

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FIRST AMERICAN FINANCIAL :

4 CORPORATION, SUCCESSOR IN INTEREST:

5 TO THE FIRST AMERICAN CORPORATION, :

6 ET AL., : No. 10-708

7 Petitioners :

8 v. :

9 DENISE P. EDWARDS :

10 - - - - - x

11 Washington, D.C.

12 Monday, November 28, 2011

13

14 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:03 a.m.

17 APPEARANCES:

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19 behalf of Petitioners.

20 JEFFREY A. LAMKEN, ESQ., Washington, D.C.; on  
21 on behalf of Respondent.

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24 United States, as amicus curiae, supporting  
25 Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 10-708, First American Financial Corporation v. Edwards.

Mr. Panner.

ORAL ARGUMENT OF AARON M. PANNER

ON BEHALF OF THE PETITIONERS

MR. PANNER: Mr. Chief Justice, and may it please the Court:

Article III requires a private plaintiff to show injury in fact, which means at a minimum that the alleged illegal conduct made her worse off. Factual injury does not automatically follow from violation of a statutory duty owed to the plaintiff, and Ms. Edwards has not alleged the type of harm alleged by plaintiffs in the common law cases that she invokes -- no misappropriation of her property, no loss of desired opportunity or benefit, no injury to reputation.

JUSTICE BREYER: Let me just get -- use an example, a hypothetical based on the next case, really: I was thinking Congress passes a law, says you can't phone people between 7:00 at night and 7:00 in the morning and try to sell them something, okay? That's the law. And anyone who gets such a phone call gets

1 \$500 in damages automatically if they sue in court if  
2 they receive such a call.

3 The harm was getting the call. So my  
4 grandmother, who is always complaining no one ever calls  
5 her, loved the telephone call. She loved it. The best  
6 thing happened to her in a month, okay?

7 Now, can she sue?

8 MR. PANNER: No, Your Honor. If she does  
9 not have actual injury, the fact of the statutory  
10 violation would not give rise to standing in that case.  
11 Now, it's -- I think it would be quite unlikely that a  
12 plaintiff would come before the Court and say: Actually  
13 the statutory violation delighted me; I nevertheless  
14 would like my \$500. But if the injury-in-fact  
15 requirement means anything, it means that a plaintiff  
16 who comes before the Court must have a harm in fact.

17 JUSTICE BREYER: In other words, if the FDA  
18 bans a substance on the ground that 98 percent of the  
19 people it hurts, and there is some kind of automatic  
20 recovery, \$500 anybody who bought the substance because  
21 it wasn't supposed to be sold, and she's one of  
22 the 2 percent that it helped --

23 MR. PANNER: Well, Your Honor --

24 JUSTICE BREYER: -- you can't sue?

25 MR. PANNER: In the case -- in the case in

1 which someone is exposed to a substance that has -- that  
2 is illegal, they might well suffer a harm, and the harm  
3 might be the exposure to the substance. And the -- the  
4 sort of inquiry that you are looking into, which is even  
5 if the exposure ended up not being harmful, would that  
6 be a case?

7 JUSTICE BREYER: Well, here she was exposed,  
8 or the plaintiff was exposed, to the kind of transaction  
9 that Congress said was harmful as a general matter, just  
10 like the example you gave.

11 MR. PANNER: I don't think so, Your Honor.  
12 And the reason is that in this case, the violation -- as  
13 her complaint makes clear, she paid the only rate for  
14 title insurance available in Ohio. She does not  
15 complain of the quality of the insurance or the service  
16 she received. She does not maintain --

17 JUSTICE SOTOMAYOR: But, counsel, going  
18 back --

19 CHIEF JUSTICE ROBERTS: I'm sorry.  
20 Justice Ginsburg.

21 JUSTICE GINSBURG: Because she can't prove  
22 it at the early stage, and the problem that Congress was  
23 concerned about was that you can't tell until the house  
24 is going to be sold in the end how adequate the title  
25 insurance was. So Congress is acting on the potential

1 that these kind of kickbacks can cause harm. And this  
2 does seem to fit the bill of restitution, unjust  
3 enrichment cases, where the plaintiff doesn't have to  
4 prove any harm, she just gets back what the defendant  
5 should not have received.

6 MR. PANNER: Your Honor, with respect to  
7 unjust enrichment cases, those cases reflect  
8 circumstances where there is a benefit received at the  
9 expense of the plaintiff. And in -- in the traditional  
10 sorts of cases -- unjust enrichment, of course, is an  
11 invention as a category that is relatively recent. But  
12 unjust enrichment cases reflect quasi-contract  
13 circumstances, where a benefit was conferred, that  
14 injustice should have been compensated, so the plaintiff  
15 is made worse off in not receiving the benefit or the  
16 compensation for the benefit; or a circumstance of  
17 constructive trust, where there was property or other  
18 right of the plaintiff that was misappropriated and used  
19 without the permission of the plaintiff. So an  
20 opportunity or a property was taken away.

21 This is not a case like that, and there is  
22 no allegation that there is anything lacking in the  
23 insurance that was issued. This is a circumstance in  
24 which Congress may believe that a certain practice as a  
25 general matter can tend to bring out -- bring about

1 bad -- bad outcomes and can therefore make it unlawful.  
2 But the question here is whether this plaintiff has a  
3 harm --

4 JUSTICE SOTOMAYOR: Counsel, are you taking  
5 a very broad position that this is an unusual State, it  
6 appears, with three or four others, where the States  
7 mandate that title insurance be at a fixed price. But  
8 in those States in which there is no such mandate, you  
9 seem to be arguing that Congress can't ever presume  
10 damages or injury, that even in those cases the  
11 plaintiff has to come in and prove that they would have  
12 paid less.

