No. 10-708

In the Supreme Court of the United States

FIRST AMERICAN FINANCIAL CORPORATION, SUCCESSOR IN INTEREST TO THE FIRST AMERICAN CORPORATION, ET AL., PETITIONERS

v.

DENISE P. EDWARDS

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits the payment of kickbacks in exchange for referrals of "business incident to or part of a [covered] real estate settlement service." 12 U.S.C. 2607(a). Any person who pays or receives a kickback in violation of Section 2607(a) is liable "to the person or persons charged for the settlement service involved in the violation" for statutory damages "in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. 2607(d)(2). The question presented is as follows:

In the absence of any claim that the alleged kickback violation of RESPA affected the price, quality, or other characteristics of the settlement service provided, does a purchaser of a real estate settlement service have standing to sue under Article III 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)?

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INTEREST OF THE UNITED STATES

The Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. 2601 *et seq.*, prohibits kickbacks paid in return for the referral of settlement service business, and it authorizes the award of statutory damages to a person who has paid for the settlement service involved in the kickback violation. 12 U.S.C. 2607(a) and (d)(2). RESPA's private right of action provides an important supplement to the federal government's own administrative and enforcement actions. Many federal laws contain similar enforcement provisions, authorizing persons whose statutory rights have been violated to sue for statutory damages. The United States therefore has a substantial interest in the question presented. At the

Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Congress enacted RESPA to protect consumers in the market for real estate "settlement services." RESPA defines the term "settlement services" to include "any service provided in connection with a real estate settlement including, but not limited to," title searches, title insurance, attorney services, document preparation, credit reports, appraisals, property surveys, loan processing and underwriting, and the like. 12 U.S.C. 2602(3). Congress found that "consumers throughout the Nation" needed "greater and more timely information on the nature and costs of the settlement process" and "protect[ion] from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). Congress further determined that "significant reforms in the real estate settlement process [we]re needed to insure that consumers" received that "information" and "protect[ion]." *Ibid.*

One of RESPA's stated purposes is "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). RESPA 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.

12 U.S.C. 2607(a).[1] RESPA similarly prohibits settlement service providers from collecting unearned fees, by providing that no portion of any charge for rendering a settlement service may go to any person "other than for services actually performed." 12 U.S.C. 2607(b).

RESPA specifies that its kickback and unearned-fee prohibitions shall not "be construed" to prohibit certain practices in the settlement-service industry. 12 U.S.C. 2607(c). For example, certain "affiliated business arrangements" are permissible, but only if (A) the arrangement is disclosed to "the person being referred" and "such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred" at or before the times specified by statute; (B) the "person being referred" is "not required to use any particular provider of settlement services"; and (C) the only thing of value that is received from the affiliated business arrangement, other than payments for services permitted under Section 2607(c), is a return on the ownership interest or franchise relationship. 12 U.S.C. 2607(c)(4); see 12 U.S.C. 2602(7) (defining "affiliated business arrangement").

Congress delegated to the Department of Housing and Urban Development (HUD) authority to administer RESPA, see 12 U.S.C. 2617, including the authority "to prescribe such rules and regulations" and "to make such interpretations * * * as may be necessary to achieve the [Act's] purposes," 12 U.S.C. 2617(a). The regulations promulgated under that authority are codified at 24 C.F.R. Part 3500. The regulation addressing kick-

[1] The criteria for identifying "federally related" loans are set forth in 12 U.S.C. 2602(1).

backs and unearned fees states that "[t]he fact that the transfer of the thing of value 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." 24 C.F.R. 3500.14(g)(2).

In July 2011, HUD's consumer-protection functions relating to RESPA were transferred to the Consumer Financial Protection Bureau (the Bureau). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. The Bureau has determined that it will enforce HUD's RESPA regulations (24 C.F.R. Pt. 3500), and that, pending further Bureau action, it will apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43,570, 43,571 (2011).

b. RESPA initially authorized enforcement of Section 2607 only through criminal prosecutions and private civil actions "to recover damages." 12 U.S.C. 2607(d), 2614 (1976). RESPA also authorized the award of attorney's fees in "successful action[s]." 12 U.S.C. 2607(d) (1976).[2] Under that version of the statute, damages for unlawful kickbacks were determined by reference to the amount of the kickback. A person who violated the anti-kickback prohibition thus was "liable to the person * * * whose business ha[d] been referred in an amount equal to three times the value or amount of the fee or thing of value" that was given and accepted under an unlawful referral-kickback agreement. 12 U.S.C. 2607(d)(2) (1976). Similarly, any person who violated the prohibition on unearned fees was liable for three

[2] RESPA now authorizes the court to award attorney's fees and costs to "the prevailing party" in a private action under Section 2607. 12 U.S.C. 2607(d)(5).

times the unearned fee or the unearned portion of the fee. *Ibid.*

In 1983, Congress amended RESPA to authorize a consumer who filed suit under Section 2607 to recover damages calculated by reference to the "charge paid" by that consumer for the settlement service involved in the violation, rather than the amount of the kickback or the unearned fee. See Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, § 461(c), 97 Stat. 1231-1232; Resp. Br. 5-8 (discussing history behind the 1983 amendments). Section 2607's civil-remedy provision now states:

> Any person or persons who violate the prohibitions or limitations of [Section 2607] 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.

12 U.S.C. 2607(d)(2). The 1983 amendments also authorized the Secretary of HUD, state attorneys general, and state insurance commissioners to bring actions to enjoin violations of Section 2607. 12 U.S.C. 2607(d)(4).

