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

REPLY BRIEF FOR PETITIONERS

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

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CORPORATE DISCLOSURE STATEMENT

Petitioners' Rule 29.6 Statement was set forth at page ii of their petition for a writ of certiorari, and there are no amendments to that Statement.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

ARGUMENT:

I. THE CIRCUITS ARE DIVIDED ON THE STATUTORY AND CONSTITUTIONAL STANDING QUESTIONS PRESENTED 2

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S STANDING JURISPRUDENCE 7

III. THE QUESTIONS PRESENTED ARE OF SINGULAR IMPORTANCE TO THE INDUSTRY 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Alston v. Countrywide Fin. Corp., 585 F.3d 753 (3d Cir. 2009) 7

ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 6-7

Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979 (6th Cir. 2009)..... 7

Doe v. National Bd. of Med. Examiners, 199 F.3d 146 (3d Cir. 1999)..... 7

Durr v. Intercounty Title Co., 14 F.3d 1183 (7th Cir. 1994) 1, 4, 5

Gollust v. Mendell, 501 U.S. 115 (1991)..... 9

Hendry v. Pelland, 73 F.3d 397 (D.C. Cir. 1996)..... 8

Kendall v. Employees Retirement Plan of Avon Prods., 561 F.3d 112 (2d Cir. 2009) 2, 5, 6, 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 9, 10

Moore v. Radian Group, Inc.:

233 F. Supp. 2d 819 (E.D. Tex. 2002), *aff'd*, No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf..... 3, 4

No. 02-41464 (5th Cir. May 30, 2003) (judgment noted at 69 F. App'x 659), *available at* http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf.....1, 3, 4

Morales v. Attorneys' Title Ins. Fund, Inc., 983 F. Supp. 1418 (S.D. Fla. 1997) 3, 4

Mullinax v. Radian Guar., Inc., 311 F. Supp. 2d 474 (M.D.N.C. 2004) 4

Shaw v. Marriott Int'l, Inc., 605 F.3d 1039 (D.C. Cir. 2010) 7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 9

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 7

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000) 2, 9

Williams v. Dallas Area Rapid Transit, 256 F.3d 260 (5th Cir. 2001) 3

Williams v. First Am. Title Ins. Co., No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460 (N.D. Miss. Sept. 13, 2005) 3, 5

Wilson v. Glenwood Intermountain Props., Inc., 98 F.3d 590 (10th Cir. 1996) 6, 7

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

U.S. Const. art. III 1, 2, 3, 5, 7, 9, 10

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* 5

29 U.S.C. § 1132(a)(3)..... 6

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* 1, 2, 3, 4, 6, 7, 8, 11

§ 8(a), 12 U.S.C. § 2607(a) 4

§ 8(b), 12 U.S.C. § 2607(b) 4

§ 8(d)(2), 12 U.S.C. § 2607(d)(2) 1, 2, 4, 8

24 C.F.R.:

§ 3500.14(a)..... 8

§ 3500.14(g)(2) 8

5th Cir. R. 47.5.1..... 3

LEGISLATIVE MATERIALS

Title Insurance – Cost and Competition: Hearing Before the Subcomm. on Housing & Community Opportunity of the H. Comm. on Financial Services, 109th Cong. (Apr. 26, 2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:30539.pdf..... 10

ADMINISTRATIVE MATERIALS

U.S. Gov't Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, GAO-07-401 (Apr. 2007), *available at* http://www.gao.gov/new.items/d07401.pdf 10

OTHER MATERIALS

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 2, 4

The parties agree that this case cleanly presents the question whether a private plaintiff can establish standing to sue under RESPA and Article III by alleging "the invasion of an individual statutory right," Opp. 18 n.10, in the absence of any concrete injury. Respondent likewise does not question that this case presents issues of exceptional importance, both because of its implications for parties that are subject to RESPA, *see* Br. of Am. Escrow Ass'n, *et al.*; Br. of Am. Land Title Ass'n, *et al.*, and because of the significance of the recurring constitutional question presented, *see* Br. of Law Professors.

