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

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Section 8(a) of the Real Estate Settlement Procedures Act of 1974 ("RESPA" or "the Act") provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. § 2607(a). Section 8(d)(2) of the Act provides that any person "who violate[s]," inter alia, § 8(a) shall be liable "to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." *Id.* § 2607(d)(2).

Respondent submits that the questions presented should be restated as follows:

1. Does section 8(a) of RESPA confer an individual right to purchase real estate settlement services that do not involve an illegal kickback or referral fee?

2. Does the invasion of an individual statutory right to purchase real estate settlement services that do not involve an illegal kickback or referral fee satisfy the Article III case or controversy requirement?

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INTRODUCTION

The petition to review the Ninth Circuit's interlocutory ruling should be denied. There is no split in the Circuits on the questions presented in this case. Three Circuits have now addressed statutory and constitutional standing under RESPA § 8(a) in precedential opinions. All of them agree that Congress intended to confer a private right of action for damages on a homebuyer who purchased a real estate settlement service "involved in" the payment of an illegal kickback or referral fee without additional proof of an overcharge, and that it was constitutional for Congress to do so under Article III. Pet. App. 1a-7a; *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009).

Petitioner's claim to the contrary is based on an opinion involving a RESPA provision not involved in this case (*Durr v. Intercounty Title Co.*, 14 F.3d 1183 (7th Cir. 1994)), and a non-precedential opinion that does not establish the law of the Fifth Circuit (*Moore v. Radian Group, Inc.*, No. 02-41464 (5th Cir. May 30, 2003)). *Durr* involved RESPA § 8(b), which forbids fee-splitting, not § 8(a), which forbids kickbacks. *See* Pet. App. 43a (reproducing provisions). The amount "involved in [a] violation" of section 8(b) is the "portion, split, or percentage" of the charge "other than for services actually performed." Suits under section 8(b) thus require proof that a portion of the fee is unearned, *i.e.*, there has been an overcharge. By contrast, when a kickback or referral fee is paid, contrary to section 8(a), the *entire* charge for the service is induced by the illegal payment, so

all of it is is involved in the violation. There is no inconsistency between *Durr*'s holding that section 8(b) liability is based on the amount charged above the value of the "services actually performed" and the decisions in *Edwards*, *Carter*, and *Alston*.

The Fifth Circuit's unpublished decision in *Moore* did mistakenly apply *Durr*'s reasoning to a section 8(a) claim, but that decision has no precedential force in the Fifth Circuit and there is nothing to prevent the Fifth Circuit from agreeing with the Third, Sixth and Ninth Circuits when the issue next arises.

The decisions of the Third, Sixth and Ninth Circuits are also correct. Their conclusion that homebuyers have standing to sue for damages when a settlement service provider pays kickbacks or referral fees accords with the position of the United States in *Carter* and *Alston*, on behalf of the Department of Housing and Urban Development (HUD), the agency charged by Congress with interpreting and implementing RESPA, 12 U.S.C. § 2617, and with HUD's regulations construing the Act. 24 C.F.R. § 3500.14(g)(2) ("The fact that the transfer of the thing of value [as a referral fee or kickback] does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited."). There is no reason for this Court's review.

STATEMENT

This case involves a nationwide scheme by a dominant title insurance firm to lock up referrals

from local title agents by acquiring interests in the title companies in exchange for future referrals, contrary to the purpose and express terms of RESPA.[1] Congress identified such "reverse competition" for referrals as a practice that limits competition and drives up the costs of settlement services for homebuyers, and explicitly created a private right of action to redress the economic harm caused when businesses compete by paying for referrals rather than lowering prices or providing better services to homebuyers.