2. This case concerns several financial transactions between four entities: petitioner First American Corporation;[3] its corporate subsidiary, petitioner First American Title Insurance Company (First American Title); the Tower City Title Agency, LLC (Tower City); and respondent. See Pet. App. 50a, 53a-54a. Because the case has not yet proceeded to summary judgment, this brief takes as true the facts alleged in respondent's com-

[3] Because petitioner First American Financial Corporation is the successor in interest to First American Corporation (Pet. ii), this brief refers to that petitioner as First American Corporation.

plaint. See *id.* at 48a-60a; cf. Pet. Br. 9 n.7 (recognizing that this Court should decide the case on the basis of respondent's allegations).

a. Respondent entered into a contract with Tower City to serve as the settlement agent for her 2006 purchase of a home in Cleveland, Ohio. Pet. App. 53a, 57a. Under that contract, Tower City provided settlement services to respondent, *ibid.*, and it referred her to First American Title to obtain a title-insurance policy for her home. *Id.* at 54a; cf. 12 U.S.C. 2602(3). After that referral, respondent and First American Title entered into a contract for title insurance. Pet. App. 54a; cf. J.A. 109. Respondent paid $455.43 of the $728.85 premium for the contracted-for insurance, and the seller paid the rest. Pet. App. 54a.

b. First American Corporation made at least two forms of payments to Tower City in exchange for Tower City's agreement to refer its title-insurance underwriting business exclusively to First American Corporation's subsidiary, First American Title. Pet. App. 51a, 53a. First, in 1998, First American Corporation purchased a minority interest in Tower City for $2 million, which was "significantly more" than the entire agency was worth. *Id.* at 51a-52a. Second, in 2004, First American Corporation made an additional cash payment of $804,825 to Tower City. *Id.* at 52a.

Before it received the kickbacks described above, Tower City had "referred substantial title insurance business to other title insurance underwriters." Pet. App. 53a. After the kickbacks, however, Tower City "referred virtually all of its title insurance business to First American Title" based on its "exclusive agency agreement" with First American Corporation. *Ibid.*; see *id.* at 52a. Neither petitioners nor Tower City "ever

disclosed the nature of their business relationship" to respondent. *Ibid.*

3. Respondent filed this putative class action, alleging that petitioners had violated Section 2607(a) by paying kickbacks for business referrals incident to or as part of a real estate settlement service involving federally related mortgage loans. Pet. App. 48a, 58a. Respondent contended that the transactions described above constituted a "purposeful violation[]" of the anti-kickback prohibition set forth in 12 U.S.C. 2607(a). Pet. App. 48a, 57a-58a. Respondent alleged that the tainted referral deprived her of "opportunities required by federal law, such as the opportunity to compare prices on the open market." *Id.* at 52a. She further alleged that petitioners' "exclusive (and secret) referral agreements" denied her, and other similarly situated home buyers, "critical information about the cost of title insurance, in a way calculated * * * 'to increase unnecessarily the cost[s]' of title insurance." *Id.* at 49a (quoting 12 U.S.C. 2601(b)(2)). Respondent did not allege, however, that she had paid more for title insurance, or that she had received title insurance of lower quality, than she would have paid or received in the absence of the alleged kickback. See *id.* at 14a.

Petitioners moved to dismiss the complaint for lack of jurisdiction and for failure to state a claim. They argued, *inter alia*, that respondent had not been overcharged for her title insurance and therefore had not suffered any injury cognizable under RESPA or under Article III of the Constitution. Pet. App. 14a.

a. The district court denied the motion to dismiss. Pet. App. 12a-22a.

The district court first held that RESPA's "plain language" does not require proof of "overcharges" to the

consumer, but rather provides that "violators are liable for 'any charge paid' for [a] settlement service 'involved in' a violation of RESPA." Pet. App. 16a. The court found additional support for that conclusion in the statutory history and in HUD's regulations. *Id.* at 17a-18a.

The district court further held that respondent had Article III standing to pursue her claim. The court explained that Congress's 1983 amendment to RESPA "created a right to be free from referral-tainted settlement services." Pet. App. 19a. The court concluded that the facts alleged by respondent, if proved, would establish "a statutory injury fairly traceable to [petitioners'] action and redressable by a favorable decision." *Id.* at 14a, 19a.

The district court then concluded that respondent had adequately pleaded the other elements of a RESPA claim. Pet. App. 20a-21a. In particular, the court held that respondent had sufficiently alleged that petitioners paid kickbacks in exchange for referrals and did not provide the disclosure necessary to qualify for a safe harbor under Section 2607(c). *Id.* at 21a. The court recognized that petitioners had controverted those allegations, but it concluded that resolution of that dispute was "better suited for argument in a motion for summary judgment." *Ibid.*

The district court denied petitioners' request to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). J.A. 6.

b. The district court subsequently denied respondent's two motions for class certification. Pet. App. 23a-30a, 31a-40a. The court of appeals allowed respondent to pursue interlocutory appeals of the class-certification rulings. J.A. 14, 24; see 28 U.S.C. 1292(e);

Fed. R. Civ. P. 23(f).[4] Petitioners argued that the Rule 23(f) appeals should be dismissed, and that the district court lacked jurisdiction over the suit, because respondent did not have either Article III standing or statutory standing under RESPA. See J.A. 150-155, 160-162.

4. The court of appeals affirmed the district court's class-certification orders in part, reversed them in part, and remanded. Pet. App. 1a-11a. As relevant here, the court of appeals rejected petitioners' challenges to respondent's statutory and constitutional standing. *Id.* at 2a-7a.