Contrary to respondent's argument, a division among the circuits exists and will likely endure unless the Court addresses the issue. Respondent concedes that the decision of the Ninth Circuit (along with those of the Third and Sixth Circuits) conflicts with the Fifth Circuit's (unreported) decision in *Moore*. Although the Fifth Circuit decision is unreported, it will nevertheless guide parties' conduct. The Fifth Circuit's disposition of *Moore* has already been treated as effectively controlling by a district court in the Fifth Circuit and would almost certainly be followed in the future – if any plaintiff were clumsy enough not to seek a friendlier forum. Respondent's effort to explain away *Durr* is no more persuasive: the Seventh Circuit specifically held that RESPA authorizes recovery of overcharges only, *not* legitimate charges for the settlement services involved in the overcharge. *Durr* has been correctly understood by district courts (and by the Fifth Circuit) to deny standing under § 8(d)(2) of RESPA – the provision at issue here – to a plaintiff who, like respondent, cannot allege such injury.

The Ninth Circuit's resolution of the Article III issue conflicts with the determination of other courts in the Second and Tenth Circuits that the allegation of a statutory violation connected to a transaction involving the plaintiff is insufficient to confer standing absent a distinct injury.

Furthermore, the Ninth Circuit's ruling is incorrect. That court's understanding that the availability of a remedy, without more, is sufficient to confer standing conflicts with this Court's analysis in *Vermont Agency*, a case that respondent fails even to cite. Respondent's suggestion (at 22) that she suffered economic harm by virtue of the "systemic effects" of generic conduct not only lacks support in the record; it is also the type of "entirely speculative" harm that has been held insufficient to establish standing to sue. *Kendall*, 561 F.3d at 122 (internal quotations omitted).

I. THE CIRCUITS ARE DIVIDED ON THE STATUTORY AND CONSTITUTIONAL STANDING QUESTIONS PRESENTED

A. Respondent argues (at 1) that "[t]here is no split in the Circuits," but, in the Fifth and Seventh Circuits, a plaintiff suing under § 8(d)(2) of RESPA must show injury in fact (i.e., an overcharge), not merely that the settlement charge she paid was connected to a violation of the statute that did not affect her directly.[1]

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[1] Because the Ninth Circuit actually decided the issue of statutory standing, and because the existence of a supposed cause of action under RESPA was the sole basis for the Ninth Circuit's resolution of the constitutional standing issue, the statutory issue is properly presented, and respondent does not argue otherwise. *Cf.* Opp. 11 n.6; Pet. 24 n.16 (citing cases for the

1. Respondent concedes that *Moore* conflicts with the Ninth Circuit's decision, but argues that this conflict does not "merit[] review" because the Fifth Circuit's decision is "not precedent" in the Fifth Circuit. Opp. 15. Whether that is true as a technical matter, it is not true as a practical matter. *Moore* affirmed the (reported) judgment of the District Court for the Eastern District of Texas, which held that Congress did not "intend[] to allow a private plaintiff to sue for an alleged violation of RESPA's anti-kickback provision when the plaintiff has not alleged that the referral arrangement increased any of the settlement charges at issue or that any portion of the charge for the settlement service was involved in the kickback violation." *Moore*, 233 F. Supp. 2d at 824 (citing *Durr* and *Morales*). Under Fifth Circuit rules, the affirmance of the district court's decision reflects the panel's judgment (confirmed by the unpublished opinion) that the district court's analysis is correct. *See Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc); 5th Cir. R. 47.5.1. District courts in the Fifth Circuit can accordingly be expected to follow *Moore*, and at least one has already done so. *See Williams*, No. Civ. A. 2:02CV194-B-B, 2005 WL 2219460, at *2. This Court regularly grants review of unpublished decisions;[2] the importance of clarifying governing law is not limited to what appears between the covers of the Federal Reporter.