A. RESPA

RESPA was intended to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). In particular, Congress sought to "effect certain changes

[1] Congress did permit investments in companies providing related settlement services without violating the referral fee prohibition. *See* H.R. Rep. 97-532, 52 (1982). Therefore, vague concerns expressed by *amici* about sweeping threats to such arrangements are unfounded. However, to enjoy safe harbor, such affiliated businesses must operate in particular ways and must disclose their affiliation to the consumer. *See* H.R. Rep. 98-123, 77 (1983); 12 U.S.C. § 2607(c)(4). It is undisputed that First American's purchases of interests in title agents did not qualify as exempt "affiliated business arrangements."

Congress also did not forbid exclusive agency agreements unless the agreements involve payments for referrals. The concern raised by a*mici* American Land Title Ass'n, *et al.*, (Br. 10-11), about a broad impact on such agreements is unjustified. Neither petitioner nor *amici* point to any development in the wake of the earlier decisions in *Carter* or *Alston* that threatens lawful agreements.

in the settlement process for residential real estate that will result — * * * (2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

To achieve that purpose, Congress prohibited payments for referrals, and enforced that prohibition by a private right of action. RESPA § 8(a), 12 U.S.C. § 2607(a), provides:

> No 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.

A separate provision, RESPA § 8(b), 12 U.S.C. § 2607(b), forbids fee-splitting (payment or receipt of "unearned fees"), and does not require proof that the payment was made for a referral. The same private civil enforcement provision applies to both of the statutory prohibitions. RESPA § 8(d)(2), 12 U.S.C. § 2607(d)(2), provides:

> Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three

> times the amount of any charge paid for such settlement service.

"Such settlement service" refers to "the settlement service involved in the violation" as defined in either 12 U.S.C. § 2607(a) or (b). Congress expressly delegated authority to HUD to implement and interpret RESPA through regulations and policy statements. 12 U.S.C. § 2617.

B. The Title Insurance Industry.

Payments for title insurance referrals are a prime example of the kind of practice Congress intended to stop. The business of title insurance in the United States is both highly profitable (less than 5% of revenues goes to pay claims, compared with over 70% in most other lines of insurance) and highly concentrated (the leading insurers, including Petitioner First American, have captured over 90% of the market).[2] Government Accountability Office, Title Insurance: Actions Needed to Improve Oversight of the Industry and Better Protect Consumers, 9, 11, 41 (April 2007) (GAO Report). Because the field is so highly concentrated, in many states—including states with statutory schemes like Ohio—large title insurers can collectively set prices

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[2] The industry is even more concentrated now than when the GAO issued its report. There are now only four major title insurers: petitioner First American and *amici* Fidelity, Stewart Title, and Old Republic. Fidelity acquired most of the subsidiaries of LandAmerica in bankruptcy proceedings.

that are much higher than actual costs of any of the services they provide or the risks they insure.[3]

As explained in the GAO Report issued while First American was carrying out its scheme, "consumers find it difficult to shop for title insurance based on price." *Id.* at 3.[4] Instead, consumers rely

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[3] It is not true that all title insurance in Ohio must be sold at a "uniform, state-regulated rate." (Pet. 7). *See* Ohio Rev. Code § 3935.03 (uniformity neither required nor forbidden). Ohio permits (but does not require) title insurers to collaborate on rate-setting through a state-authorized bureau (the Ohio Title Insurance Rating Bureau) operated by a private corporation called Demotech, Inc. Ohio Rev. Code § 3935.04(B); *see* http://www.otirb.com (rating bureau website); http:www.demotech.com (Demotech website). Rates go into effect unless disapproved by the state Superintendent of Insurance within thirty days. Ohio Rev. Code § 3935.04(D). The rating bureau statute thus seemingly confers state immunity upon what would otherwise be an illegal cartel. Ohio Rev. Code § 3935.06. *See In re Title Ins. Antitrust Cases*, 702 F. Supp.2d 840 (N.D. Ohio 2010) (antitrust claims barred by "filed rate" doctrine); *cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (describing standards for state action antitrust immunity). However title insurers (even those that participate in the bureau) are not required to price their insurance at the rates set by the bureau. Ohio Rev. Code § 3935.07 (participants in rating bureau may seek approval for different rates). Because the industry is so concentrated, however, the practical effect of the state rate-setting scheme is to allow the dominant insurers to set prices at monopoly levels.