13 Is that the position you are taking?

14 MR. PANNER: No, Your Honor. The type of  
15 injury that is incurred doesn't necessarily have to be a  
16 financial one and there could be circumstances where a  
17 plaintiff would allege an injury -- and I -- it's  
18 important to --

19 JUSTICE SOTOMAYOR: No, no. Please tell me,  
20 in those States in which insurance is not fixed by the  
21 State, what does the plaintiff have to do other than to  
22 say, "they didn't disclose to me that there was a  
23 kickback and I want the amount I paid for the service"?  
24 Do they have to show something more?

25 MR. PANNER: If the -- I want to -- I'm not

1 sure I understand Your Honor's question, but if the  
2 question is, there were various rates available and the  
3 Plaintiff alleges an overcharge, that they purchased  
4 a -- a policy and there was a cheaper policy available,  
5 and as a result of the violation --

6 JUSTICE SOTOMAYOR: So you are in fact  
7 arguing very broadly that there is no presumption of --  
8 of injury in these cases, that the plaintiff still has  
9 to come in and prove --

10 MR. PANNER: Your -- Your Honor --

11 JUSTICE SOTOMAYOR: -- that in fact they  
12 would have gotten a cheaper -- a cheaper policy?

13 MR. PANNER: Your Honor, the -- the  
14 plaintiff would have to allege in the complaint and then  
15 eventually show that there was some injury. It doesn't  
16 have to be a financial injury.

17 JUSTICE SOTOMAYOR: Same thing with nominal  
18 damages and statutory damages? You're -- you're taking  
19 a very broad position now.

20 MR. PANNER: I don't think so, Your Honor,  
21 because again the question for purposes of standing, the  
22 question for purposes of the ability of a plaintiff to  
23 come into court, is to show that they have some injury  
24 in fact, that there is some harm, some way in which they  
25 were made worse off. This plaintiff --



1 JUSTICE SCALIA: That's not so  
2 extraordinary. It is what has to be shown in -- in  
3 Sherman Act cases, right? Contracts and combinations  
4 in -- in restraint of trade are unlawful; but in order  
5 to recover under the Sherman Act, you have to show not  
6 only that it was unlawful, but that you were harmed by  
7 it.

8 MR. PANNER: That's true. That's certainly  
9 the norm in all sort of tort -- tort cases.

10 JUSTICE KENNEDY: I was going to ask you,  
11 along that line, are there any trust cases that -- that  
12 Respondents or the government could cite in which a  
13 party can go into court alleging that the market has  
14 been distorted, even though that person has no damage?  
15 Anything like that in the antitrust? What would be  
16 their closest case?

17 MR. PANNER: Well, Your Honor, I'm not  
18 sure -- I did not see any of the cases that they cited  
19 involving the trust -- the trust circumstance --

20 JUSTICE KENNEDY: Yes.

21 MR. PANNER: -- where there was that sort of  
22 vague allegation. The trust cases I think actually are  
23 a good illustration of the type of injury that is  
24 required. We are talking about trust, not antitrust  
25 now.

1 JUSTICE KENNEDY: Right.

2 MR. PANNER: But the trust cases involve a  
3 circumstance, the -- I think that the plaintiff here  
4 kind of gives the game away by, in the -- when talking  
5 about the Michoud case, using the phrase "the plaintiff  
6 may sue," and of course that's not what the case says.  
7 What the case says is that a -- that a beneficiary can  
8 come into court and say: The trust has violated the  
9 duty to me; I want to unwind the transaction to get the  
10 benefit that I would have gotten had the trustee behaved  
11 in the way required. So in those cases involving  
12 trustees, for example, they --

13 JUSTICE KENNEDY: There is not automatic  
14 disgorgement in those --

15 MR. PANNER: There could be automatic  
16 disgorgement, Your Honor. But again that reflects the  
17 lost value of what was paid for in terms of the -- of  
18 the --

19 JUSTICE SCALIA: Well, but --

20 JUSTICE KAGAN: Mr. Panner, I thought --

21 JUSTICE SCALIA: -- let -- let's assume that  
22 a trustee acts on its own interest and -- and sells  
23 property. But let's assume that he gets top dollar for  
24 that property, so that the beneficiary hasn't really  
25 been deprived of anything. What is the injury to the

1 beneficiary?

2 MR. PANNER: Well, the injury to the  
3 beneficiary in that circumstance, Your Honor, is that  
4 the trustee would have misappropriated an opportunity  
5 that belonged to the beneficiary. In the cases  
6 that are -- in the ordinary case, then, the beneficiary  
7 has the option to say, I would like to unwind that or  
8 get the benefit that the trustee got, if there was  
9 self-dealing. But in a circumstance where a trustee  
10 sells, for example, a piece of property and the -- and  
11 the claim is one for restitution to try to unwind the  
12 transaction that was done, it's the option of the  
13 beneficiary to say: You know what, maybe I am wrong but  
14 I think I would be better off if I could undo that  
15 transaction.

16 So it's a very conventional kind of harm  
17 where someone believes that their property was -- was  
18 taken away from them and used in a way to their  
19 detriment, and they are therefore seeking relief.

20 JUSTICE SOTOMAYOR: So what more does this  
21 plaintiff have to allege other than, if I had been told  
22 that this was a prearranged, tied product between the  
23 mortgage and the title company, but that I had a right  
24 to get an untied product even at the same price, and I  
25 would have exercised that right if I had known -- would

1 that be enough?

2 MR. PANNER: That might be enough, Your  
3 Honor. But that's exactly what she didn't allege.

4 JUSTICE SOTOMAYOR: Would that be enough  
5 in -- in Justice Breyer's example, of someone who says,  
6 I received a call at midnight and it bothered me?

