

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 INTERNATIONAL ASSOCIATION
OF DEFENSE COUNSEL AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The IADC has a particular interest in the fair and efficient administration of class actions like this, which are increasingly global in reach, as well as in ensuring that actions are brought in the appropriate forum and decided by courts with proper jurisdiction.



¹ This brief was authored by *amicus* and their counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amicus* or their counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to rule 37 of the Rules of the Supreme Court of the United States, all parties have consented to the filing of this and other *amicus curiae* briefs. Letters indicating the parties' blanket consent have been submitted to the Court.

SUMMARY OF ARGUMENT

Petitioners and other *amici* have already explained at length why the absence of an injury in fact to Ms. Edwards dooms her suit. We do not repeat those arguments. Rather, we explain why recognizing that there can be no standing without injury in fact, even where a federal statute purports to provide a private right of action, is consistent with Article III's focus on maintaining the balance of power between the different branches of government. In particular, we explain that insisting on the injury in fact requirement furthers the Framers' intent to prevent the legislative branch from dwarfing the judicial and executive branches. We also present examples of other federal statutes beyond the Real Estate Settlement Procedures Act of 1974 (RESPA) which, in a world without an Article III injury in fact requirement, could give rise to increased litigation in federal court.



STATEMENT OF THE CASE

Amicus hereby adopts and incorporates by reference the Statement of the Case set forth in the Petitioners' Brief.



ARGUMENT

I. ARTICLE III STANDING EMBODIES SEPARATION OF POWERS PRINCIPLES AND ENSURES THAT THE LEGISLATIVE BRANCH DOES NOT OVERPOWER THE JUDICIAL AND EXECUTIVE BRANCHES.

Article III standing presents a “threshold jurisdictional question” for the federal courts. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). In its most basic form, standing amounts to a determination that a party is entitled to have a federal court decide the merits of a dispute because the matter presents a real “case” or “controversy.” That the plaintiff must have a personal stake in the outcome of a case or an “injury in fact” is just one component of the “irreducible constitutional minimum of standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Constitutional standing is separate from statutory standing. As this Court has acknowledged, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); see also *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 487 n.24 (1982). Thus, even after Congress has authorized suit, “Art[icle] III’s requirement remains[, and] the plaintiff still must allege a distinct and palpable injury to himself.” *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Indeed, recognizing injuries that only Congress has declared to exist would eliminate the “hard

floor” requirement that Article III imposes and run roughshod over the separation-of-powers limits provided by the Constitution. *Summers v. Earth Island Inst.*, 555 U.S. 488, ___, 129 S.Ct. 1142, 1151 (2009); cf. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

Standing is a “constitutionally based doctrine designed to implement the Framers’ concept of ‘the proper – and properly limited – role of the courts in a democratic society.’” Roberts, John G., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1220 (1993). “The legitimacy of an unelected, life tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary’s power in Article III to actual ‘cases’ and ‘controversies.’” *Id.* Standing, as Chief Justice Roberts has described it, can thus be “properly regarded as a doctrine of judicial self-restraint.” *Id.* at 1221. The requirement of an injury in fact accordingly “flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separate government.” *Id.* at 1224.

The injury in fact rule also carries out “the Framers’ design for a balanced government” by separating out “those whose claims are essentially political, and thus should be addressed to the legislature or executive branch, from others whose claims are sufficiently individual and hence may be heard by the courts.” Leonard, James and Brant, Joanne C. *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers’ Plan for Federal Courts of Limited Jurisdiction*, 54 Rutgers L.Rev. 1, 6 (2001).

The Framers sought to preserve liberty by providing for co-equal branches of government that would prevent one department from having an “‘overruling influence’” on the others. *Id.* at 52. “To the Framers, tyranny was by definition the concentration of power in any one person, group or agency of government. . . . Madison saw the legislature as the greatest potential threat” because “there is a natural tendency for legislative power to predominate.” *Id.* at 50.

Since the Constitution was intended not only “to maintain the integrity of the three branches of national government” but to “keep the legislative branch from dominating the other two,” it would be improper to permit Congress to override by statute the standing limitations imposed by Article III. *Id.* at 65. After all, “[e]nforcement of the law is a political decision left to the executive branch; it becomes the concern of the courts only when individually aggrieved plaintiffs appear before them. Permitting Congress to confer standing on anyone by denominating rights as individualized entitlements would disrupt the balance that the Framers created. . . .” *Id.* at 115.