[4] In that regard, the situation is much as Congress found it in 1974:

> The average person . . . is a captive customer in the hands of the lender, the real estate agent or the attorney. He has no basis for judging whether a particular fee or charge is reasonable, particularly when the amount of the fee or

on referrals to make their purchases. *Id.* at 25. Consumers are unfamiliar with title insurance and buy it only a few times in their lives, when they purchase or refinance a home. *Id.* at 21. It is hard for consumers to compare prices for title insurance services, and title insurance is only a small part of a complex larger transaction that occupies the buyer's attention. *Id.* at 22. As the GAO Report explains:

> by the time consumers receive an estimate from the lender of their title insurance costs as part of the Good Faith Estimate, a title agent has already been selected, and the title search has already been requested or completed. To shop around for another title insurer at that point in the process could also threaten to delay the scheduled closing. According to a number of title industry officials and state insurance regulators we spoke with, most consumers place a higher priority on completing their real estate

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> charge is small relative to the total purchase price of the house. Once a buyer is committed to a particular purchase, he is in no position to question individual charges which may be tacked on by various partial participants in the settlement process. It is unrealistic to assume that consumers will suddenly begin shopping for settlement services. A few sophisticated buyers might. However, the vast bulk of consumers will go along with whatever charges are imposed as they do today.

S. Rep. 93-866, 18 (1974).

> transaction than on disrupting or delaying that transaction to shop around for potentially small savings.

Id. at 23.

Instead of competing for homebuyers' business on the basis of price or service, title insurers engage in what is known as "reverse competition," for referrals from the real estate professionals on whom ordinary consumers rely for advice in their home purchase transactions. *Id.* at 25 ("According to title industry officials, because of consumers' unfamiliarity with and infrequent purchases of title insurance, it is not cost-effective to market to them. Rather, title agents market to and compete for referrals from real estate and mortgage professionals.").

The availability of referral fees gives title agents and other real estate professionals an incentive to steer homebuyers to the firms that offer the best compensation for referrals, rather than the best price or service for the homebuyer. GAO Report at 25-26; House Financial Services Comm., Subcomm. on Housing and Community Opportunity, H.R. Hearing No. 109-88, 29 (April 26, 2006) (Testimony of J. Robert Hunter, Consumer Federation of America); *id.* at 49 (Testimony of Gary M. Cunningham, HUD, referring to 1980 study describing "reverse competition" in title insurance, which persists). In some markets, title insurers that will not pay for referrals are excluded from most transactions, preventing competition that benefits consumers. *Id.* at 30-31 (Testimony of Douglas Miller, President and CEO of Title One). Because

real estate professionals, not homebuyers, actually choose the insurer, the usual market mechanisms do not restrain pricing as long as referral fees continue to be paid.

The prohibition against kickbacks and referral fees was intended to change the way the market for settlement services operates—to stop title insurers and other settlement service providers from engaging in reverse competition so that they would instead compete for customers on the basis of lower prices or better service. Because standard prices within the existing market reflect the perverse incentives of reverse competition, the harm to consumers has nothing to do with overcharges in any individual transaction, *i.e.*, whether the title insurer has charged more than its usual fee.

C. First American's Referral Purchase Scheme

Edwards bought title insurance from First American through a referral from Tower City, the title company that conducted the closing on her home purchase. Unknown to Edwards, the title company was partially owned by First American. The class action complaint, (Pet. App. 53a (Complaint, ¶ 21)); supported by a declaration from a company insider; (CA ER 68-73 (Stipanovich declaration)), alleged that First American had similarly paid to acquire interests in numerous local title companies across the country (the captive title agents). Although the terms of the deals sometimes varied, the common feature of all of them was a promise to refer title insurance business to First American. That promise

was a material term, and indeed the object, of every agreement, and First American's contract consideration was given for the promise of referrals as well the other terms. (CA ER 73, ¶ 23). The agreements thus exchanged "a thing of value"—some portion of the contract consideration—for referrals, contrary to RESPA § 8(a). Each purchase of First American title insurance in connection with a home purchase through one of the captive title agencies was "involved in the violation."