The court of appeals held that respondent has a cause of action under RESPA whether or not the alleged kickback affected the charge she paid for her title insurance. The court stated that, under the "clear" language of Section 2607(d)(2), "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid. The use of the term 'any' demonstrates that charges are [not] restricted to a particular type of charge, such as an overcharge." Pet. App. 5a.

The court of appeals next explained that, when Congress enacts "statutes creating legal rights," the "invasion" of those rights may "create[] standing" if the statutes "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." Pet. App. 4a (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975)) (intervening citation omitted). The court concluded that, because RESPA confers such a right on respondent, the allegation that petitioners had violated

[4] Although the court of appeals later stated that "[d]efendants [*i.e.*, petitioners] brought this appeal," and that the court had appellate jurisdiction pursuant to 28 U.S.C. 1292(b), Pet. App. 2a, those statements are incorrect.

RESPA in selling respondent services made out "an injury sufficient to satisfy Article III." *Id.* at 5a; cf. *id.* at 4a (noting that the "parties disagree about the injury component [of Article III standing] only," not "causation" or "redressibility").

5. Petitioners sought this Court's review, both on the question whether respondent satisfied the statutory prerequisites for invoking RESPA's private right of action, and on the question whether allowing respondent's suit to go forward would be consistent with Article III. This Court granted the petition for a writ of certiorari limited to the second question presented. J.A. 165.

SUMMARY OF ARGUMENT

A. The dispute between the parties in this case centers on whether respondent established standing to sue by alleging a concrete and particularized invasion of a legally protected interest. Although Congress's express authorization of a particular category of suits is not dispositive, it is highly relevant to the Article III inquiry. Common-law courts have long adjudicated tort and contract suits in which the plaintiffs alleged deprivations of their legally protected interests, even when they did not allege any further consequential harms flowing from the deprivations. Consistent with that traditional understanding of the judicial role, Congress may create new legal rights, the deprivation of which gives rise to Article III standing.

B. Respondent satisfied Article III's injury-in-fact requirement by alleging a particularized violation of her statutory right to a kickback-free referral. The requirement of a "particularized" injury serves to ensure that the plaintiff has suffered some harm not shared by the citizenry at large—and, in particular, to prevent the

general public interest in observance of the laws from being treated as an individual right vindicable through a private lawsuit. Contrary to petitioners' contention, however, respondent's suit does not assert a "generalized grievance," but rather alleges a violation of *her own* statutory rights. RESPA's private right of action renders violators liable, not to any person who might wish to sue, but only "to the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Respondent's entitlement to sue thus rested on her payment of money for the settlement service in question, not simply on her opposition to the allegedly unlawful practice she complained of.

In enacting RESPA, Congress targeted practices that had the *potential* to harm consumers financially, and it limited the private right of action to plaintiffs who have been "charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Congress did not, however, make case-specific proof of consequential financial harm to the plaintiff an element of either the substantive violation or the private right of action. In its general approach, Section 2607(d)(2) is similar to private rights of action created by many other federal laws. By limiting the private right of action to persons having a sufficient nexus to the violation to be reasonably regarded as its victims, Congress respects the role of the Executive Branch as vindicator of the public interest, while providing important enforcement tools in circumstances where the tangible consequences of particular breaches are difficult to determine.

C. Congress's power to define statutory rights and authorize private suits is particularly clear when the cause of action it creates bears a close resemblance to an established category of common-law suits. RESPA's

anti-kickback prohibition serves in significant part as a conflict-of-interest rule, and the duty it imposes has close common-law analogs. At common law, a trustee who engaged in self-dealing, as by accepting payment from a third party to perform his duties in a particular way, would be subject to suit by the trust beneficiary whether or not the conflict of interest caused any harm other than the breach itself. Although RESPA does not subject real estate settlement agents to the full range of duties to which common-law fiduciaries are subject, the validity of RESPA's substantive anti-kickback rule is uncontested, and there is no reason to doubt Congress's power to authorize private enforcement of that prohibition on the same terms that similar conflict-of-interest rules have traditionally been enforced.

D. The fact that respondent sought class certification is irrelevant to the Article III analysis. If Congress is persuaded that suits like these create an untoward risk of exorbitant damages liability, it may amend RESPA's private cause of action or create additional prerequisites to class certification. The only question for this Court, however, is whether the deprivation of respondent's own statutory right to a kickback-free referral is a sufficiently concrete and particularized injury to give rise to Article III standing.

ARGUMENT

RESPONDENT HAS ARTICLE III STANDING TO PURSUE THE CLAIMS ALLEGED IN HER COMPLAINT

Respondent alleges that she received a kickback-tainted referral to a particular settlement-service provider, and that she paid money for the service she received as a result of the kickback. That nexus between respondent and the alleged violation provides a constitu-

tionally sufficient basis for Congress to authorize this suit for statutory damages. This Court has repeatedly recognized that the "actual" invasion of a "legally protected interest" will constitute an Article III injury-in-fact if it is "concrete" and "particularized." Far from raising a generalized grievance or an abstract claim of illegality, respondent alleges that *she* received tainted advice regarding a specific transaction in which *she* expended funds. Congress's power to authorize private suits in these circumstances is particularly clear because the violation that respondent alleges is closely analogous to self-dealing by a fiduciary. Courts have traditionally adjudicated suits alleging such breaches of fiduciary duty, without requiring plaintiffs to allege or prove that a particular breach caused some further consequential harm.