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proposition that statutory standing may be considered before Article III standing).

[2] *See* Eugene Gressman et al., *Supreme Court Practice* 263 (9th ed. 2007) ("[T]he Court grants certiorari to review unpublished and summary decisions with some frequency.") (citing cases).

2. The attempt to distinguish *Durr* because the underlying violation of RESPA involved § 8(b) (which involves fee-splitting in particular) rather than § 8(a) (which involves referral fees more generally) does not hold water. The issue in *Durr*, as here, was whether RESPA provides for recovery of fees charged for services actually rendered – rather than for an overcharge alone – simply because the transaction was connected to an alleged violation. The Seventh Circuit noted that the district court did *not* impose sanctions because the plaintiff's "basic theory of recovery" – that is, his claim that the overcharge violated § 8(b) of RESPA – "was so far outside of the purview of RESPA that he should be sanctioned." 14 F.3d at 1187. Rather, the court found that the plaintiff "identified only an $8.00 overcharge [but] nevertheless sued to recover all the charges that Intercounty made to Durr" even though "[t]here was never an allegation that these fees were illegitimate." *Id.* at 1188.[3] That is why courts (including the district court and Fifth Circuit in *Moore*, the Florida district court in *Morales*, and the North Carolina district court in *Mullinax*) have correctly understood *Durr* to hold that § 8(d)(2) confers statutory standing only in cases involving overcharges, not in cases involving uninflated charges connected to alleged RESPA violations. *See Mullinax*, 311 F. Supp. 2d at 486 ("In summary . . . , the holdings of *Durr*, *Morales*, and *Moore* demonstrate that Plaintiffs in this case lack standing to pursue their RESPA claims.").

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[3] The overcharge at issue in *Durr* was not a separate fee but was part of the fee imposed for recording the deed and the mortgage. *See* 14 F.3d at 1184. The recordation fee, in particular, was among those that the Seventh Circuit said were not "illegitimate." *Id.* at 1188; *see also Mullinax*, 311 F. Supp. 2d at 484.

3. Acknowledging that the federal courts have reached conflicting results on the statutory question presented, respondent speculates that "[t]here is little probability" that the split of authority "will persist." Opp. 16. To the contrary, unless the Court grants review, the conflict will almost certainly remain unresolved: reasonably careful plaintiffs' counsel will pursue claims in those circuits where the law is favorable, not where the law is unfavorable. *See* Am. Escrow Ass'n Br. 5-6. We have been unable to locate a single district court decision in the Seventh Circuit since *Durr* or in the Fifth Circuit since *Williams* that confronted the standing issues presented in this case. This case presents the appropriate vehicle to resolve the persistent confusion.

B. Respondent argues that there is no split in the circuits on the Article III question because cases diverge, not over the requirement of a distinct injury beyond the invasion of a statutory right, but instead "over whether particular statutes . . . confer individual predicate statutory rights." Opp. 17. But if respondent were correct, then none of the cases cited in the petition would have discussed the requirements of Article III – they would simply have addressed *statutory* standing. In fact, the circuits have "disagree[d] . . . over whether [constitutional] standing may be based on the violation of a [statutory] right alone." Law Professors Br. 3.

Kendall rejected the plaintiff's argument that ERISA "does not require a showing of direct injury" – beyond an alleged violation of ERISA affecting a plan of which she was a beneficiary – based on the Article III requirement that she "demonstrat[e] individual loss, to wit, . . . an injury-in-fact." 561 F.3d at 119 (internal quotations omitted). ERISA authorizes a

civil action by "a participant, beneficiary, or fiduciary" "to enjoin any act or practice which violates any provision of this subchapter." 29 U.S.C. § 1132(a)(3). By its terms, that does not require a plan beneficiary to show an injury aside from an alleged breach of a statutory duty. The Second Circuit nevertheless rejected the claim "that either an alleged breach of fiduciary duty to comply with ERISA, or a deprivation of her entitlement to that fiduciary duty, in and of themselves constitutes an injury-in-fact sufficient for *constitutional* standing." 561 F.3d 121 (emphasis added). In the absence of a non-speculative allegation that the alleged breach had caused the plan beneficiary concrete harm, the plaintiff lacked standing.[4]