D. Proceedings Below.

Edwards filed a class action complaint on June 11, 2007 (Pet. App. 48a-60a). The district court denied First American's motion to dismiss for lack of standing (Pet. App. 13a-19a). The district court subsequently denied Edwards' motions to certify a nationwide class of customers of First American's captive title agents (Pet. App. 23a-30a) and a class limited to customers of First American's Tower City subsidiary. (Pet. App. 31a-40a).

Edwards appealed the two orders denying class certification to the Ninth Circuit pursuant to Fed. R. Civ. P. 23(f). The Court of Appeals issued both a precedential opinion (Pet. App. 1a-7a) and a non-precedential memorandum (Pet App.8a-11a). In the non-precedential memorandum, the Court of Appeals reversed the denials of class certification, holding that the district court had abused its discretion in denying certification of a nationwide class without allowing discovery (Pet. App. 9a), and had abused its discretion in denying certification of the Tower City class. (Pet. App. 11a). First

American's petition does not challenge those rulings.[5] Class discovery is now underway on remand.

In its precedential opinion, the Court of Appeals expressly agreed with the two circuits that had previously addressed the question of standing to sue for kickback violations under RESPA § 8(a), 12 U.S.C. § 2607(a), affirming the district court in that respect. (Pet. App. 7a).[6] The Court of Appeal denied First American's petition for rehearing en banc challenging the precedential opinion, with no judge requesting a vote. (Pet. App. 41a).

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[5] Accordingly, contrary to the submission of *amici* American Escrow Ass'n, *et al.*, (Br. 5-6), this case is not a vehicle to address issues about class action litigation under RESPA.

[6] First American moved to dismiss the appeal, asserting a lack of subject matter jurisdiction based on the absence of Article III standing. Pet. 9. The asserted basis for appellate jurisdiction to review Edwards' *statutory* right to sue under RESPA is unclear, however. *See* Pet. App. 2a (incorrectly stating that the Defendants appealed the denial of their motion to dismiss, and citing 28 U.S.C. § 1292(b)). The question whether Edwards sufficiently pleaded a claim under RESPA § 8(a) does not implicate subject matter jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). First American's motion to dismiss Edwards' appeals did not allow First American to seek a modification of the judgment in its favor by obtaining an outright dismissal of the complaint on grounds other than lack of subject matter jurisdiction. *Greenlaw v. United States*, 554 U.S. 237 (2008). There was no cross-appeal.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT IN THE CIRCUITS.

A. There is No Split Concerning Standing to Sue for Violation of RESPA § 8(a).

The Petition erroneously claims there is a split in the Circuits over whether RESPA § 8(d)(2), 12 U.S.C. § 2607(d)(2), requires proof that the RESPA violation increased the cost of the settlement service. (Pet. 11-12). Section 8(d)(2) authorizes suits to recover damages by "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" (Pet. App. 46a). However, that provision is not a self-contained right of action. It is the enforcement mechanism for rights defined in sections 8(a) and (b). Those provisions, rather than section 8(d)(2) itself, create the individual statutory rights that determine statutory and Article III standing. There is no split about standing to sue based on a violation of section 8(a).

RESPA § 8(a) is violated whenever a referral fee or kickback is paid. (Pet. App. 43a). RESPA § 8(b) is violated when any "portion, split, or percentage" of a settlement charge is paid "other than for services actually performed." (*Id.*). Thus, a violation of § 8(b) involves an overcharge (in the sense that the fee paid is for more than the services actually performed), but § 8(a) does not. The difference between fee-splitting claims (governed by § 8(b)) and referral-fee claims (governed by § 8(a)

accounts for the difference between the Seventh Circuit's decision in *Durr* and the Third, Sixth and Ninth Circuit decision in *Alston*, *Carter* and *Edwards*.