A. Congress Can By Statute Create "Legally Protected Interests," The Invasion Of Which Will Produce An Article III "Injury"

1. The Article III "judicial Power" of the United States extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. This Court developed the doctrine of Article III standing as "an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under that doctrine, "a party seeking to invoke a federal court's jurisdiction must demonstrate three things": "(1) 'injury in fact,' by which [the Court] mean[s] an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical'"; "(2) a causal relationship between the injury and the challenged conduct"; and "(3) a likelihood that the injury will be redressed by a favor-

able decision." *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 663 (1993) (quoting *Defenders of Wildlife*, 504 U.S. at 560). The Court has recognized that historical practice "is particularly relevant to the constitutional standing inquiry since * * * Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)); see *Sprint Commc'ns Co.* v. *APCC Servs., Inc.*, 554 U.S. 269, 274 (2008) ("[H]istory and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider.").

As the case comes to this Court, the disagreement between the parties centers on the "injury in fact" component of the Article III standing requirement. Pet. App. 4a. An Article III "injury in fact" exists when three distinct requirements are satisfied. First, the asserted "injury" must constitute "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. Second, that "invasion" must be "concrete and particularized." *Ibid.* Third, the "invasion" must be "actual or imminent, not conjectural or hypothetical." *Ibid.* (citation and internal quotation marks omitted). The Court has repeatedly defined an "injury in fact" using those three criteria. See, *e.g.*, *Arizona Christian Sch. Tuition Org.* v. *Winn*, 131 S. Ct. 1436, 1443 (2011); *Sprint Commc'ns Co.*, 554 U.S. at 273; *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997); *United States* v. *Hays*, 515 U.S. 737, 743 (1995); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211 (1995).

2. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers* v. *Earth Island Inst.*, 129 S. Ct. 1142, 1151 (2009). Congress cannot authorize suits by plaintiffs having no particularized connection to an alleged violation by conferring upon all persons a purported "right" to have regulated parties obey the law. See *Defenders of Wildlife*, 504 U.S. at 573-574, 576-577. This Court has long recognized, however, that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* at 578 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), which, in turn, quotes *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Express congressional authorization of a particular category of suits "is of critical importance to the standing inquiry" because "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Massachusetts* v. *EPA*, 549 U.S. 497, 516-517 (2007) (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment)).

That principle flows directly from the understanding that the "injury" Article III demands is "an invasion of a legally protected interest." *Defenders of Wildlife*, 504 U.S. at 560. The requisite "legal injury is by definition no more than the violation of a legal right" and, of course, "legal rights can be created by the legislature." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 885 (1983) (*Doctrine of Standing*). For that reason, the "existence [of Article III standing] in a given case is largely within the control of Congress" because a plaintiff's ability to establish a cognizable "in-

jury" will "depend[] upon whether the legislature has given [her] personally a right to be free of [the challenged] action," or instead has left "enforcement" of the relevant prohibition "exclusively to public authorities." *Ibid.*

3. That understanding of Article III is consistent with traditional judicial practice. See p. 14, *supra* (noting the importance of historical practice in determining whether an Article III "case" or "controversy" exists). In tort law, for instance, an "injury" is understood to mean an "invasion of a legally protected interest." Restatement (First) of Torts § 7 cmt. a (1934-1939). Although "[t]he most usual form of injury is tangible harm," a plaintiff can have an "injury" sufficient to "maintain an action" even when "no harm is done." *Ibid.*; *id.* § 902 cmt. a.

Common-law courts have long entertained suits and awarded "nominal" damages against "a wrongdoer who has caused no harm" if he "has invaded an interest of the plaintiff protected against nonharmful conduct." Restatement (First) of Torts § 907 cmts. a and b; accord Restatement (Second) of Torts § 907 cmt. b (1979). For instance, an owner of real property can bring a trespass action for nominal damages, even if the trespass caused no actual harm. Restatement (First) of Torts §§ 158, 163, 907 cmt. b. Justice Story thus explained that one of the "elements of the common law" was that it "tolerates no farther inquiry than whether there has been the violation of a right" because "the party injured is entitled to maintain his action for nominal damages, in vindication of his right." *Webb* v. *Portland Mfg. Co.*, 29 F. Cas. 506, 507-508 (C.C. Me. 1838) (No. 17,322). The same holds true in contract. "A breach of contract always creates a right of action," and when "no harm was

caused by the breach * * * judgment will be given for nominal damages." Restatement (First) of Contracts § 328 & cmt. a (1932); see, *e.g.*, *Wilcox* v. *Plummer's Ex'rs*, 29 U.S. (4 Pet.) 172, 181-182 (1830); *Marzetti* v. *Williams*, 109 Eng. Rep. 842, 845 (K.B. 1830) (Lord Tenterden, C.J.).

That rule is reflected in the law of damages more generally. "Nominal damages are sometimes awarded to vindicate and judicially establish a right * * * even if no harm is done." Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191-192 (1st ed. 1973) (Dobbs); see, *e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266 & n.23 (1978) (citing Dobbs); see also *Farrar* v. *Hobby*, 506 U.S. 103, 112 (1992). At common law, it was therefore understood that "the right alone was essential" to sustain an action, and that "infringements of right" could be asserted without a claim of other damage because "damage to the right [was] sufficient to warrant the owner in asserting the right against the party infringing it." *Mayor of London* v. *Mayor of Lynn*, 126 Eng. Rep. 1026, 1041 (H.L. 1796) (Eyre, C.J.); see J.G. Sutherland, *A Treatise on the Law of Damages* § 9, at 31, 34 (4th ed. 1916). Early in the Nation's history, Chief Justice Marshall thus echoed Blackstone's description of this colonial-era principle: "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768)).[5]

