No. 10-708

IN THE
Supreme Court of the United States

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

v.

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

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

BRIEF OF AMICI CURIAE AARP, CENTER FOR RESPONSIBLE LENDING, NATIONAL CONSUMER LAW CENTER, NATIONAL CONSUMERS LEAGUE, AND PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENT

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amici Curiae

October 2011

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Constitutional Provisions, Statutes, and Rules:

Other:

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of organizations interested in the effective enforcement of consumer-protection laws, including the law at issue in this case, the Real Estatement Settlement Procedures Act, or RESPA.[1] Amici submit this brief to assist the Court in understanding the range of federal consumer-protection statutes whose purposes could be adversely affected by a ruling that proof of pecuniary loss is necessary for Article III standing under statutes where Congress has given consumers a legally protected interest and provided statutory damages as a remedy for the injury they suffer when that interest is infringed.

AARP is the leading organization representing the interests of people aged 50 and older. AARP is greatly concerned about the illegal, unfair and deceptive settlement charges imposed on older homeowners, many of whom are especially vulnerable to such abuses.

Center for Responsible Lending (CRL) is a non-profit policy, advocacy, and research organization dedicated to exposing and eliminating abusive practices in the market for consumer financial services and to ensuring that consumers may benefit from the full range of consumer protection laws designed to inhibit unfair and deceptive practices by banks and other financial services providers. To advance this mission, CRL's litigation team regularly relies on consumer

---

[1] Written consents from both parties to the filing of amicus curiae briefs in support of either party are on file with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to preparation or submission of this brief.

protection statutes, like RESPA, that provide the remedy of statutory damages as redress for consumer harm, when it litigates on behalf of consumers victimized by predatory and abusive financial practices.

National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969 at Boston College School of Law, NCLC has been a resource center addressing issues such as illicit contract terms and charges, home improvement frauds, debt collection abuses, and fuel assistance benefit programs. NCLC publishes an 18-volume Consumer Credit and Sales Legal Practice Series, and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws, and acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer-protection regulations.

The National Consumers League (NCL), founded in 1899, is nation's oldest consumer organization. The mission of the NCL is to protect and promote social and economic justice for consumers and workers in the United States and abroad. On behalf of the general consuming public, the NCL appears before legislatures, administrative agencies, and the courts on a wide range of issues, and promotes laws protecting consumers. The NCL also educates consumers on ways to avoid fraud in the marketplace through its National Fraud Center.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, represents its approximately 225,000 members and supporters nationwide before

Congress, administrative agencies, and courts, and works for the enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has often litigated issues of standing, and is concerned that the argument that the plaintiffs in this case lack standing to pursue a cause of action for statutory damages conferred on them by Congress would impair the effectiveness of remedies for consumers contained in a host of federal statutes that similarly provide for monetary recoveries without proof of pecuniary loss.

SUMMARY OF ARGUMENT

Where a statutory violation will cause financial harm or other harm to consumers, but the extent of that harm would be difficult or burdensome to prove in individual cases, Congress has often permitted plaintiffs to sue for statutory damages without proof of pecuniary harm. Consumer-protection statutes regularly fit this description. Violations of consumer-protection statutes frequently affect markets in which businesses operate in ways that will predictably harm consumers financially. The harms, however, can be small by traditional measures and difficult to distinguish from other factors affecting the consumer's experience. Because proving monetary damages can cost more than the harm suffered, few consumers would accept this cost if recoveries were limited to proven monetary losses.

With this concern in mind, Congress has long included statutory damages provisions in consumer-protection statutes. As Judge Posner has explained, "[m]any statutes, notably consumer-protection statutes, authorize the award of damages (called 'statutory damages') for violations that cause so little measurable injury that the cost of proving up damages

would exceed the damages themselves, making the right to sue nugatory." *Crabill v. Trans Union, L.L.C.,* 259 F.3d 662, 665 (7th Cir. 2001). Such statutes create legally protected interests and thus confer standing on a consumer who thereafter is injured by participation in a transaction tainted by a statutory violation that infringes the consumer's protected interest. Such statutes also provide measures of recovery that reinforce Article III values by ensuring that plaintiffs have concrete stakes in litigation to enforce their rights. At the same time, statutory damages provisions reflect Congress's weighing of such considerations as the amount of financial harm likely attributable to the misconduct at issue, the amount of recovery needed to motivate plaintiffs to bring actions and to deter misconduct, and the need to avoid excessive financial burden on defendants that might result from overlarge and disproportionate recoveries.