Durr involved an appeal from the dismissal of and imposition of Rule 11 sanctions for a complaint seeking damages under RESPA based on a title agent's overcharge for recording a deed and mortgage. The complaint in that case alleged a violation of RESPA § 8(b). 14 F.3d at 1186 (quoting section 8(b)); *see* Pet. App. 43a (reproducing statutory text); Pet. 12 & n.7 (*Durr* involved a claim under § 8(b)). Although the only alleged overcharge was for a recordation fee, the plaintiff also sought to recover damages for other fees as well.

The Seventh Circuit held that the complaint did not state a claim under RESPA because, although it alleged an overcharge, there was no fee-splitting:

> the plaintiff failed to allege that [the title agent's] overcharge was in the nature of a "portion, split, or percentage of any charge" given to a third party. If anything, [the title agent's] overcharge was simply a windfall it kept for itself. As we stated in *Mercado* [*v. Calumet Fed. Sav. & Loan Assn.*, 763 F.2d 269 (7th Cir. 1985)], RESPA 'requires at least two parties to share fees." *Id.* at 270. Therefore, the district court correctly dismissed the case because there was no allegation that Intercounty shared the $8.00 [recordation fee overcharge] with anyone.

14 F.3d at 1187.[7] That holding has no relevance to whether proof of an overcharge is required to state a claim for damages based on the payment of a kickback or referral fee under § 8(a). Nor is there any relevance to the Seventh Circuit's holding that Rule 11 sanctions were properly imposed on the plaintiff for seeking damages for settlement services under section 8(b) as to which no overcharge was even alleged. 14 F.3d at 1188; *see id.* at 1185 (distinguishing fee for which an overcharge was alleged from fees that were not challenged).

Because *Durr* involved section 8(b), not section 8(a), and had nothing to do with kickbacks or referral fees, there was no reason for the Ninth Circuit below to discuss *Durr* or to acknowledge a split. *See* Pet. 10 (Ninth Circuit failed to acknowledge contrary decisions), 14 (accusing the Ninth Circuit of ignoring *Durr*). Contrary to the implication of the Petition (*id.* at 14-15), the Sixth Circuit in *Carter* did not acknowledge a split with the Seventh Circuit. 553 F.3d at 983 ("no circuit court has squarely confronted the issue of standing in the absence of monetary injury" but noting a divergence among district courts, including the district court in *Durr*). Likewise, the Third Circuit in *Alston* identified only "a split of district court authority." 585 F.3d at 760 & n.7 (citing the district court decision in *Durr* and its affirmance). Even *Amici* American Land Title

[7] There is an acknowledged circuit split over whether unearned fees that are not divided between two parties as a kickback violate RESPA § 8(b). *Compare Freeman v. Quicken Loans, Inc.*, 626 F.3d 799 (5th Cir. 2010) *with Cohen v. JPMorgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007), but that issue is not presented in this case.

Association, *et al.* (at p. 8, citing *Durr* with a *cf.*) rightly decline to cite *Durr* as establishing a Circuit split.

The unpublished decision in *Moore* does not create a conflict meriting review because that decision is not precedent in the Fifth Circuit. 5th Cir. R. 47.5.4; *Taylor v. United States*, 493 U.S. 906 & n.* (1989) (opinion of Stevens. J., respecting denial of petition for certiorari) (noting absence of an inter-Circuit conflict because a published Fifth Circuit decision shortly after the conflicting decision in petitioner's case agreed with the other Circuits that had addressed the question); *Cua-Tumax v. Holder*, 343 Fed. Appx. 995, 997, n.7 (5th Cir. Sept. 15, 2009) (unpublished decisions not binding); *United States v. Salinas*, 480 F.3d 750, 758 n.8 (5th Cir. 2007) (expressly declining to endorse the reasoning of a prior unpublished opinion); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260, (5th Cir. 2001) (Smith, J., dissenting from denial of rehearing en banc) (noting conflict between the panel decision and a prior unpublished and therefore non-precedential opinion).[8]