[5] That "general" rule, of course, is subject to exceptions. For instance, a plaintiff who has Article III standing nevertheless will lack a judicial remedy against the United States unless Congress has enacted a statutory waiver of sovereign immunity. See *Department of*

4. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363 (1982), illustrates Congress's power to create rights that, if invaded, can confer standing. The Court in *Havens Realty* considered the question whether "testers"—*i.e.*, "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"—had Article III standing to sue when they were falsely told that particular housing was unavailable. *Id.* at 373. The Court explained that Section 804(d) of the Fair Housing Act "conferred on all 'persons' a legal right to truthful information about available housing." *Ibid.* The Court further observed that an Article III injury can exist "solely" by virtue of "'statutes creating legal rights, the invasion of which creates standing,'" and that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against." *Ibid.* (quoting *Warth*, 422 U.S. at 500). The Court concluded that a tester who had "alleged injury to her statutorily created right to truthful housing information" had thereby satisfied Article III's "injury in fact" requirement. *Id.* at 374.

In concluding that "[a] tester who has been the object of a misrepresentation made unlawful under § 804(d)" had Article III standing, 455 U.S. at 373, the

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the Army v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379-380 (1821) (Marshall, C.J.); see also *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 562-564 (1962) (plurality opinion) (The rule "that 'the sovereign power is immune from suit'" was "'well settled and understood' at the time of the Constitutional Convention.") (citation omitted). Even within that context, however, the determination whether particular suits can go forward is subject to the control of Congress.

Court in *Havens Realty* did not suggest that Congress could authorize one plaintiff to sue regarding the provision of false information to another. To the contrary, the Court held that plaintiff Willis, who had received truthful information concerning the availability of apartments, did *not* have "standing to sue in his capacity as a tester." *Id.* at 375. The Court thus limited tester standing to specific victims of the deceptive practices Section 804(d) forbade—*i.e.*, persons who alleged that their *own* rights to truthful information had been violated. The Court's analysis made clear, however, that, so long as the plaintiff adequately alleged a deprivation of his Section 804(d) right to truthful information, Article III did not require him to allege any further consequential harm resulting from that deprivation.

To be sure, Article III places meaningful limits on the types of interests Congress may define as judicially-enforceable rights. In particular, the general public interest in compliance with (and proper enforcement of) federal law cannot "be converted into an individual right by a statute that denominates it as such." *Defenders of Wildlife*, 504 U.S. at 576. As we explain below, that principle is one aspect of the requirement that a plaintiff allege and prove "concrete and particularized" injury. As we further explain, respondent satisfied that requirement by alleging that petitioners violated the statutory rights that protect *her* in connection with a transaction in which *she* expended money. Recognition of Congress's authority to create such a cause of action in no way threatens "to transfer from the President to the courts" the general duty to enforce and administer federal law. See *id.* at 577.

B. Respondent Has Satisfied Article III's Injury-In-Fact Requirement By Alleging A "Concrete and Particularized" Invasion Of Her Legally Protected Interests

1. "[T]he 'injury in fact' test" described in this Court's decisions "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Defenders of Wildlife*, 504 U.S. at 563 (quoting *Sierra Club* v. *Morton*, 405 U.S. 727, 734-735 (1972)). The "injury" necessary to establish Article III standing—*i.e.*, the "invasion of a legally protected interest"—therefore must be "concrete and particularized." *Id.* at 560. An injury is "particularized" if it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1; see *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (contrasting a "concrete and particularized" injury with "a grievance the [plaintiff] suffers in some indefinite way in common with people generally") (citation and internal quotation marks omitted). As noted above, that requirement serves in part to protect the separation of powers by restraining courts from entering general disputes over the "public interest" that properly are resolved by the political Branches. *Defenders of Wildlife*, 504 U.S. at 573-574, 576-577. The "concrete injury requirement" thus reflects the understanding that "'[t]he province of the court,' as Chief Justice Marshall said in *Marbury* * * * , 'is, solely, to decide on the rights of individuals.'" *Ibid.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

This Court's decisions emphasize that the requirement of "concrete" and "particularized" injury, distinguishing the plaintiff "from the citizenry at large," is "the indispensable prerequisite of standing." Scalia, *Doctrine of Standing*, 17 Suffolk U.L. Rev. at 881-882, 895. In *Defenders of Wildlife*, for instance, the Court

held that the citizen-suit provision of the Endangered Species Act of 1973 (ESA), which stated that "any person" could bring suit to enjoin any violation of the Act, did not confer Article III standing on a plaintiff who suffered no particularized harm from an agency's alleged non-compliance with the ESA's requirements. 504 U.S. 571-578. The Court explained that, although Congress can create legal rights that give rise to standing, Congress cannot "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts." *Id.* at 577.

Similarly in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), the Court concluded that the plaintiffs lacked Article III standing to pursue their Establishment Clause challenge to the government's transfer to a religious college of real property in Pennsylvania, because the plaintiffs had failed to show "any personal injury suffered by them as a consequence of the alleged constitutional error." *Id.* at 485. The named plaintiffs lived in Maryland and Virginia; their organizational headquarters were in Washington, D.C.; and they learned of the transfer only through a news release. *Id.* at 487. Their suit thus was based on a "generalized grievance" that all citizens could assert, namely, the violation of an abstract "right to have the Government act in accordance with law." *Defenders of Wildlife*, 504 U.S. at 575-576.