Upholding the power of Congress to provide RESPA plaintiffs causes of action without proof of monetary loss does not offend the core values reflected in constitutional standing doctrine. RESPA plaintiffs who have participated in an anticompetitive settlement services transaction have a sufficient personal stake in a case to assure concrete adverseness. They must allege concrete and particularized facts about their personal involvement in a transaction in which statutory rights specifically conferred upon them by Congress were violated. And because they may obtain statutory damages if they are successful, they have an interest in the suit's outcome. Relatedly, because RESPA plaintiffs are not asserting rights shared by the public at large, and because they are not suing to enjoin action by another branch of government, recognizing standing in these cases does not raise separation of powers concerns.

ARGUMENT

I. Statutory Damages Provisions in Consumer-Protection Statutes Allow for Recovery Where Monetary or Other Harm Is Difficult to Quantify.

A. RESPA's Enactment Reflected Congressional Intent to Provide a Remedy for Practices That Are Injurious to Consumers.

In RESPA, Congress provided consumers with a right of action for statutory damages that is not dependent on a showing of actual monetary loss. Congress created this remedial scheme because of its express recognition that the conduct it prohibited in RESPA has broad anticompetitive effects that impose very real costs on consumers of settlement services. But because of the inherent difficulty and excessive cost that would be needed to prove that the plaintiff in a transaction tainted by a settlement agent's conflict of interest paid more, received poorer service, or received a lower-quality product, statutory damages are an integral part of Congress's effort to provide consumers with a practical remedy that will serve values of both deterrence and compensation.

Before the passage of RESPA, Congress enacted the Emergency Home Finance Act of 1970, which directed the heads of the Veterans Administration (VA) and Housing and Urban Development (HUD) to conduct a joint study and recommend to Congress what actions Congress should take to reduce and standardize mortgage settlement costs. *See* S. Rep. No. 93-866, at 1 (1974). The report of that study identified several problem areas in the mortgage settlement market and recommended that Congress take immediate action to address these problems. Among its findings were:

> 6. The buyer seldom decides who will provide settlement services for him. If there is a choice, he usually depends upon advice of the broker, escrow agent, seller, or settlement attorney. Often the buyer is or believes he is required to deal with a particular source for some or all settlement services.
>
> 7. Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, *rarely inure to the benefit of the home buyer, and generally increase total settlement costs*.
>
> 8. Settlement charges often are based on factors unrelated to the cost of providing the services. The overall level of charges tends to be significantly lower when the charge for a service is not directly related to the sales price of the property.

Mortgage Settlement Costs, Report of Department of Housing and Urban Development and Veterans' Administration 2-3 (1972) (hereafter HUD-VA Report) (emphasis added).

The HUD-VA Report further explained how the combination of the lack of competition in the mortgage settlement industry and the existence of kickback arrangements harms consumers. Because of the absence of consumer choice and the pervasiveness of referral arrangements, the Report found, "[t]he competition that exists in this industry … is not based on price, because the ultimate consumer has a small voice in that decision." *Id.* at 15-16.

Less than three years later, in enacting RESPA, Congress expressly adopted and implemented the rec-

ommendations made in the HUD-VA Report. Pub. L. No. 93-533, § 2, 88 Stat. 1724 (1974), *codified at* 12 U.S.C. § 2601). One stated purpose of the Act was to eliminate "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." *Id.* § 2(b)(2), 12 U.S.C. § 2601(b)(2). Toward this end, section 8(a) of 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). Under section 8(d)(2), any person who violates section 8(a) shall be liable to the "person or persons whose business has been referred … in an amount equal to three times the value or amount of the fee or thing of value." 12 U.S.C. § 2607(d)(2).