7 MR. PANNER: Yes, I think that certainly  
8 would be enough, absolutely. The -- the point is that  
9 this complaint abstracted away any such particularized  
10 claim for a very particular purpose, which was that in  
11 order to maintain this case as a class action the basis  
12 of harm could not be anything personal or individual to  
13 this plaintiff.

14 JUSTICE SOTOMAYOR: So you go back to your  
15 position that Congress has no power to give a cause of  
16 action on the basis of a statutory violation in which it  
17 is presuming injury?

18 MR. PANNER: That is correct, Your Honor.  
19 The -- what Congress cannot do is to confer on a  
20 particular plaintiff an injury that is constitutionally  
21 sufficient under Article III. I think this Court has  
22 made clear that Congress cannot do that and that the  
23 existence of a statutory right by itself, even the  
24 invasion, the violation of the statutory right does not  
25 create injury for constitutional purposes. Injury --

1 JUSTICE SOTOMAYOR: Well, certainly you  
2 couldn't -- you couldn't sue. But if I paid money that  
3 I would have -- and that I'm entitled to get back, then  
4 I have been injured, because --

5 MR. PANNER: Well, Your Honor, you paid  
6 money -- in this case the plaintiff paid money for a  
7 title insurance policy which she received. She paid at  
8 -- at the legally required rate, and she makes no  
9 complaint about the policy, nor does she claim that it  
10 would have mattered to her --

11 JUSTICE ALITO: Could I ask you to clarify  
12 something? What could a plaintiff who purchases title  
13 insurance in Ohio allege that would be sufficient to  
14 provide standing?

15 MR. PANNER: Well, certainly if a plaintiff  
16 said that the -- that the manner in which the title  
17 insurance was provided had delayed her closing or that  
18 there were procedures that were --

19 JUSTICE ALITO: No, what could be done --  
20 okay. Go ahead.

21 MR. PANNER: -- that there was something  
22 about the service that she received as a result of  
23 the -- the referral to a particular title insurer,  
24 again, assuming that this is a violation, which we  
25 don't -- we don't think it is. But -- but assuming that

1 it is, that --

2 JUSTICE ALITO: So you could -- the  
3 plaintiff could allege some kind defective service at  
4 the time when the title insurance was purchased? There  
5 really is no service provided at that time, is there?

6 MR. PANNER: Actually, most --

7 JUSTICE ALITO: You get a title insurance  
8 policy and that's it; and you don't know whether -- you  
9 don't know what will happen if there is some problem  
10 alleged with the title at some point down the road.

11 MR. PANNER: Well, that's really -- the --  
12 the risk of that is really on the title insurer, which  
13 is why the title insurer has no incentive whatsoever to  
14 encourage poor service by a title insurance agent.

15 JUSTICE KENNEDY: Well, that -- that leads  
16 me to this point. I thought -- I never thought of title  
17 insurance companies as being fungible, and some were  
18 very, very good about narrowing the exceptions, about  
19 working with the seller of the property, if you  
20 represented the buyer, to get rid of the exceptions.  
21 And so I'm not sure that it's just a question of a  
22 policy versus no policy. There's a -- there's a quality  
23 to the -- to the research they do.

24 And the next -- and related to that is this:  
25 you -- you put the case as if the price is going to be

1 the same for the insurance. A, I think there is nothing  
2 in the -- in the State law that permits the insurance  
3 company to get -- to set a lower rate; and second, don't  
4 the title companies charge other fees, title search fees  
5 and so forth, other fees in addition to the price of the  
6 insurance? And those other fees, arguably -- I know she  
7 didn't allege any damage -- but those other fees  
8 arguably are too high because of this fixed market.

9 MR. PANNER: Well, Your Honor, that --

10 JUSTICE KENNEDY: Now, she didn't allege  
11 that. I know that.

12 MR. PANNER: She didn't allege it, and I  
13 think that's critical, because the -- the issue is not  
14 whether it's conceivable that an injury could occur from  
15 the violation. It could. And what you have indicated  
16 about difficulty clearing objections to a title, for  
17 example, if there was a problem that she had with  
18 respect to that and she believed it was the case, that  
19 would actually be the job of the title agent, which --  
20 and there is no allegation that she was improperly  
21 referred to the title agent.

22 So the insurer is issuing -- underwriting  
23 the policy and bears the residual risk, but it's the  
24 agent that is actually engaged with the -- with the  
25 plaintiff here. And there, the agent's name here was

1 Tower City.

2 JUSTICE BREYER: Suppose Congress makes a  
3 finding; this is the finding: We think that lawyers or  
4 whoever is engaged in these who hire title insurance  
5 companies should hire the best one on the merits, not on  
6 the basis of which one will give them the biggest  
7 kickback. We think that's so because that will help  
8 keep people secure. Everyone in such -- who buys a  
9 house will feel more secure knowing that the market  
10 worked there. We can't prove who feels insecure and who  
11 doesn't. We think in general they would, and so we give  
12 everybody the right to recover \$500 if they are injured,  
13 where the injury consists of being engaged in a  
14 transaction where the title insurance company was not  
15 chosen on the merits, but was chosen in whole or in part  
16 on the basis of the kickback.

17 And they write that right into the statute,  
18 so therefore there is no doubt that the plaintiff here  
19 suffered the harm that Congress sought to forbid. That  
20 harm was being engaged in a transaction where the title  
21 insurance company was not chosen on the merits, but  
22 partly in terms of a kickback. Now, what in the  
23 Constitution forbids Congress from doing that?