2. The "generalized grievance" precedents discussed above would be directly on point in this case if Congress had authorized "any person" to sue whenever Section 2607(a) is violated and if respondent had filed suit simply to vindicate the public interest in having the law

obeyed. The statute that Congress actually enacted, however, requires a nexus between a Section 2607(d)(2) plaintiff and a particular RESPA violation by rendering violators of Section 2607 liable, not to "any person" who might wish to sue, but only "to the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2). Consistent with that requirement, respondent alleged that she had paid $455.43 of the title insurance premium charged in connection with the purchase of her home. Pet. App. 54a. Respondent further alleged that, "[p]ursuant to the Captive Title Insurance Arrangement" (the agreement that is alleged to have violated Section 2607(a)'s anti-kickback prohibition), Tower City had "referred the title insurance to First American Title, which issued both the lender and owner policies." *Ibid.*

Respondent thus alleged not simply that petitioners had violated Section 2607(a), but that *she* was the victim of the violation. Section 2607(a) conferred on respondent a statutory right to a kickback-free referral for settlement services she purchased. Petitioners' alleged violation of that right was an "invasion of a legally protected interest" that is both "concrete" and "particularized"—*i.e.*, that "affect[ed] [respondent] in a personal and individual way"—because it concerned a specific financial transaction in which respondent herself participated. See *Defenders of Wildlife*, 504 U.S. at 560 & n.1.

3. Petitioners dispute that characterization of the right that RESPA confers, arguing that the anti-kickback prohibition "protects consumers' *pecuniary* interests" rather than a broader interest in freedom from kickback-tainted referrals. Pet. Br. 40. In petitioners' view, Congress's sole concern was with "the financial injury caused when a settlement service provider

takes advantage of an unwitting customer unlawfully referred." *Id.* at 41. Petitioners contend on that basis that, unless a particular plaintiff alleges (and ultimately proves) concrete financial harm resulting from a statutory breach, he necessarily lacks standing to claim a violation of any right that Congress intended RESPA to protect. That argument is misconceived.

To be sure, Congress in enacting RESPA targeted industry practices that had the *potential* to cause financial harm to consumers. Thus, RESPA contains a congressional finding that "significant reforms in the real estate settlement process [we]re needed to insure that consumers * * * are protected from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. 2601(a). Congress also identified, as one of the statute's purposes, 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). In addition, RESPA requires each private plaintiff to establish a specific pecuniary nexus between himself and the alleged violation on which a suit is premised, since the private right of action is available only to "the person or persons charged for the settlement service involved in the violation." 12 U.S.C. 2607(d)(2).

Congress did not, however, make case-specific proof of consequential financial harm to the plaintiff an element of either the substantive violation or the private right of action.[6] Rather, Congress prohibited the pay-

[6] The court of appeals held that, under the "clear" language of Section 2607(d)(2), "[a] person who is charged for a settlement service involved in a violation is entitled to three times the amount of *any* charge paid," and that "the statutory text does not limit liability to instances in which a plaintiff is overcharged." Pet. App. 5a. Petitioners sought review of that holding, but the Court granted certiorari only on

ment of kickbacks in exchange for referrals of "business incident to or a part of a [covered] real estate settlement service" involving a federally related loan. 12 U.S.C. 2607(a); see 24 C.F.R. 3500.14(g)(2) (HUD implementing regulation explains that the fact that a kickback "does not result in an increase in any charge made" is "irrelevant in determining whether the act is prohibited"). And Congress granted any consumer who is "charged for the settlement service involved in the [kickback-referral] violation" the right to recover from the violator "three times the amount of any charge paid for such settlement service," 12 U.S.C. 2607(d)(2), without regard to the amount (if any) by which the cost of the settlement service is inflated or its quality diminished. Those provisions grant consumers a right to referrals untainted by unlawful kickbacks and, when they are charged for settlement services as to which a kickback has been paid, a remedy against those who violated their rights.[7]

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the question whether respondent has standing under Article III. To the extent that petitioners seek to revisit the court of appeals' statutory analysis, their arguments "fall[] outside [the] limited grant of certiorari in this case" because the Court "denied certiorari on [petitioners'] first question presented." *Missouri* v. *Jenkins*, 495 U.S. 33, 53 (1990).

[7] If respondent and petitioners had included in their title insurance contract a provision stating that respondent's referral was not procured by means of a kickback, respondent would have had a contractual right to enforce that provision. Although respondent would be unable to secure more than nominal damages unless she could establish an additional injury, she would nevertheless have a cause of action in court based on that breach. See pp. 16-17, *supra*. The fact that respondent's right to a kickback-free referral was conferred by a federal statute rather than by a private agreement provides no basis for imposing a more demanding Article III inquiry. See *Defenders of Wildlife*, 504 U.S. at 576 ("[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right.").

Kickback schemes can often involve numerous participants and complex payment and referral arrangements, making it impossible as a practical matter to quantify and apportion the injury to a particular consumer whose settlement is linked to such a kickback. Congress could reasonably conclude that kickbacks for settlement-service referrals cause substantial aggregate harm, see American Bankers Ass'n Br. 7-8 (acknowledging that kickbacks are often passed on to consumers as "a cost of doing business"), but that Section 2607(d)(2)'s remedial and deterrent objectives would be disserved by requiring case-specific proof of such an effect. In this case, for example, petitioners argue that respondent cannot establish an overcharge because the premium she paid for title insurance reflected the standard market rate. But if unlawful kickbacks are pervasive in a particular market, the standard rate may be inflated to reflect that systemic illegal practice. Acceptance of petitioners' constitutional theory would thus render private enforcement of RESPA's anti-kickback prohibition unavailable in the very markets where that enforcement tool is most needed.