Section 8(d) thus provides a right of action to consumers who participate in an anticompetitive settlement services transaction. Read against the backdrop of the HUD-VA Report, section 8(d) reflects Congress's belief that consumers who participate in such a transaction ordinarily suffer economic loss, whether through higher premiums, lower-quality service, or a lower-quality product. As stated in a 1982 House Report supporting a bill that sought to clarify section 8's anti-kickback provision, "a consumer who is referred by a real estate professional to a controlled title insurance company is likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." H.R. Rep. No. 97-532, at 51 (1982). In light of the difficulty of proving any one of these harms in a given case, Congress reasonably cre-

ated a statutory entitlement not to be subject to such a conflict of interest, reinforced by a right to recover an amount that reflects the reality that consumers who are subjected to anticompetitive settlement services practices suffer genuine, if difficult to document, economic detriment.

B. Modern Consumer-Protection Statutes Permitting the Award of Damages in the Absence of Provable Monetary Loss Have Strong Common-Law and Statutory Antecedents.

In providing a RESPA damages remedy for injurious practices not tied to proof of pecuniary loss, Congress acted within a longstanding tradition recognizing the legitimacy of such remedies for infringements of both common-law and statutory interests. For example, "courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (plurality opinion) (citing Restatement of Torts § 568, cmt. b, p. 162 (1938), for the proposition "that damages were to be presumed for libel as early as 1670"). *See also, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964) ("Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars."); *Pollard v. Lyon*, 91 U.S. 225, 227 (1875) ("Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff[.]").

"The rationale of the common-law rules has been the experience and judgment of history that 'proof of actual damage will be impossible in a great many cas-

es where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.'" *Dun & Bradstreet, Inc*, 472 U.S. at 760 (plurality opinion) (quoting W. Prosser, *Law of Torts* § 112, p. 765 (4th ed. 1971)); *see also Carey v. Piphus*, 435 U.S. 247, 262 n.17 (1978) ("'By the very nature of harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle.'" (quoting 1 F. Harper & F. James, *Law of Torts* § 5.30, p. 468 (1956))).

In the realm of statutory rights of action, this Court has long recognized the legitimacy of a damages remedy not tied to a demonstration of actual monetary loss in the Copyright Act. Specifically, the Act provides that infringement of copyright is itself a violation of a legally protected interest—an injury—that may serve as the basis for an action seeking both damages and injunctive relief. Thus, the current statute provides that "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled … to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(b); *see also id.* § 502 (authorizing injunctive relief); *id.* § 504(b) (authorizing recovery of actual damages). Further, more than a century ago, Congress provided that a successful copyright infringement plaintiff may recover, as alternatives to actual damages, either the profits earned by the infringer (regardless of whether the plaintiff would have earned comparable profits in the absence of infringement) or statutory damages ranging from a few hundred dollars for a single infringing copy to tens of thousands of dollars for larger-scale infringement. *Id.* § 504(c).

A copyright plaintiff's entitlement to statutory damages does not depend on proof of any injury beyond the deprivation of the statutory entitlement to prevent infringing acts. Instead, the statute "give[s] the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits," and also serves to deter "willful and deliberate infringement." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). As Justice Jackson explained in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952), statutory damages play a critical role in fostering the purposes of copyright law:

> [A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.

Id. at 233.

The injury inherent in the violation of the statutory entitlement to prevent unauthorized copying, together with the concrete stake in the outcome of the litigation created by the congressionally authorized remedies of statutory damages and injunctive relief, suffice to create standing for a copyright infringement plaintiff regardless of whether she has suffered a de-

monstrable financial loss. Thus, "a copyright owner who can prove infringement need not show that the infringement caused him a financial loss." *In re Aimster Copyright Litig.*, 334 F.3d 643, 649 (7th Cir. 2003) (Posner, J.). Although without such a showing he cannot obtain compensatory damages, "he can obtain statutory damages, or an injunction, just as the owner of physical property can obtain an injunction against a trespasser without proving that the trespass has caused him a financial loss." *Id.*; *see also Egenet, Inc. v. GS1 AISBL*, 742 F. Supp. 2d 997, 1014 (E.D. Wis. 2010) (rejecting argument that copyright owner did not have statutory and constitutional standing because it failed to plead actual financial loss).