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[8] The Court has sometimes included an unpublished opinion in listing one side of a Circuit split in addition to divergent published opinions. *Ortiz v. Jordan,* 2011 WL 197801, *2 n.1 (S. Ct. Jan. 24, 2011); *Johnson v. United States,* 529 U.S. 694, 699 n.3 (2000); *see also Langston v. United States*, 506 U.S. 930, 931 (1992) (White, J., dissenting from denial of certiorari). The Court also sometimes has granted review of an unpublished decision in cases where there is a split in the Circuits in published opinions. In those situations, a non-precedential opinion may demonstrate the persistence of a conflict existing among precedential decisions (*see* E. Gressman, *et al.*, Supreme

Moore involved a claim that Wells Fargo violated RESPA § 8(a) by receiving kickbacks in the form of reduced fees for the insurance Wells Fargo was required to purchase to sell pools of mortgages in the secondary market, in exchange for referring its customers to Radian to buy private mortgage insurance (PMI) on their individual home loans. The court of appeals held that the complaint did not state a claim because it did not allege that the plaintiffs were overcharged for the PMI they purchased. The court relied for that conclusion on *Durr*, overlooking the fact that *Durr* involved section 8(b), not section 8(a). *Moore*, at 9 (referring to *Durr* as one of "two cases reviewing the damages available to private plaintiffs in § 2607(a) [RESPA § 8(a)]").[9]

A division among district courts when the Circuits are united is not a ground for review by this Court. Rule 10. But even if it were, there would be no need for review here. There is little probability that any division among district court judges will persist in light of the clear and correct guidance provided in the unanimous Circuit opinions. The only district court case decided after *Carter* and *Alston* reached the same conclusion as all of the courts of appeals. *Gomez v. Wells Fargo Bank NA,* 2010 WL 3463436 (D. Minn. Aug. 30, 2010). Pet. 16

Court Practice, 263 (9th ed. 2007)) or it may serve as a vehicle for resolving one. We are not aware of any case in which the existence of a Circuit split has been premised *solely* on a non-precedential opinion disagreeing with otherwise unanimous Circuits.

[9] The Fifth Circuit also relied on a district court opinion, *Morales v. Attorney's Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1428 (S.D. Fla. 1997), that itself mistakenly relied on *Durr*.

nn.10-13. And even before *Carter,* the trend and the majority of the district court opinions agreed with the unanimous courts of appeals. *See Spears v. Wash. Mut. Bank FA,* 2010 U.S. Dist. LEXIS 1454 (N.D. Cal. Jan. 8, 2010).

B. There is Also No Split Over the Test for Article III Standing to Enforce Statutory Rights.

Petitioner also suggests there is also a conflict about when statutory violations confer Article III standing. The Petition ranges far and wide for decisions involving other statutes, claiming the decision below conflicts with a Second Circuit decision involving ERISA (*Kendall v. Employees' Retirement Plan*, 561 F.3d 112 (2d Cir. 2009)), and a Tenth Circuit decision involving the Fair Housing Act (*Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590 (10th Cir. 1996)). (Pet. 18-19). But there is no conflict. The cases agree on the governing standard: "[t]he injury required by Article III can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" Pet. App. 4a (citations omitted); *Carter*, 553 F.3d at 988-89; *Alston*, 585 F.3d at 763; *Kendall*, 561 F.3d at 118; *Wilson*, 98 F.3d at 595. *See* Br. *Amici* American Escrow Ass'n, *et al.*, 14 (citation omitted) ("No one doubts that Congress may create new interests the invasion of which may confer Article III standing."). The cases diverge not over the constitutional test, but over whether particular statutes other than RESPA confer individual predicate statutory rights in particular circumstances having nothing to do with this case. The application of an uncontroversial

constitutional standard to disparate statutes in disparate factual settings does not create a conflict.[10]