4. In its general approach, Section 2607(d)(2) is similar to private rights of action created by many other federal statutes. As an adjunct to the creation of substantive statutory rights, Congress often authorizes private suits to be filed by classes of persons whom the proscribed conduct has a natural tendency to injure. Many such laws, however, do not require proof that the feared tangible harms have actually materialized in a particular case, but rather allow awards of statutory damages to plaintiffs who establish a deprivation of the statutory right itself but do not prove any further consequential injury.

For example, federal copyright law has long authorized awards of statutory damages to copyright holders in the absence of any proof of harm other than infringement. See 17 U.S.C. 504(a) and (c); *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998) (discussing statutory damages provisions in the Copyright Act of 1790 and its state-law predecessors). The Fair Credit Reporting Act addresses more modern problems, providing statutory damages for willful violations of any of its requirements, including printing a receipt with more than the last five digits of a credit card; making a credit report that includes adverse (accurate) information older than a statutory cutoff; or failing to provide either a free reinvestigation of disputed information or a free credit report as required by statute. 15 U.S.C. 1681c(a) and (g), 1681c-1(a)(2), 1681i(a)(1), 1681n(a). And the Homeowners Protection Act of 1998 authorizes statutory damages for violations, including the unlawful failure to provide notices to mortgagors within statutory time limits. 12 U.S.C. 4904(b), 4905(c), 4907(a)(2). Other statutes that protect individuals by creating statutory rights similarly prescribe statutory damages for violations.[8]

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[8] See, *e.g.*, 15 U.S.C. 1117(c) (Supp. III 2009) (statutory damages for use of counterfeit marks); 15 U.S.C. 1679g(a)(1)(B) (statutory refund of amount paid to organization that violates Credit Repair Organizations Act); 15 U.S.C. 1693m(a)(2) (statutory damages for failing to comply with any provision of Electronic Fund Transfer Act with respect to a consumer); 17 U.S.C. 911(c) (statutory damages for infringement of semiconductor mask work); 18 U.S.C. 2710(b) and (c)(2)(A) (liquidated damages for knowing disclosure of personally identifiable information by videotape service provider); 18 U.S.C. 2724(a) and (b)(1) (statutory damages for knowingly obtaining, disclosing, or using personal information from a motor vehicle record for purposes not permitted by statute); 29 U.S.C. 1821(a) and (b), 1831(a) and (b), 1843, 1854(c)(1)

Such private rights of action reflect a suitably restrained application of the principle that Congress may "creat[e] legal rights, the invasion of which creates standing." *Havens Realty*, 455 U.S. at 373 (internal quotation marks omitted). By limiting the right of action to persons having a sufficient nexus to the violation to be reasonably regarded as its victims, Congress avoids displacement of the Executive Branch as vindicator of the public interest, and it confines the federal courts to their assigned function of "decid[ing] on the rights of individuals." *Defenders of Wildlife*, 504 U.S. at 576 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170); see pp. 20-22, *supra*. Those provisions furnish important enforcement tools, however, in circumstances where proscribed conduct has a natural tendency to disadvantage specific categories of persons, but the tangible consequences of particular breaches are difficult to determine.

(statutory damages for intentional violations of Migrant and Seasonal Agricultural Worker Protection Act, including by failing to provide written disclosures to a migrant or seasonal agricultural worker at the time of his recruitment and by failing to display posters specifying workers' rights); 47 U.S.C. 227(b)(1)(A)(iii), (B) and (3)(B) (statutory damages for violations of the Telephone Consumer Protection Act of 1991, including by making an automatically dialed or prerecorded call to a cell phone or making a prerecorded call to a residence without consent); 47 U.S.C. 605(a) and (e)(3)(C)(i)(II) (statutory damages for unlawful disclosure of wire or radio communication).

C. The Violation That Petitioners Are Alleged To Have Committed Is Closely Analogous To Self-Dealing By A Fiduciary, Which Has Traditionally Been Remediable In Court Without Proof Of The Violation's Tangible Effects

Congress's "power to define injuries and articulate chains of causation that will give rise to a case or controversy" extends to "the articulation of new rights of action that do not have clear analogs in our common-law tradition." *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Because historical practice is central to the Article III inquiry, however, Congress's power is particularly clear when the cause of action it creates *does* bear a close resemblance to an established category of common-law suits. That is the case here.

1. RESPA's anti-kickback prohibition serves in significant part as a conflict-of-interest rule that protects consumers' ability to receive dispassionate settlement-service advice. As the legislative history of amended Section 2607(d)(2) explains, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror [*sic*] or his associates have a financial interest in the company being recommended." H.R. Rep. No. 532, 97th Cong., 2d Sess. 52 (1982). The payment of an unlawful kickback thus has a natural tendency to induce referrals that disserve consumers' best interests, even though that effect may be difficult or impossible to prove in particular cases.

2. RESPA's statutory right to be free from kickback-tainted referrals has close analogs at common law. A trustee may not purchase property from his

trust, Restatement (Second) of Trusts § 170(1) & cmt. b (1959), and an agent may not take bribes from third parties, Restatement (Second) of Agency § 388 (1958). If a trustee or agent violates those duties, the courts have long entertained suits for returned fees, disgorged profits, or analogous relief with "no further inquiry" into whether the conflict of interest caused any harm other than the breach itself. See generally Resp. Br. 21-38.