24 MR. PANNER: The Constitution, Article III,  
25 as this Court has interpreted it, requires that a



1 plaintiff that comes into court must have suffered an  
2 injury in fact, and Congress cannot create that injury  
3 legislatively. Otherwise, the Congress can enlist the  
4 courts for regulatory purposes that are unrelated to the  
5 core function of the Court as this Court has articulated  
6 it.

7 JUSTICE KAGAN: Mr. Panner, suppose there  
8 were a contract between Ms. Edwards and Tower and the  
9 contract had a no-kickback clause, not one that  
10 suggested that Ms. Edwards had to show any kind of  
11 injury, greater cost or lesser service, but just you  
12 can't have any kickbacks. Can she sue on that contract?

13 MR. PANNER: Well, if it was a negotiated  
14 agreement and it was -- it was one where the parties had  
15 given value for that assurance, then that would  
16 represent something that there had been a judgment in  
17 advance by this particular individual that that was  
18 something that was a performance that she was willing to  
19 pay for and a promise that meant something to her, and  
20 so that would potentially be a different case.

21 JUSTICE KAGAN: And now suppose that  
22 Congress passes a law and says every contract of this  
23 kind has to have such a provision in it.

24 MR. PANNER: Right.

25 JUSTICE KAGAN: Would she now have standing?

1 MR. PANNER: Most likely not, Your Honor.  
2 And the reason is that it's the difference between a  
3 contract that the parties engage in, where there would  
4 be a -- if there's a negotiated contract, it would be  
5 reasonable for the Court to say, well, there's value  
6 attached to the rights that the parties have bargained  
7 for here. But it's different if Congress is using it as  
8 a mechanism to create injury legislatively, and in that  
9 circumstance the court would still have to determine  
10 whether there was injury in fact that would allow the  
11 Plaintiff to get into court. But it's a different case.

12 JUSTICE SCALIA: Could Congress decree that  
13 the agent in this case shall be an agent of the  
14 purchaser rather than an agent of the title insurance  
15 company, as is done in real estate, I think? The real  
16 estate broker must be an agent of the seller and not of  
17 the purchaser. Can it establish a trust relationship  
18 between the purchaser here and the person selecting the  
19 title insurance company?

20 MR. PANNER: Well, I think that Congress  
21 could potentially create a trust relationship.

22 JUSTICE SCALIA: And if it did, would the  
23 violation of that trust relationship constitute injury  
24 for -- for Article III purposes?

25 MR. PANNER: Well, it would depend, Your

1 Honor. Not per se. It would depend on whether there  
2 was some way in which that violation caused an injury in  
3 fact. So, for example -- first of all, to the extent  
4 that there was some --

5 JUSTICE SCALIA: We don't require injury in  
6 fact for most breaches of trust, do we?

7 MR. PANNER: You do, Your Honor. That is to  
8 say that in the case of any of the examples that the  
9 plaintiff has cited there is an underlying interest, an  
10 antecedent interest, a concrete interest in property or  
11 in an economic opportunity, paid-for services of an  
12 agent, and it is that concrete interest which is invaded  
13 by the -- by the alleged violation of the responsibility  
14 of trust.

15 But of course here you don't even have that  
16 relationship of trust. As --

17 JUSTICE SCALIA: Well, I understand, but I'm  
18 just saying that that concrete interest can be created  
19 by Congress instead of being created by contract. What  
20 difference does it make? If you become a trustee by  
21 contract you get one result, but if you are a trustee by  
22 government decree so that you must be a trustee,  
23 contract or not, somehow the situation changes?

24 MR. PANNER: I don't -- I don't think the  
25 situation would change. I guess what I'm saying is that

1 even -- I don't see any of the common law cases  
2 involving trusts, trustees, as involving recoveries or  
3 suits in the absence of what this Court would certainly  
4 consider to be an injury in fact, that is to say some  
5 harm to a concrete interest that exists apart from the  
6 statutory duty or the common law duty.

7 JUSTICE KAGAN: Mr. Panner, in response to  
8 Justice Scalia's questions and my questions, you are  
9 suggesting that there is a difference depending on what  
10 the source of the law is. If the source of the right is  
11 a contract, there is one result. If the source of the  
12 right is a statute, there is another result. And I  
13 thought that that was very much -- that is -- that's  
14 very much inconsistent with our case law, and  
15 specifically with Lujan.

16 MR. PANNER: I certainly didn't mean to say  
17 that, Your Honor, so let me try to clarify. The  
18 question was, there are circumstances in which the legal  
19 relationship is such that there could be -- let me back  
20 up.

21 The question is whether there is an injury  
22 in fact, that is to say a harm that exists as a factual  
23 matter, and those interests certainly can be reflected  
24 by the legal duties that are created. So, for example,  
25 there are legal duties in contract that are intended to

1 protect the interests of the contracting parties. There  
2 are legal duties under the law of trust that are  
3 intended to protect the beneficiary.

4 But this Court has frequently reflected the  
5 fact that there is the question of the violation, but  
6 then there is separately the question of the injury.  
7 And the point that I'm making -- and it should be the  
8 same answer with respect to your question and  
9 Justice Scalia's -- is if the mere fact of a violation  
10 of a duty does not create injury per se, and none of the  
11 cases reflect that, and that is the proposition that  
12 plaintiff relies on here, precisely because of what she  
13 alleged and what she is attempting, the type of case  
14 that she is attempting to bring. She is attempting to  
15 bring a case in which the statutory violation is the  
16 injury. No other injury is required. She very  
17 straightforwardly says, it does not matter if there is  
18 any economic harm, it does not matter if there is any  
19 quality difference, it does not matter if there is any  
20 consequential effect on me at all.