II. IF VIOLATION OF A STATUTORY RIGHT UNACCOMPANIED BY AN ACTUAL INJURY WERE SUFFICIENT TO ESTABLISH CONSTITUTIONAL STANDING, FEDERAL COURTS WOULD BE OVERWHELMED WITH CASES IN A WIDE VARIETY OF SUBJECT MATTER AREAS.

Article III requires a litigant to allege an injury that is “distinct and palpable,” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth*, 422 U.S. at 501), “concrete,” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), “certainly impending,” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979), and “actual or imminent, not ‘conjectural’ or ‘hypothetical’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). To eliminate this requirement and allow it to be trumped by a statutory pronouncement would promote “uncontrolled litigation threatening massive liability.” *Petition for Writ of Certiorari*, p. 31. The threat of liability is even greater in this “era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies.” *Arizona Christian Sch. Tuition Org. v. Winn*, 131 S.Ct. 1436, 1449 (2011).

A brief review of a variety of federal statutes reveals the wide-ranging adverse impact of eliminating or loosening the injury in fact requirement.

The Electronic Communications Privacy Act (“ECPA”) and Stored Communications Act (“SCA”), 18 U.S.C. § 2701, *et seq.*, prohibit unauthorized access to electronic communications (e-mails) or stored electronic information. A violator is subject to civil liability in a claim by a consumer for statutory damages. 18 U.S.C. § 2707(a)-(c). There is a split of authority as to whether actual damages must be alleged to maintain an action under these statutes. *Compare Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 204-06 (4th Cir. 2009) (holding that statutory damages under the SCA are recoverable only where a plaintiff has also suffered *actual damages* (emphasis added) *with Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F.Supp.2d 417, 428 (S.D.N.Y. 2010) (finding Congress intended to allow statutory damages whether or not plaintiff suffered actual damages) and *Freedman v. Town of Fairfield*, 2006 U.S. Dist. LEXIS 66857 (D.Conn. Sept. 19, 2006) (same). Thus, absent an injury in fact requirement, internet service providers and businesses who access employee e-mails could be forced to unnecessarily defend claims under these statutes in federal court.

The Truth in Lending Act (“TILA”), 15 U.S.C. § 1601, *et seq.*, imposes mandatory disclosure requirements on those who extend credit to consumers. TILA was specifically designed to remedy problems that had developed from the rapidly expanding use of consumer credit in the 1960’s. *Purtle v. Eldridge Auto Sales*, 91 F.3d 797, 799-800 (6th Cir. 1996). The purpose of TILA, as stated by Congress, is as follows:

It is the purpose of this title . . . to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. . . .

Id. quoting 15 U.S.C. § 1601(a).

TILA provides for statutory damages of up to \$500,000. 15 U.S.C. § 1640(a) (1)-(4). Courts have interpreted this alternative-damages provision to allow a consumer to bring a claim without having to allege actual damages. *See, e.g., Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2d Cir. 1983); *Purtle*, 91 F.3d at 797. Thus, without an injury in fact requirement, any entity that lends money to consumers, including mortgage companies, credit-card issuers, banks, and car dealers, could be required to face claims under this statute in federal court.

The Cable Communications Privacy Act (“CCPA”), 47 U.S.C. § 551, requires a cable communications provider to disclose to consumers the extent of personally identifiable information collected from consumers and the anticipated use of such information. The CCPA allows a consumer to sue for “liquidated damages” of \$100.00 per day. 47 U.S.C. § 551 (f)(2)(A). Courts have acknowledged the statute gives rise to a private right of action for statutory damages, even where actual damages may be lacking. *See, e.g., Wilson v. American Cablevision of Kansas City, Inc.*, 133 F.R.D. 573, 577 (W.D. Mo. 1990) (denying class certification but noting that a statutory

violation of the CCPA gives rise to a claim without any proof of actual damages); *Metrovision, Inc. v. Wood*, 864 F.Supp. 675, 680 (E.D. Mich. 1994) (allowing a claim for statutory damages where defendant cable customers in piracy suit bringing counterclaim for violation of CCPA did not show any actual damages as a result of cable companies' failure to provide required notice). As the district court in *Warner v. American Cablevision of Kansas City, Inc.*, 699 F.Supp. 851, 859 (D. Kan. 1988) explained:

American [Cablevision of Kansas City, Inc.] violated section 551(a) by failing to make a privacy disclosure at the time it contracted to provide Warner cable service, and it further violated that same section by failing to make the proper disclosures in its bill stuffer. The court finds that Warner was thereby 'aggrieved' by American's violation of the Cable Act. No finding of actual damages or an actual invasion of privacy is required. In fact, it is difficult to conceive of how a subscriber might suffer 'actual' injury as a result of a cable operator's failure to timely provide the subscriber with the proper disclosures as required by section 551(a)(1). Yet, Congress did not limit recovery to those who are the subject of the violations under Subsections (b) through (e). All violations of the Cable Act are actionable.