The Second Circuit's decision in *Kendall* turned on its prior interpretation of ERISA to require an individual demonstration of financial harm in order to bring a monetary claim for equitable restitution or disgorgement, a holding tied to the

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[10] The situation is different for statutes like RESPA, that create *individual* rights tied to causes of action (where individual injury is inherent in a statutory violation), than it is for statutes like the Administrative Procedures Act (where injury to the individual plaintiff is not inherent). The relevant distinction is the public or private character of the statutory right, rather than whether the suit is against a public or private defendant, as an *amicus* brief suggests. Law Professors Br. at 7. This case is, in any event, not an appropriate vehicle to explore the question whether "injury in fact" may be dispensed with in suits against private parties, because injury in fact is established here by the invasion of an individual statutory right.

Amici Law Professors (Br. 4) cite language in *Doe v. Nat. Bd. of Med. Examiners*, 199 F.3d 146, 153 (3d Cir. 1999), stating that more than a statutory violation is required for standing in a case under the Americans with Disabilities Act. The Third Circuit concluded that the plaintiff could not show standing based on the possibility of future discrimination, but held that the plaintiff did have standing because flagging his test scores identified him as disabled in violation of the Act. Thus, *Doe* is perfectly consistent with the Ninth Circuit's ruling in this case that the invasion of an individual statutory right suffices for standing, and with the Third Circuit's ruling to the same effect in *Alston*. *Doe* merely rejects standing on the basis of a speculative future violation merely because such a violation is pleaded in the complaint. That is not an issue here. *Doe* certainly does not hold that Congress cannot recognize new rights and give them statutory protection enforceable in federal court under Article III. There is no intra-Circuit conflict.

difference between ERISA's protection of a benefits plan as opposed to an individual beneficiary of a plan. 561 F.2d at 120. The Second Circuit explicitly recognized, as did the Ninth Circuit, that Congress may create statutory rights giving rise, when invaded, to standing. 561 F.3d at 118 (quoting the language reproduced at Pet. App. 4a). However, the plaintiff in *Kendall* could not meet that standard because under Circuit precedent she lacked the *statutory* right to seek monetary relief. That has nothing to do with the Article III standing of a homebuyer to seek relief for a violation of her statutory right under RESPA.

The Tenth Circuit's decision in *Wilson* likewise turned on the scope of a statutory right—whether the Fair Housing Act protected anyone exposed to a discriminatory advertisement, regardless whether that person would have been able to rent the housing units absent discrimination. As in *Kendall*, the court acknowledged that standing "may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" 98 F.3d at 595, but found no such invasion of a statutory right. The plaintiffs were not Brigham Young students and therefore could not qualify for the student housing being advertised. The Tenth Circuit concluded that the "provision at issue here is 42 U.S.C. § 3604(c), which prohibits discriminatory advertisements, but does not expressly state that advertisements and statements to 'any person' are unlawful; the subsection does not designate to whom the statements must be made to be unlawful. Subsection (c) therefore does not give all persons an express statutory right to be free from discriminatory

advertising." 98 F.3d at 596. To be sure, the *Wilson* Court's reading of the Fair Housing Act was informed by Article III concerns, *id.*, but the outcome turned on the statute, not on a different constitutional test for standing.[11]

II. THE UNANIMOUS VIEW OF THE CIRCUITS THAT HAVE DECIDED THE ISSUES IS CORRECT AND IN ACCORD WITH THE VIEW OF THE AGENCY RESPONSIBLE FOR INTERPRETING RESPA.