21 JUSTICE KAGAN: I'm not sure that that's the  
22 right understanding of her complaint. She is saying: I  
23 don't have to prove those things because there's been a  
24 judgment made that these kinds of practices tend to  
25 decrease service and tend to increase price and

1 therefore I don't have to prove those matters. And  
2 that's the exact same judgment that is made in the trust  
3 cases, for example.

4 MR. PANNER: Again, I don't think that the  
5 trust cases can be fairly read to say that, Your Honor.  
6 But the key point is that there is a distinction between  
7 what Congress -- the statutory duties that Congress can  
8 impose and the manner in which Congress can choose to  
9 have those enforced -- well --

10 JUSTICE GINSBURG: Suppose she appended to  
11 her complaint an affidavit by a well-respected economist  
12 that says: Congress was right; these kind of  
13 arrangements will have an adverse effect on the people  
14 who are purchasing title insurance, and goes through all  
15 kinds of analyses that show that. Would that be  
16 adequate then?

17 MR. PANNER: Well, at the pleading stage it  
18 might be, Your Honor. That is to say that if the  
19 question were whether there was an allegation, certainly  
20 it's possible that there could be a sufficiently  
21 concrete allegation in a complaint that there was that  
22 sort of an impact, but -- and this is critical -- not  
23 only was that not alleged here, but the mere fact that  
24 there is a statutory duty does not reflect that's the  
25 judgment or, you know, the fact that there's been any

1 sort of many systemic effect.

2 Congress has broadly prohibited practices  
3 involving kickbacks and the paradigm case has nothing to  
4 do with a situation in which a title insurance agent is  
5 issuing a title insurance policy for an underwriter.

6 Now, it's not to say that Congress can't  
7 pass a broader prohibition and -- you know, and require  
8 that it be enforced. Well, Congress can pass a broader  
9 prohibition and then the executive could enforce it.  
10 But what Congress cannot do is to dictate in advance  
11 that a particular practice has caused injury to a  
12 particular plaintiff.

13 JUSTICE KAGAN: Counsel, I'm still having  
14 problems.

15 JUSTICE KENNEDY: Just following up Justice  
16 Ginsburg's hypothetical, suppose the Congress works with  
17 economists and concludes there is a reasonable  
18 probability that if there were no kickbacks there would  
19 be a more competitive market, there would be lower  
20 prices for some of the escrow fees, some of the  
21 collateral fees in addition to the title insurance. And  
22 the plaintiff then alleges that there is this reasonable  
23 probability that there would be a more efficient market,  
24 resulting in cost savings. Would that be enough?

25 MR. PANNER: Well, Your Honor, there has to

1 be a connection between the violation alleged and the  
2 harm that ensues, and so a general understanding that --

3 JUSTICE KENNEDY: Well, the person alleges:  
4 And I was in this market and I might have -- there is a  
5 reasonable probability that I could have had a lower  
6 price, according to economic theory.

7 MR. PANNER: Well -- well, again, that  
8 wasn't alleged here. So the question --

9 JUSTICE KENNEDY: I'm assuming it's alleged.

10 MR. PANNER: I understand that, Your Honor.  
11 So the question would be particular to the allegations  
12 that were made. In a case like this one, it's in all  
13 likelihood a generic allegation that there had been --  
14 that there was some sort of systemic effect is -- it  
15 would be insufficient. That would be a speculative sort  
16 of claim of harm and that would be really something  
17 where if it's a general systemic effect with no  
18 traceability between the violation that's alleged and  
19 any supposed harm to the plaintiff, that that would be  
20 something for the executive.

21 Mr. Chief Justice, if I can reserve --

22 JUSTICE ALITO: If the plaintiff went  
23 further and alleged some harm particular to her,  
24 wouldn't that be even more speculative, some economic  
25 harm particular to her? I don't want to take up your



1 rebuttal time, but --

2 MR. PANNER: Thank you, Your Honor.

3 I think it would depend. I mean, certainly  
4 there are all sorts of circumstances where there is  
5 broad systemic harm, but yet the harm to the plaintiff  
6 is very clear, if you think about, for example, about  
7 price-fixing.

8 If I could reserve the remainder.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Panner.

11 Mr. Lamken.

12 ORAL ARGUMENT OF JEFFREY A. LAMKEN

13 ON BEHALF OF THE RESPONDENT

14 MR. LAMKEN: Thank you, Mr. Chief Justice.

15 And may it please the Court:

16 For at least 280 years the law has been  
17 clear that when someone breaches a duty of loyalty owed  
18 to you by taking a kickback or otherwise introducing a  
19 conflict into a transaction, you can sue on the basis of  
20 that alone, without showing a further harm in terms of  
21 economic loss. The invasion of your right to  
22 conflict-free service was itself a sufficiently concrete  
23 and particularized injury in fact, not an abstract and  
24 undifferentiated --

25 JUSTICE SCALIA: You speak of a duty of

1 loyalty. There is no duty of loyalty owed here. It was  
2 just a law that said you cannot get -- and I'm not even  
3 sure it's proper to call it a kickback. It's a  
4 commission. These people are agents for the title  
5 insurance company and they get a commission on -- on  
6 every sale of title insurance that they make. You can  
7 call it a kickback, I suppose. I don't know why the  
8 other side does. But, but -- but it seems to me a  
9 commission. There is no duty of loyalty. Isn't the --  
10 isn't the seller here the agent of the title insurance  
11 company?

12 MR. LAMKEN: Congress could have made them,  
13 the agent, could have, as you pointed out, could have  
14 made them a full-fledged fiduciary. Elevating your  
15 interest in having no conflicts whatsoever in the  
16 transaction to establish -- -

17 JUSTICE SCALIA: We'd have a different --  
18 we'd have a different case then. But they didn't do  
19 that, did they?