Thus, if the injury in fact requirement were eliminated, cable providers could be routinely hailed into federal court for alleged violations of the CCPA.

The Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) requires a merchant to omit all but the last five digits of a customer’s credit card number on receipts and provides a statutory damages provision for harm resulting from willful or knowing violations of the Act with respect to a consumer. 15 U.S.C. § 1681c(g), § 1681n(a)(1)(A). This statute, too, could be read to give rise to a federal court action in the absence of an injury in fact.

In *Ramirez v. Midwest Airlines, Inc.*, 537 F.Supp.2d 1161, 1163 (D. Kan. 2008), the plaintiff brought a putative class action lawsuit alleging the defendant violated FACTA by giving her a receipt that included her credit card’s expiration date. Defendant moved for summary judgment on the basis of an expert’s affidavit that the fact that plaintiff’s receipt contained four digits of her credit card number and the card’s expiration date could not have placed her or anyone else at risk of being the victim of fraud or identity theft; therefore, plaintiff could not show the injury in fact required for Article III standing. *Id.* The court disagreed, concluding that because “[a] statute itself may create a legal right,” “the invasion of [that right] causes an injury sufficient to create standing.” *Id.* See also *Korman v. Walking Co.*, 503 F.Supp.2d 755, 759 (E.D. Pa. 2007).

In contrast, some circuits have properly insisted that Congress should not be permitted to override the judicial standing requirements in the Constitution. In *Joint Stock Society v. UDV North America, Inc.*, 266 F.3d 164, 168 (3d Cir. 2001) (Alito, J.) for example, the Third Circuit had the opportunity to analyze the injury in fact question in a case involving allegations of violations of the Lanham Act. 15 U.S.C. § 1051, *et seq.* The plaintiffs (a Russian company and Delaware company designated as its exclusive licensee) contended the defendants had misappropriated the Smirnov vodka name and misled consumers into believing that the Smirnov vodka sold in the United States was made in Russia and was the same product that was purveyed to the czar before the Russian Revolution. *Id.* Plaintiffs had never marketed any vodka in the United States and had not shown they were prepared to sell any vodka in this country that did not use the Smirnov name. *Id.* at 176. The Court determined plaintiffs' claims to be "conjectural" or "hypothetical" and that constitutional standing therefore was not met. *Id.* at 177.

In *Moore v. Radian Group*, the Fifth Circuit affirmed the district court's decision to dismiss putative class claims for alleged violations of RESPA. *Moore v. Radian Group*, 233 F.Supp.2d 819 (E.D. Tex. 2002), *aff'd*, 69 Fed. Appx. 659, 2003 U.S. App. LEXIS 12159 (5th Cir. 2003) (unreported; opinion *available at* <http://www.ca5.uscourts.gov/opinions/unpub/02/02-41464.0.wpd.pdf>). The plaintiffs alleged that in connection with their home mortgages, plaintiffs' lenders

purchased “pool insurance” from Radian at low prices in exchange for the lenders’ referral of primary mortgage insurance (“PMI”) business to Radian. *Id.* at 822. Plaintiffs did not contend the PMI or any other settlement service they received was of inferior quality, or that any portion of their PMI payments was kicked back to the lenders or used to underwrite any of the insurers’ below-market sales of pool insurance in exchange for the referral. *Id.* Rather, plaintiffs alleged they had standing under Article III because the defendants’ allegedly unlawful kickbacks were *per se* violations of RESPA. *Id.* at 822-23. Unlike the Ninth Circuit in this case, the Fifth Circuit determined that plaintiffs had failed “to articulate or plead an actual injury in fact” and therefore lacked standing. Typed opn. at 13.

In order to prevent Congress from exercising unfettered power to confer standing in litigation and flood the federal courts with entirely new varieties of claims, this Court should reaffirm the independent constitutional injury in fact requirement.



CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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