C. Many Consumer-Protection Laws Similarly Provide for Damages Recoveries in the Absence of Proof of Pecuniary Loss.

1. Numerous consumer-protection statutes, including RESPA, borrow from the common-law and statutory tradition of permitting presumed or statutory damages for violations of legally protected interests that may not give rise to provable monetary loss. The concern underlying many of these statutes is the protection of broad economic interests of consumers, but they do not do so by requiring proof of monetary loss in particular transactions. Rather, they give consumers legal entitlements whose infringement constitutes injury, backed by statutory damages remedies that both give teeth to the substantive terms of the legislation and ensure concrete adverseness in litigation over claims that a defendant committed a violation.

For example, the Fair Credit Reporting Act (FCRA) regulates consumer reporting agencies, which are organizations that "assembl[e] or evaluat[e] con-

sumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(f). FCRA is intended to ensure that these organizations adopt procedures that are "fair and equitable to the consumer." *Id.* § 1681(b). Toward this end, Congress regulated the circumstances in which a consumer reporting agency can furnish a credit report, § 1681b, the contents of credit reports, § 1681c, the measures that must be taken to avoid identify theft, §§ 1681c-1, 1681c-2, and the measures that must be taken to ensure accuracy of credit reports, § 1681e, among other things.

Although the harm of being the victim of an inaccurate credit report is principally economic, Congress did not require consumers to prove economic harm in all circumstances.[2] Rather, it provided for actual damages or statutory damages of between $100 and $1,000 for willful violations. *Id.* § 1681n(a)(1)(A). Therefore, a consumer need not allege financial loss to bring an action under § 1681n. *See Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-06 (6th Cir. 2009) (Sutton, J.); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (Easterbrook, J.). As the Seventh Circuit has explained, "individual losses, if any, are likely to be small—a modest concern about privacy, a slight chance that information would leak out and lead to identify theft." *Murray*, 434 F.3d at 953. "That actual loss is small and hard to quantify is why statutes such as the Fair Credit Reporting Act provide for modest damages without proof of injury." *Id*.

---

[2] As discussed below, the statute also expressly safeguards the "consumer's right to privacy." 15 U.S.C. § 1681(a)(4).

Thus, in *Beaudry*. the plaintiff alleged that the defendants failed to provide accurate information, namely that they "failed to account for a 2002 change in the numbering used by the Tennessee driver's license system, leading their systems to reflect incorrectly that many Tennessee consumers, including Beaudry, were first-time check-writers." 579 F.3d at 703. The district court dismissed the case because the plaintiff had not alleged monetary loss. Reversing, the Sixth Circuit held that the plaintiff "suffered the precise 'injury' that the statute proscribes: the defendants 'prepare[d] a consumer report' about her but failed to 'follow reasonable procedures to assure maximum possibly accuracy of the information' it contained." *Id.* at 705 (quoting 15 U.S.C. § 1681e(b)). The court further concluded that the statutory damages provision raised no constitutional concerns. *Id.* at 707.

Another example of such a statute is the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C § 1692. In enacting the FDCPA, Congress noted the

> abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

Id. § 1692(a). The FDCPA's purpose is, among other things, to "eliminate abusive debt collection practices by debt collectors." *Id.* § 1692(e). The FDCPA regulates debt collectors' communications, both with consumers and third parties, *id.* §§ 1692b, 1692c, 1692d, and the means by which debt collectors collect debts, *id.* § 1692f. It also prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt." *Id.* § 1692e. To en-

force these provisions, § 1692k(a) provides for actual damages, and statutory damages of up to $1,000.