20 MR. LAMKEN: Congress actually elevated one  
21 component of that by giving you a right to -- freedom  
22 from a particular conflict of interest, and that is the  
23 kickbacks that undermine their incentive to serve your  
24 best interest, that undermine their incentive to choose  
25 the insurer that provides the best quality and the best

1 service.

2 JUSTICE ALITO: Well, this is where I have  
3 problems with your argument, because this doesn't seem  
4 to me to be a fiduciary relationship and I don't see  
5 where the duty of loyalty comes from. And to say that  
6 Congress can just impose some attributes of a fiduciary  
7 relationship wherever it wants seems rather strange.

8 Let me give you this example. I take my car  
9 to an auto dealer to have -- because it's making a  
10 strange sound. And I say: Call me up when you figure  
11 out what you think is the problem. And they call me up  
12 and they say: Well, there are certain things wrong with  
13 it, and it's going to cost you \$1,000. And I say:  
14 Okay, now, thanks for diagnosing the problem; where  
15 should I have it fixed? Should I have it fixed at your  
16 shop or should I go to another place and have it fixed?  
17 And they say: Well, have it fixed at our shop. Now, is  
18 there a breach of a duty of loyalty there?

19 MR. LAMKEN: Well, you might have an  
20 interest in getting an honest opinion. It's just not  
21 protected by law. They are allowed to tell you what  
22 they want to tell you because you have no protected  
23 interest in their opinion.

24 JUSTICE ALITO: I know. But we are looking  
25 for whether there is an injury in fact. Put aside the

1 question of whether there is a breach of the duty in  
2 law. There is allegedly here. I just don't see where  
3 there is an injury in fact, because I know -- I'm an  
4 idiot if I don't realize -- that they have a strong  
5 economic incentive to say: Come have it fixed at my  
6 place.

7 MR. LAMKEN: Well, in fact, Your Honor,  
8 Congress is entitled to elevate your interest in  
9 obtaining honest judgments or conflict-free advice to  
10 legal protection. Whether you would be an idiot in  
11 accepting it or expecting it in the first instance, they  
12 can take that relationship and make it confidential and  
13 make it an honest one, even if you hadn't expected that  
14 in the first place.

15 JUSTICE SCALIA: Well, the issue isn't  
16 whether they can afford it legal protection. They  
17 certainly can. And there can be suits by -- by the  
18 Federal government or I think under this statute even by  
19 State, State attorneys general. The issue isn't whether  
20 Congress can achieve that result. It's whether they can  
21 achieve it by permitting private suits.

22 MR. LAMKEN: Right. But the common law was  
23 absolutely clear that when someone invaded your right to  
24 a conflict-free transaction, invaded your right not to  
25 have kickbacks in your transactions, you didn't have to

1 prove that there was an economic consequence. The  
2 invasion of your right not to have conflicts invade that  
3 transaction was sufficient.

4 JUSTICE KENNEDY: Could you tell me, just  
5 with Justice Alito's automobile hypothetical, just as a  
6 matter of agency law -- I'm a little rusty on this one.  
7 If the auto repair people phone and say, and you need  
8 two parts and we will purchase those parts for you, and  
9 they then purchase parts from a company that they own,  
10 under standard agency law could the vehicle owner get  
11 disgorgement?

12 MR. LAMKEN: If they are acting --

13 JUSTICE KENNEDY: And he doesn't know, they  
14 haven't been informed --

15 MR. LAMKEN: If that is an agency duty, and  
16 we assume that that's an agent; they are acting as agent  
17 for the person with the broken car -- the answer is  
18 absolutely, without having to show any loss. And this  
19 Court's case in *Magruder v. Drury* was that type of case,  
20 where it was absolutely clear that the plaintiff would  
21 not have paid a cent more, the estate would not have  
22 paid a cent more if that -- if they had gone elsewhere  
23 to make the purchase.

24 JUSTICE SCALIA: If I take my car to an auto  
25 mechanic, he's not my agent. He's an independent

1 contractor doing business. He's not my agent.

2 MR. LAMKEN: That's exactly why I said --

3 JUSTICE SCALIA: And it's not an agency  
4 relation here, either. It's a customer going to  
5 somebody who is an independent contractor.

6 MR. LAMKEN: Congress imposed one component  
7 of the duty that applies to agents and fiduciaries  
8 across the board and that is: Don't take kickbacks that  
9 undermine the incentive to obtain the best deal offered  
10 a consumer.

11 JUSTICE SCALIA: It wasn't agents and  
12 fiduciaries across the board. He is neither an agent  
13 nor a fiduciary. And what's the closest case you have  
14 to a situation where there is neither an agency  
15 relationship nor a trust relationship, and yet this kind  
16 of a right to sue without showing damage exists? What's  
17 your -- what's your best shot?

18 MR. LAMKEN: Well, the law has a number of  
19 contexts where you don't have to show financial losses.  
20 If somebody defames you, you don't have to -- in your  
21 business, you don't have to show that you are  
22 financially injured. That's injury in fact in and of  
23 itself.

24 CHIEF JUSTICE ROBERTS: Well, that gets to a  
25 point that I am having trouble getting my arms around.

1 It seems to me what your position is, what you want us  
2 to focus on, there are three possible arguments. One is  
3 that there is injury in fact in this case. I see some  
4 of that argument in your briefs. Two, that Congress  
5 presumes injury in fact. Injury in fact is still  
6 required, but that is presumed. I read that to be  
7 perhaps what the trust cases say. Or three, that injury  
8 in fact is not required at all. Now, which are you  
9 arguing? One, two or three?

