Automakers cite *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018-20 (7th Cir. 2002), in which the circuit court reversed certification of nationwide classes on unmanageability grounds due to application of multiple states' laws. Plaintiffs' standing was not at issue. Plaintiffs apparently had proffered a sufficient showing of injury to satisfy Article III's low bar. The Automakers focus on dicta regarding whether plaintiffs' assertions of financial injury stated a claim under laws of various states, an altogether different concern. Further, the court's musing that the marginal cost of properly designing or manufacturing a defective product limits a defendant's liability, *see id.* at 1017 n.1, is curious given the likelihood that such failure can trigger damages far exceeding that cost, as, for example, the Deepwater Horizon oil spill amply demonstrates.

IV. CONCLUSION

Plainly, the Automakers are unhappy about their potential liability to customers for economic losses when a material defect in an automaker's vehicles, after public revelation, measurably diminishes the vehicles' market value. The Automakers cite decisions affirming such liability, for which they could have sought this Court's review. But this is not such a case. Rather than involving evidence of measurable economic losses, here there is no evidence of harm at all. Instead, according to Respondent, there is a long-standing, narrowly applied presumption of injury that Congress invoked for private RESPA claims – a presumption that has no place in defective-vehicle economic-loss cases.

Nonetheless, exploiting an opportunity created by the parties' blanket consent to all *amicus curiae* briefs, the Automakers submit a brief addressing issues that stray far from the actual question presented. The Automakers' question and their arguments have no place here. The *Toyota* Economic-Loss Plaintiffs respectfully submit that the Court should address the question presented and not the Automakers' remote, unripe alternative.

Dated: October 18, 2011

Respectfully submitted,

STEVE W. BERMAN
Counsel of Record
ERIN K. FLORY
HAGENS BERMAN SOBOL
SHAPIRO LLP
1918 Eighth Avenue,
Suite 3300
Seattle, WA 98101
(206) 268-9320
steve@hbsslaw.com

MARC M. SELTZER
SUSMAN GODFREY L.L.P.
1901 Avenue of the Stars,
Suite 950
Los Angeles, CA 90067
(310) 789-3102

FRANK M. PITRE
COTCHETT, PITRE
& MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
(650) 697-6000

Counsel for Amicus Curiae