Likewise, *Wilson* held that, although "[s]tanding under the Fair Housing Act is as broad as permitted by Article III," the plaintiffs lacked standing. 98 F.3d 593. Although the plaintiffs had read the discriminatory advertisement (and thus been subjected to the statutory violation), the Tenth Circuit explained that "mere receipt by plaintiffs of the [allegedly unlawful] advertisements" does not create a constitutionally cognizable injury, because "'"the psychological consequence presumably produced by observation of conduct with which one disagrees" . . . do[es] not provide the kind of particular, direct, and concrete injury that is necessary to confer standing to sue.'" *Id.* at 596 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605,

[4] The conflict between *Kendall* and the decision below is particularly clear because the statutory right allegedly violated in *Kendall* – that is, the fiduciary obligation of the plan administrator – is analogous to the supposed "right to conflict-free referral advice" under RESPA, the invasion of which respondent claims is sufficient to confer standing "even without proof of financial injury." Opp. 21-22.

616 (1989) (plurality), quoting in turn *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982)).[5]

The court below – like the Third Circuit in *Alston*, the Sixth Circuit in *Carter*, and the D.C. Circuit in *Shaw v. Marriott International, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) (cited in Law Professors Br. 3-4) – held that the interest in being free from a statutory violation is sufficient to confer standing, even if the statutory violation caused the plaintiff no actual injury. *See Shaw*, 605 F.3d at 1042 ("Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute.") (internal quotations omitted). That understanding of Article III is inconsistent with the understanding applied in *Kendall* and *Wilson*.

II. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S STANDING JURISPRUDENCE

The Ninth Circuit's holding that respondent has standing rests on that court's erroneous belief that RESPA allows a plaintiff to sue, even in the absence of actual injury. That interpretation of the statute

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[5] Contrary to respondent, in *Doe v. National Board of Medical Examiners*, the late Judge Becker expressly rejected the same analysis employed by the Ninth Circuit below, explaining that "[t]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated. Although Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone." 199 F.3d at 153.

ignores the statute's requirement that a plaintiff may sue only if the fee the plaintiff paid was "involved in the violation" of RESPA, *see* Pet. 22-23, and likewise disregards the serious constitutional issue that is raised by reading the statute in that way, *see* Pet. 23-24.[6] Respondent makes no effort to defend the Ninth Circuit's reading of § 8(d)(2).

Respondent defends the Ninth Circuit's constitutional holding primarily on the ground that, because "RESPA gives [a] homebuyer a right to conflict-free referral advice," the "invasion of that statutory right is an injury conferring standing" irrespective of whether the alleged "invasion" caused any distinct harm to the plaintiff. Opp. 21-22.[7] Respondent's argument neatly frames the question: whether the allegation that a defendant violated RESPA and that

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[6] Respondent gains no support from the statement in HUD's regulation that "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made . . . is irrelevant in determining whether the act is prohibited." 24 C.F.R. § 3500.14(g)(2). That statement, by its terms, relates to what conduct is prohibited by the statute, not whether a private party has a cause of action based on payment of a settlement fee at the state-mandated legal rate. *See id.* § 3500.14(a) ("Any violation of this section is a violation of section 8 of RESPA . . . and is subject to enforcement as such *under § 3500.19* [relating to executive branch and state enforcement].") (emphasis added).