10 MR. LAMKEN: I think our argument is that  
11 the invasion of your statutory right to a conflict-free  
12 service is itself an injury in fact --

13 CHIEF JUSTICE ROBERTS: Okay, statutory  
14 right.

15 MR. LAMKEN: But it also has --

16 CHIEF JUSTICE ROBERTS: Could I? I'm sorry  
17 to interrupt you, but I want to pause on that question.  
18 You said violation of a statute is injury in fact. I  
19 would have thought that would be called injury in law.  
20 And when we say, as all our standing cases have, is that  
21 what is required is injury in fact, I understand that to  
22 be in contradistinction to injury in law. And when you  
23 tell me all that you've got or all that you want to  
24 plead is violation of the statute, that doesn't sound  
25 like injury in fact.

1                   MR. LAMKEN: It's injury in fact in the  
2 following two senses, Judge -- Mr. Chief Justice.  
3 First, all you have to do -- getting a conflict-free  
4 referral is itself substantively more valuable than  
5 getting one laden by conflict.

6                   CHIEF JUSTICE ROBERTS: Okay. Now, that  
7 goes back to the first proposition. That is an argument  
8 that there is injury in fact here. So it seems to me  
9 that -- I don't mean this in a pejorative sense, but it  
10 seems to me that you slide back and forth between one,  
11 two, and three, which makes it hard for us to get a  
12 decision.

13                   MR. LAMKEN: I think the answer is so long  
14 as Congress has entitled you to something of potential  
15 value that isn't being denied to every other member of  
16 the public in an undifferentiated way, that is  
17 sufficient to be injury in fact.

18                   CHIEF JUSTICE ROBERTS: Potential value.

19                   MR. LAMKEN: Potential value. And it's more  
20 valuable --

21                   CHIEF JUSTICE ROBERTS: Now, we said in the  
22 Whitmore case, and this is a quote: "Allegations of  
23 possible future injury do not satisfy the requirements  
24 of Article III." Potential value sounds to me like  
25 possible future injury.



1 MR. LAMKEN: In this sense, Your Honor.  
2 What you received is substantively less valuable. All  
3 you have to do is ask yourself: Would I value more  
4 advice from somebody who is playing it straight on the  
5 financial side or someone who is taking kickbacks from  
6 the --

7 CHIEF JUSTICE ROBERTS: So that is injury in  
8 fact?

9 MR. LAMKEN: That is injury in fact, and  
10 there is another way in which it's injury in fact.

11 CHIEF JUSTICE ROBERTS: So if you tell me  
12 what this case is about is whether or not you've shown  
13 injury in fact, it's not a significant -- significant  
14 case, and your client has to prove that at trial.

15 MR. LAMKEN: Well, she proved that she got  
16 something less valuable. She got something she was  
17 entitled to --

18 CHIEF JUSTICE ROBERTS: But I thought -- and  
19 maybe it's a unique circumstance in this case, but Ohio  
20 says this is going to cost you the same no matter what  
21 you do.

22 MR. LAMKEN: That is actually quite  
23 incorrect, Your Honor.

24 CHIEF JUSTICE ROBERTS: Okay. But then  
25 again, that's an argument about was there or was there

1 not injury in fact.

2 MR. LAMKEN: Well, the injury in fact is  
3 getting something that is potentially -- not getting  
4 something to which the law entitles you, which has  
5 potential value to you. And a conflict-free referral is  
6 much more valuable than one laden by conflict.

7 And there is another thing. We haven't  
8 disclaimed the notion entirely. We haven't -- in fact  
9 we believe it is very likely that -- that quality or  
10 price suffered as a result of these -- of these  
11 conflicts. But --

12 CHIEF JUSTICE ROBERTS: That sounds, again  
13 to use a word that we have said is inadequate to support  
14 standing, that sounds conjectural.

15 MR. LAMKEN: No, it is not, It's not  
16 conjectural at all. Congress specifically found that  
17 these are the consequences. But the reason --

18 CHIEF JUSTICE ROBERTS: No, no, no. We are  
19 talking about not what Congress found; but what the  
20 injury in fact is.

21 MR. LAMKEN: Your Honor, so -- -

22 CHIEF JUSTICE ROBERTS: You will agree,  
23 won't you, that the idea that it's certainly possible or  
24 whatever your formulation was, that the quality here  
25 wasn't good enough or that the entire quality across the

1 board might be better, that's conjectural, right?

2 MR. LAMKEN: No. Well, Your Honor, it is  
3 very hard to prove. And it was for that exact reason  
4 that --

5 CHIEF JUSTICE ROBERTS: Now we in point --  
6 now we are at level two: It's hard to prove. So is  
7 that your argument, that Congress presumed injury?

8 MR. LAMKEN: No, Your Honor.

9 CHIEF JUSTICE ROBERTS: Okay.

10 MR. LAMKEN: That's why the common law  
11 elevated the right to conflict-free services from not  
12 being legally protected to legal protection, because it  
13 was so hard to figure out, for the judge --

14 JUSTICE BREYER: What is the -- I think this  
15 is very interesting and informative to me. Go back to  
16 the middle category. As I am now seeing it, have you a  
17 version of the middle category that the Chief Justice  
18 was asking. And -- and call it Congress sometimes  
19 passes a statute that creates a pariah. It could be a  
20 substance, it could be a form of behavior, it could be a  
21 structure of an industry.

22 And then once it does that, it makes that  
23 unlawful. And now what it's done, it is more unusual  
24 than I ever thought. It comes up in the loyalty  
25 context, fiduciary, but we are not talking about

1 fiduciary. It says it is a harm and you will earn money  
2 if you deal with a pariah, assuming it wasn't your  
3 fault.