In *Michoud* v. *Girod*, 45 U.S. (4 How.) 503 (1846), for example, the Court recognized that if a trustee who sells a part of the trust corpus "becomes himself interested in the purchase," the trust beneficiary would have a cause of action on the theory that the transaction was void, "without any further inquiry" into the nature of the sale or the fairness of the price. *Id.* at 553, 557. That rule, the Court explained, "embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing" and "his own individual interest." *Id.* at 559. As respondent explains (Br. 21-38), the "no further inquiry" rule predates the Founding; remains vital today; and imposes liability on both the party who breaches its duty and those that induce the breach.

3. To be sure, RESPA does not expressly designate real estate settlement service providers as "fiduciaries," and it does not impose upon such persons the full spectrum of duties to which a traditional fiduciary would be subject. Section 2607(a)'s anti-kickback prohibition, however, addresses a practice—the acceptance of payments from a third party to render particular advice to the service provider's client—that for a traditional fiduciary would be an especially egregious breach of duty. The anti-kickback prohibition is also intended, at least in significant part, to further the objectives that conflict-

of-interest rules are typically designed to serve. See pp. 24-25, 28-29, *supra*. And petitioners do not contest the authority of Congress to enact that substantive prohibition.

Once the validity of the substantive anti-kickback rule is established, there is no reason to doubt Congress's power to authorize private enforcement of that prohibition on the same terms that similar conflict-of-interest rules have traditionally been enforced. In a suit brought by a consumer who paid money for the settlement service involved in a Section 2607(a) violation, a requirement that the consumer prove an overcharge or similar economic harm would effectively preclude claims closely analogous to those that common-law courts have traditionally adjudicated. This Court's Article III jurisprudence provides no warrant for that approach. Just as suits for breach of duty implicating the "no further inquiry" rule were the "sort traditionally amenable to, and resolved by, the judicial process," *Vermont Agency of Natural Res.*, 529 U.S. at 774 (quoting *Steel Co.*, 523 U.S. at 102), so too is RESPA's cause of action for a violation of Section 2607. The close functional resemblance between Section 2607(d)(2) actions and common-law suits for breach of fiduciary duty reinforces the conclusion that respondent's suit presents a "case" or "controversy" cognizable in federal court.[9]

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[9] In other legal contexts as well, the constitutional authority of federal courts to grant relief for violations of federal conflict-of-interest rules does not depend on proof that a violation actually affected the outcome of the conflicted person's decision. See, *e.g.*, *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862-870 (1988) (affirming new-trial order based on district court's conflict of interest, without suggesting that the district court's merits rulings had been demonstrably affected by the conflict); *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927)

D. The Fact That Respondent Sought Class Certification Has No Bearing On The Article III Analysis

Petitioners suggest (Br. 42-46) that respondent's theory of injury reflects an attempt to manipulate class-certification requirements, and that the potential for significant damage recoveries in class actions should inform this Court's Article III analysis. Those arguments misconceive the proper role of this Court in determining whether a particular dispute is a justiciable "case" or "controversy."

1. Petitioners speculate that "[o]ne likely reason" for respondent's failure to allege consequential economic harm "is that an individual plaintiff with a truly personal and concrete injury [such as an overcharge] * * * would have been much less adequate as a putative class representative" because her circumstances would have been less typical of the class. Pet. Br. 43. Quite apart from such strategic concerns, however, respondent had no reason to allege consequential economic harm because such harm is not an element of either the Section 2607(a) violation or the Section 2607(d)(2) cause of action. Although the question of statutory standing was contested in the proceedings below, the district court and court of appeals both resolved it in respondent's favor, and this Court denied review on that issue. See pp. 9-10, 23 n.6, *supra*. To be sure, respondent's class-action complaint understandably emphasized a feature of her legal theory that enhanced the case's potential suitability for class treatment. See Pet. App. 49a (alleg-

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(holding that state trial judge's financial incentive to convict deprived the defendant of his right to due process of law, regardless of the strength of the evidence of guilt, because "[n]o matter what the evidence was against him, he had the right to have an impartial judge").

ing that petitioners' "exclusive (and secret) referral agreements have thus injured all members of the proposed plaintiff class in precisely the same way"). But even if this suit had been brought purely as an individual action, respondent would have had no reason to allege consequential economic injury when RESPA makes such harm irrelevant.

2. The only question presented in this case is whether a *single* plaintiff can establish an Article III injury sufficient to invoke federal jurisdiction based on a concrete and particularized invasion of her statutory right to a kickback-free referral. Petitioners dispute that they violated any such right, see Pet. Br. 45; Pet. App. 21a, and they may ultimately prevail on the merits. But if respondent's allegations are otherwise sufficient to establish a "case" or "controversy" in light of the remedial scheme that Congress has created, neither the possibility of class treatment, nor the likely magnitude of the recovery that a successful class action might produce, bears on the Judiciary's Article III power to decide respondent's claim. Cf. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (recognizing that "some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action," but concluding that this fact "has no bearing * * * on [the defendant's] or the plaintiffs' legal rights" because the potential for class certification does not affect the total liability to which the defendant is legally subject).

To be sure, *Congress* could appropriately take account of the practical concerns petitioners identify. If Congress is persuaded that suits like these create an untoward risk of exorbitant damages liability, it may address that problem either by amending RESPA's

cause of action or by creating additional prerequisites to class certification. But "the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability," *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 748 (1975), much less curtail its own traditional authority under Article III "to decide on the rights of individuals," *Defenders of Wildlife*, 504 U.S. at 576-577 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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