Every circuit to address the issue has concluded that "statutory damages are available without proof of actual damages" under the FDCPA. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir. 1982); *see also Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211-12 (10th Cir. 2006); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 307 (2d Cir. 2003); *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998). And one circuit court has explicitly held that the FDCPA's statutory damages provision is constitutional. *See Robey*, 434 F.3d at 1211-12.

The facts in *Keele* illustrate the importance of allowing recovery for an FDCPA claim without proof of monetary loss. In *Keele*, the named plaintiff wrote an $85.26 check to Wal-Mart for which she had insufficient funds. The law firm Wal-Mart hired to collect the funds sent the plaintiff letters threatening to charge her an illegal $12.50 collection fee on top of a legal $20 service charge. 149 F.3d at 591. On appeal, the defendants argued that the plaintiff lacked standing because she did not pay the $12.50 fee. The court held that Congress intended this fact to be immaterial, reasoning that "the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not." *Id.* at 593-94. Highlighting the difficulties in proof that would be involved if the plaintiff had to prove an actual financial loss, the court noted that it was "far from clear whether the defendants are correct in asserting that [the plaintiff] did not pay the collection fee." *Id.* at 593. Keele paid $20 more than the original $85.26, and the record did not reflect whether some of those funds were retained by the defendants as part of the threatened "illegal collection fee." *Id.* The court

agreed with the district court that it was "unnecessary to decide whether a benefit to [the defendant] was tantamount to actual damage," relying instead on the FDCPA's statutory damages provision. *Id.*

Other consumer-protection statutes in which economic harm would be difficult or burdensome to prove and for which Congress has provided for statutory damages include the Federal Odometer Act, 49 U.S.C. § 32710(a); *see Womack v. Nissan N. Am., Inc.*, 550 F. Supp. 2d 630, 634 (E.D. Tex. 2007) (finding that "Congress' provision for statutory damages [in the Federal Odometer Act] of $1500 per vehicle allows victims to recover without proving actual damages" and that the statutory damages provision is constitutional), the Credit Repair Organizations Act, 15 U.S.C. § 1679g(a)(1)(B), and the Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a)(2).

2. As common-law defamation claims illustrate, injury may also be difficult to prove when it involves non-pecuniary harms such as invasions of personal privacy, embarrassment, or nuisance. Such harms frequently also follow from violations of consumer-protection statutes. Accordingly, Congress has allowed plaintiffs under such statutes to sue for monetary recoveries based on violations of their statutorily created interests without proof of financial loss.

For example, in enacting the Telephone Consumer Protection Act, 47 U.S.C. § 227, Congress found that

> (5) Unrestricted telemarketing … can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
>
> (6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

* * *

> (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991). To enforce its restrictions on telemarketing, Congress created "an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(c)(5). Thus, the "'called party' has standing to bring suit against a person or entity that violates the TCPA, even if the called party has suffered no actual [monetary] harm." *Leyse v. Bank of Am., Nat'l Ass'n*, 2010 WL 2382400, at *3 (S.D.N.Y. June 14, 2010); *see also Landsman & Funk, P.C. v. Lorman Bus. Ctr., Inc.,* 2009 WL 602019, at *3 (W.D. Wis. Mar. 9, 2009) (finding allegation that defendant sent fax to plaintiff in violation of TCPA sufficient basis for standing); *Anderson v. AFNI, Inc.*, 2011 WL 1808779, at *6 (E.D. Pa. May 11, 2011) ("We are satisfied that Anderson has constitutional standing in this case. She has demonstrated an injury in fact—the receipt of nearly fifty calls to her residential telephone number over eight months from an apparently implacable automated caller.")

Another example is the Driver's Privacy Protection Act, 18 U.S.C. § 2724, which states:

> A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom

> the information pertains, who may bring a civil action in a United States district court.

Id. § 2724(a).