All of the Circuits that have considered the issue have construed RESPA § 8(a) to give homebuyers protection against the purchase of settlement services tainted by the payment of a kickback or referral fee, regardless of whether the particular fee charged was increased as a result of the kickback. That interpretation accords with HUD's regulation interpreting the statute. 24 C.F.R. § 3500.14(g)(2) ("The fact that the transfer of a thing

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[11] The Petition also refers to a non-precedential Tenth Circuit decision in *Heard v. Bonneville Billing & Collections*, Nos. 99-4092 & 99-4100 (10th Cir. June 26, 2000). The fee-splitting claim in *Heard* was based on a violation of state legal ethics rules, rather than on the invasion of a federal statutory right. *Heard* does not evidence a Circuit split about the test for Article III standing applicable to claims under the Fair Debt Collections Practices Act. A more recent published decision from the same Circuit held that a plaintiff had standing to sue under the same statute at issue in *Heard* to vindicate the invasion of a statutory right despite the absence of economic damage. *Robey v. Shapiro, Marianos & Cedja, LLC*, 434 F.3d 1208, 1209-10 (10th Cir. 2006). Cf. *Doe v. Chao*, 540 U.S. 614, 624, 625 (2004) (distinguishing between Article III standing and recovery of statutory damages under the Privacy Act).

of value [as a kickback or referral fee] does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited."). *See Carter*, 553 F.3d at 987 (discussing regulation and United States' brief). Congress delegated responsibility to HUD to implement RESPA, also conferring explicit authority to interpret the Act. 12 U.S.C. § 2617. HUD's interpretation is therefore entitled to *Chevron* deference. *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-81 (2005); *Long Is. Health Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007); *Carter*, 553 F.3d at 987-88. Regardless of whether there is an "overcharge," when a referral fee or kickback is paid, the settlement service is "involved in [a] violation" of RESPA.

Congress created an individual right against real estate settlement providers paying kickbacks or referral fees because of the systemic effect of such kickbacks on prices. A homebuyer's statutory right is invaded whenever a kickback or referral fee is paid in connection with a settlement service he or she has purchased. That is "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (invasion of "statutorily created right to truthful housing information"); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (statutory right to information about campaign contributions).

First, RESPA gives homebuyer a right to conflict-free referral advice (or to timely disclosure of the conflict in an affiliated business arrangement). The invasion of that statutory right is an injury conferring standing without proof of an out-of-pocket "overcharge." It has long been true that an agent

who breaches a duty of loyalty to the principal forfeits the right to compensation, even without proof of financial injury to the principal. *See, e.g., Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996); Restatement (2d) of Agency § 469 (1958); Restatement (3d) of Agency § 8.01, comment (d)(2) (2006). "Injury to rights recognized at common law—property, contracts and torts—are sufficient for standing purposes. E. Chemerinksky, Constitutional Law: Principles and Policies § 2.3 at 68 (3d ed. 2006).

Second, even if economic injury were required, kickbacks cause economic injury to those who purchase settlement services on which kickbacks have been paid, because they thwart competition. Although Petitioner equates the absence of an "overcharge" with the absence of economic injury (e.g., Pet. 23), that is simply not the case. A homebuyer who purchases a settlement service as a result of a kickback scheme like First American's has been injured not only by the invasion of a statutory right to conflict-free referrals, but also by the systemic effects of reverse competition on pricing. *See Carter*, 553 F.3d at 988. Once settlement service providers may no longer engage in reverse competition for referrals—a practice that benefits real estate insiders, not consumers—then they will have to compete as businesses ordinarily do, by offering homebuyers lower prices or better service. Those economic effects are not discrete "overcharges" (as would be the case under RESPA section 8(b)), but they are just as real as the harms to customers buying goods in a market that has been monopolized or subject to illegal pricing agreements. *See Blue Shield of Virginia v. McReady*, 457 U.S. 465, 480-81

(1982) ("we think it clear that McCready was 'within that area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from Blue Shield's selective refusal to reimburse"; citation omitted); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (consumer is injured for purposes of Clayton Act "when the price of those goods or services is artificially inflated by reason of the anticompetive conduct complained of.").

Congress was free to tie damages for RESPA violations to the charge paid for the settlement service (just as faithless fiduciaries could be required to disgorge their fees), and in any event the appropriateness of that measure of damages has nothing to do with the questions presented which concern only standing to sue.

An individual who has received self-interested advice and paid prices set in a market without price competition has suffered the economic injury Congress intended to prevent and has standing to bring an action against such conduct.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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