[7] Respondent relies on *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996), for the proposition that an attorney who violates a fiduciary duty to a client cannot insist on payment for services rendered, but that does not mean that a party can sue for breach of fiduciary duty in the absence of injury. As the D.C. Circuit made clear, "forfeiture [of the attorney's fees] reflects . . . the decreased value of the representation itself" – that is, an actual injury in fact. *Id.* at 402. Here, by contrast, there is no allegation that respondent paid for "referral advice," as opposed to the title insurance policy she received and about which she had no complaint.

the violation had an arguable connection to a transaction involving the plaintiff satisfies Article III's injury-in-fact requirement in the absence of any other "distinct and palpable injury" to the plaintiff. *Gollust*, 501 U.S. at 126 (internal quotations omitted). This Court's standing cases make clear that the answer is no: unless a plaintiff is seeking "compensation" for (or to prevent) an injury to herself, she lacks standing. *Vermont Agency*, 529 U.S. at 772-73. A private individual does not gain standing simply by virtue of an interest in enforcing compliance with the law. *See Citizens for a Better Env't*, 523 U.S. at 106 (rejecting "vindication of the rule of law" as a basis for standing); *Lujan*, 504 U.S. at 573-78. The possibility that the plaintiff will recover money through an action does not alter the conclusion: such recovery is "merely a byproduct of the suit itself" and "cannot give rise to a cognizable injury in fact for Article III standing purposes." *Vermont Agency*, 529 U.S. at 773 (internal quotations omitted).

Respondent argues that, if economic injury is required, she can satisfy it because the "systemic effects" of the "kickbacks" alleged in the complaint have affected pricing of settlement services. Opp. 22; *see also* Opp. 8-9. The first and sufficient response to this argument is that such an injury is nowhere alleged in the complaint (and the Ninth Circuit made no mention of it); the only injury averred in the complaint (on which respondent does not attempt to rely) is that she was denied information concerning "the cost of title insurance." App. 49a. Moreover, respondent provides no clue as to how the business arrangement at issue in this case had any "systemic" effect on the prices charged for title insurance in Ohio. Respondent – relying on a GAO report – argues that

referral fees given by *title agents* to "real estate professionals" such as mortgage brokers and real estate agents leads to improper "steer[ing]" of homebuyers to a particular agency. Opp. 8; *see also* U.S. Gov't Accountability Office, *Title Insurance: Actions Needed to Improve Oversight of the Title Industry and Better Protect Consumers*, GAO-07-401, at 3-4 (Apr. 2007); *Title Insurance – Cost and Competition: Hearing Before the Subcomm. on Housing & Community Opportunity of the H. Comm. on Financial Services*, 109th Cong. 31 (Apr. 26, 2006) ("For title service providers, there is an almost irresistible incentive to financially influence . . . realtors to refer them business.") (statement of Douglas Miller, President & CEO, Title One, Inc.). But the arrangement at issue here was between a title insurer and its affiliated agent and did not involve any referral fee of the sort respondent claims affects competition. Respondent does not explain how that business arrangement affected any incentives to compete either for referrals or directly for the business of consumers. A supposed injury that is "conjectural or hypothetical" cannot satisfy Article III. *Lujan*, 504 U.S. at 560 (internal quotations omitted).

III. THE QUESTIONS PRESENTED ARE OF SINGULAR IMPORTANCE TO THE INDUSTRY

"[T]he Ninth Circuit's ruling threatens a common form of business arrangement that has been accepted for decades." Am. Land Title Ass'n Br. 7. Respondent does not question that the claims of the putative nationwide class she seeks to represent threaten potentially enormous liability based on nothing more than the existence of arrangements that are well known to state and federal regulators. Such litiga-

tion inflicts enormous costs, even when the underlying claims lack merit. *See* Pet. 31. RESPA does not call for that result, and the Constitution does not permit it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES A. NEWMAN
MICHAEL J. DUVALL
SNR DENTON US LLP
One Metropolitan Square
Suite 3000
St. Louis, Missouri 63102
(314) 259-5399

MICHAEL K. KELLOGG
AARON M. PANNER
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@khhte.com)

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