As a remedy for a violation of § 2724(a), Congress provided "actual damages, but not less than liquidated damages in the amount of $2,500." *Id.* § 2724(b)(1). Therefore, under the DPPA, "a plaintiff need not prove actual damages to recover liquidated damages." *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1216 (11th Cir. 2005); *see Taylor v. Acxiom Corp.*, 612 F.3d 325, 340-41 (5th Cir. 2010) (Dennis, J., concurring) (reaching standing question majority did not address and concluding that plaintiffs had Article III standing under DPPA); *Cook v. ACS State & Local Solutions, Inc.*, 756 F. Supp. 2d 1104, 1107 (W.D. Mo. 2010); *Parsus v. Cator*, 2005 WL 2240955, at *5 (W.D. Wis. Sept. 14, 2005) ("It is true that plaintiff has not alleged that he suffered injury as a *result* of defendant Kreitlow's obtaining his personal information. However, under the statute, improperly obtaining plaintiff's information *was* an injury.").

As one court stated:

> If Congress's power to define injuries as a method of bestowing standing is to mean anything, the case cannot be dismissed [for failure to show injury]. While these injuries are certainly not garden-variety tort injuries, such is the nature of a statute designed to protect an interest as abstract as personal privacy.

Cook, 756 F. Supp. 2d at 1107.

Other consumer-protection statutes create a statutory right to information, the violation of which is actionable without proof of any further loss. An important example is the Truth in Lending Act (TILA),

which requires disclosure of critical facts to consumers who enter into credit transactions and creates a right of action to obtain either actual or statutory damages (sometimes referred to as penalties) for violations. 15 U.S.C. § 1640(a)(2)(A). As this Court explained in *Mourning v. Family Publications Service Inc.*, 411 U.S. 356 (1973), a consumer's ability to obtain the recovery specified in § 1640(a)(2)(A) where actual damages or entitlement to other measures of recovery are incapable of being proven is of vital importance to carrying out the purposes of TILA:

> In light of the emphasis Congress placed on … private and administrative enforcement of the Act, we cannot conclude that Congress intended those who failed to comply with regulations to be subject to no penalty or to criminal penalties alone. … [I]mposition of the minimum sanction is proper in cases such as this, where the finance charge is nonexistent or undetermined.

Id. at 376.

Requiring proof of actual damages would impair Congress's intent to provide for enforcement "largely through the institution of civil actions authorized under [§ 1640]." S. Rep. No. 90-392, at 9 (1967). Thus, the courts have agreed that proof of financial loss is not required in a TILA action. *See Edwards v. Your Credit Inc.*, 148 F.3d 427, 441 (5th Cir. 1998) ("[W]hile the harm that Edwards may have suffered is relevant to the damages to which she may be entitled, it is irrelevant to whether she is entitled to bring an action." (citation omitted)); *Zamarippa v. Cy's Car Sales, Inc.,* 674 F.2d 877, 879 (11th Cir. 1982) ("[T]he statutory civil penalties must be imposed for such a violation regardless of the district court's belief that no actual damages resulted or that the violation is *de*

minimis."). The same is true under the informational provisions of the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g). *See Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1231 (D. Nev. 2007) (stating that "[e]very district court to consider the issue has found a plaintiff has standing to pursue a FACTA claim for statutory damages even without showing actual damages" and citing cases).

In addition, Congress has provided for statutory damages to protect non-pecuniary interests in the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3417(a)(1); *Beam v. Mukasey*, 2008 WL 4614324, at *6 (N.D. Ill. Oct. 15, 2008) (finding that the plaintiffs who did not allege financial harm have constitutional and statutory standing under RFPA), the Video Privacy Protection Act, 18 U.S.C. § 2710(c)(2)(a); and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2707(c), 2520(c).

* * *

In short, RESPA is but one of many statutes that provide protection to consumers by creating an actionable statutory entitlement to be free from a particular type of wrongful conduct, and providing a statutory damages remedy that is available without proof of monetary loss or other actual damages. Accepting petitioners' argument that RESPA violates Article III would upset the means of enforcement chosen by Congress for a broad range of consumer-protection laws and significantly impede the objectives of Congress in creating the legally protected interests that those laws incorporate.

II. Permitting RESPA Plaintiffs to Seek Statutory Damages Without Proving Monetary Loss Does Not Undermine the Values of Constitutional Standing.

"Article III standing enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (internal quotation marks and alterations omitted). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure … concrete adverseness ….'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Thus, the "more specific standing requirements"—injury in fact, redressability, and causation—"are simply different descriptions of the same judicial effort to assure, in every case or controversy, 'that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Sprint Comms. Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 288 (2008) (quoting *Baker*, 369 U.S. at 204).

RESPA plaintiffs, and plaintiffs under other consumer-protection statutes that similarly permit statutory damages in the absence of proof of monetary loss, have a sufficient personal stake in a case to assure concrete adverseness: (1) A plaintiff's personal participation in a settlement services transaction that violates RESPA is a prerequisite to suit; (2) Congress has found that a consumer's personal participation in such a transaction is likely to result in economic harm to that consumer and to consumers in the aggregate; and (3) because of RESPA's statutory damages provision, a plaintiff has a personal stake in the suit's outcome.

A. Under these circumstances, the concerns that have led this Court to find no constitutional standing in other contexts are not present. First, a RESPA plaintiff's interest in a case is personal, particularized, and concrete. This requirement "preserves the vitality of the adversarial process" because it assures (1) "'that the legal questions presented … will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,'" and (2) "that the parties before the court have an actual, as opposed to professed, stake in the outcome." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992) (omission in original) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

A RESPA plaintiff who has proven that she received poor or overpriced service because of a kickback arrangement presents a case no more susceptible to judicial resolution than a plaintiff who seeks statutory damages on account of the fact of the kickback arrangement alone. The legal question in a RESPA case does not depend on the nature or existence of monetary loss. As the Third Circuit stated in *Alston v. Countrywide Financial Corp.*, "RESPA only authorizes suits by individuals who receive a loan accompanied by a kickback or unlawful referral, which is plainly a particularized injury[.]" 585 F.3d 753, 763 (3d Cir. 2009); *see also Beaudry*, 579 F.3d at 705 (finding that the FCRA requirement that a plaintiff be among the injured "poses no obstacle here: Beaudry alleged that she was one of the consumers about whom the defendants were generating credit reports based on inaccurate information due to their failure

to update their databases to accommodate the new Tennessee driver's license number system").

Nor is this injury of an "abstract and indefinite nature—for example, harm to the 'common concern for obedience to law,'" which this Court has found deprives a case of concrete specificity and effectively results in an advisory opinion. *FEC v. Akins*, 524 U.S. 11, 23 (1998) (quoting *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 303 (1940)). When a RESPA plaintiff shows that she was personally involved in a settlement services transaction involving an illegal kickback arrangement, she has provided a court all the concrete particularity needed to resolve the legal dispute.

Because of RESPA's provision for statutory damages, a plaintiff also has an actual stake in the outcome of the case, and a stake tied specifically to a violation suffered by the plaintiff personally—a stake no different from that of a plaintiff who has proven economic loss. Although an interest in a suit's outcome "unrelated to injury in fact" is insufficient for standing purposes, *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000), an interest designed to remedy past violations suffered by the plaintiff personally is sufficient for standing purposes. *Id.* RESPA's statutory damages provision is thus unlike the bounty provided to qui tam relators under the False Claims Act that this Court addressed in *Vermont Agency*. Whereas a qui tam relator's interest in a case is akin to "someone who has placed a wager upon the outcome," *id.* at 772, the statutory damages in RESPA directly redress injury suffered by the plaintiff and function as a substitute for actual damages because the "cost of proving up damages would exceed the damages themselves." *Crabill*, 259 F.3d at 665.

Second, permitting a RESPA plaintiff to seek statutory damages without proving pecuniary loss does not raise separation of powers concerns. "[W]here large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Akins*, 524 U.S. at 23; *see also Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) ("The constitutionally mandated standing inquiry is especially important in a case like this one, in which taxpayers seek 'to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.'" (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989)). But RESPA plaintiffs have personal interests in their case that distinguish them from members of the public at large. *See Alston*, 585 F.3d at 763 ("The [RESPA] case before us is not one in which plaintiffs press 'a generalized grievance shared in substantially equal measure by all or a large class of citizens.'" (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *cf. Beaudry*, 579 F.3d at 705 (FCRA "does not authorize suits by members of the public at large; it creates an individual right not to have unlawful practices occur with respect to one's own credit information." (quotation marks and citation omitted)).

Separation of powers concerns associated with constitutional standing are most pronounced when a plaintiff is using the judiciary to enjoin government action. *See Hein*, 551 U.S. at 611-12 (2007) ("The [standing] rule respondents propose would enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials."); *Lujan*, 504 U.S. at 577 ("To permit Congress to convert the undifferentiated

public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.' Art. II, § 3."). This concern is particularly present when a plaintiff is challenging the constitutionality of government action. *See Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other branches of the Federal Government was unconstitutional.").

These concerns are not implicated here. The petitioner's argument that "allowing a plaintiff to pursue a statutory cause of action in the absence of an actual injury would expand judicial and legislative power at the expense of the executive," Pet. Br. 45, is at bottom an argument that consumer-protection statutes should be enforced nearly exclusively by the government. This rule would be a radical departure from Congress's current practice and would weaken Congress's ability to protect consumers' interests.

B. The Constitution is not offended when Congress recognizes the general causal relationship between a statutory violation and significant financial or other consequential harm to consumers, and creates a statutory right the violation of which serves as the requisite actual injury without the necessity of proof that other harm has materialized in the particular transaction at issue. *See Warth v. Seldin*, 422 U.S. at 500 ("The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617

n.3 (1973)); *Massachusetts v. EPA*, 549 U.S. at 516 ("'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.'" (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment))). This Court has long found constitutional standing under these circumstances in the context of statutory rights to information. *See Akins*, 524 U.S. at 21; *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449 (1989). Thus, in *Public Citizen*, the Court recognized that "[a]s when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent [the Federal Advisory Committee Act] allows constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. at 449. In both *Akins* and *Public Citizen*, the plaintiffs' interest in information may also have helped to protect other concrete interests, but the actual harm that followed from the deprivation of information was not determinative of the question of standing, which turned instead on the statutorily created entitlement to information.

The reasons supporting standing where Congress creates a right to information support the recognition of standing based on the deprivation of a statutory right to participate in a settlement services transaction untainted by kickback arrangements. In both contexts, Congress has created an legally protected interest in part to protect other interests (such as consumers' interests in avoiding the higher prices and decreased quality that accompany anticompetitive settlement practices)—but it is the infringement of that statutory interest, not the monetary loss or other injury that may follow, that serves as injury in fact for

standing purposes. *See Rule v. Ft. Dodge Animal Health, Inc.*, 607 F.3d 250, 253-54 (1st Cir. 2010) (noting that "for policy or other reasons, a court might choose to look at injury at some earlier point and ignore later realities").

C. Finally, when considering the constitutionality of RESPA's statutory-damages provision, this Court should bear in mind that courts have traditionally deemed claims made by plaintiffs seeking only statutory damages "to be capable of resolution through the judicial process." *Raines v. Byrd*, 521 U.S. at 819 (citation omitted). Congress has long allowed consumers to vindicate their rights through causes of action that do not require showings of monetary damages. And courts have long resolved these disputes. Where this Court has found a tradition of judicial resolution of a type of dispute, it has stated that it would be "unwise for us to abandon history and precedent in resolving the question before us. … [T]he far more sensible course is to abide by … history and tradition and find that the [plaintiffs] possess Article III standing." *Sprint*, 554 U.S. at 288-89 (holding that assignees had Article III standing to bring claims arising from payphone operators' injuries); *see also Vt. Agency*, 529 U.S. at 774 (looking at history of qui tam actions and finding it "particularly relevant to the constitutional standing inquiry). Petitioners have provided this Court no compelling reason to abandon its traditional willingness to hear claims of this nature.

CONCLUSION

The Court should hold that respondent has Article III standing to pursue her RESPA claim and affirm the judgment of the court of appeals.

Respectfully submitted,

SCOTT L. NELSON
Counsel of record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Counsel for Amici Curiae

October 2011