4 Now, that's -- that's where I have ended up  
5 with your answers to the Chief, and now, having put it  
6 that way, I can find loads of examples in my mind where  
7 there is a trustee or fiduciary involved. I can think  
8 of an example in the qui tam context, but to think of  
9 one right on point is a little hard, though I thought  
10 there must be some.

11 MR. LAMKEN: Justice Breyer, the breach of  
12 contract, in some sense, is precisely that pariah.

13 JUSTICE BREYER: The what?

14 MR. LAMKEN: A breach of contract. If  
15 somebody breaches -- a contractual duty owed to me, I  
16 don't have to prove that I suffered economic injury.  
17 The breach of the promise itself gives me a grievance  
18 sufficient to entitle me to sue for nominal damages  
19 and --

20 JUSTICE BREYER: You mean you can sue in  
21 court even if what you come in and you say, they  
22 breached my contract, and as a result, I made \$10,000 I  
23 wouldn't have otherwise made? And when the judge says  
24 "And what damages do you seek," you say?

25 MR. LAMKEN: I would like \$1 more, Your

1 Honor. I want nominal damages or --

2 JUSTICE BREYER: And you can do that?

3 MR. LAMKEN: Or -- or -- so, if there are  
4 stipulated liquidated damages, you are entitled to those  
5 as well. That is the common law rule for years --

6 JUSTICE BREYER: No liquidated --

7 MR. LAMKEN -- and that is the majority rule  
8 today.

9 JUSTICE BREYER: Okay.

10 MR. LAMKEN: So that is -- that is precisely  
11 the context. But if I --

12 JUSTICE SOTOMAYOR: Counsel --

13 CHIEF JUSTICE ROBERTS: So you would accept  
14 \$1 in this case?

15 MR. LAMKEN: Well, Your Honor, we are in --  
16 I think that that is --

17 (Laughter.)

18 MR. LAMKEN: We are hoping to do better,  
19 Your Honor. But that actually illustrates --

20 CHIEF JUSTICE ROBERTS: Well, no, that --  
21 that gets -- I didn't mean to be facetious, but it gets  
22 to the question of whether or not you have to actually  
23 show injury-in-fact. Your allegation in this case is  
24 for damages, not just nominal damages but damages.

25 MR. LAMKEN: Your Honor, if the injury is

1 sufficient to get you in court to get \$1 --

2 JUSTICE GINSBURG: Is that --

3 MR. LAMKEN: -- it doesn't evaporate just  
4 because you want to get --

5 JUSTICE GINSBURG: Mr. Lamken, you are not  
6 seeking damages. You are seeking what the statute says  
7 you can get which is your money back treble?

8 MR. LAMKEN: Exactly, Your Honor. We are  
9 seeking precisely what the statute and title does when  
10 there is the breach of this duty owed to us --

11 JUSTICE GINSBURG: So it's not that you have  
12 to prove --

13 MR. LAMKEN: -- for our protection.

14 JUSTICE GINSBURG: -- any other damages  
15 because the statute has specified what the recovery is.

16 MR. LAMKEN: Exactly right.

17 CHIEF JUSTICE ROBERTS: Do you want -- I'm  
18 sorry.

19 MR. LAMKEN: One injury not to, one  
20 injury-in-fact, a violation of a duty owed to us for our  
21 protection, not an additional injury in the form of  
22 having suffered an economic loss.

23 CHIEF JUSTICE ROBERTS: Do you want to get  
24 out of this contract?

25 MR. LAMKEN: Pardon?

1 CHIEF JUSTICE ROBERTS: Do you want to get  
2 out of this deal?

3 MR. LAMKEN: Your Honor, I don't know  
4 whether or not Ms. Edwards would want to get out of the  
5 deal or not. But the statute says that she doesn't have  
6 to give up her insurance which protects her home in  
7 order to obtain the benefits of -- that Congress  
8 guaranteed her which were --

9 CHIEF JUSTICE ROBERTS: I didn't see -- I  
10 didn't see an allegation for a decision or -- or -- so  
11 you are perfectly happy as far as we know from the  
12 complaint with this deal, you just want the extra \$500  
13 per class member without showing any injury --

14 MR. LAMKEN: I think this -- I think this  
15 brings me back to the question you were asking me  
16 before, which is indeed, we think it's like that there  
17 is -- that there are diminution in quality and paying  
18 excessive price, but the law says we don't have to prove  
19 that because the law's elevated our right to a  
20 conflict-free transaction to legally protect its status.

21 The very reason the common law said in the  
22 fiduciary and the trust and all the other confidential  
23 issues in context said we are not going to ask about the  
24 economics, we are not going to regulate the economics  
25 here, because that's too hard. What we are going to do

1 is we are going to protect your right to receive the  
2 best advice possible. And at that --

3 JUSTICE SOTOMAYOR: Counsel, maybe I'm just  
4 looking at this too simply. You pay -- your client paid  
5 \$455 for title insurance, correct?

6 MR. LAMKEN: Yes.

7 JUSTICE SOTOMAYOR: She is claiming that she  
8 paid that money on the statutory assumption that the  
9 agent would disclose to her any kickbacks, correct?

10 MR. LAMKEN: It's not a disclosure duty but  
11 on the statutory basis that she was entitled to a  
12 conflict-free referral. That they were not directing  
13 her purchase on the basis of complex that is so --

14 JUSTICE SOTOMAYOR: She said I didn't  
15 receive what I paid for, correct?

16 MR. LAMKEN: Exactly, Your Honor.

17 JUSTICE SOTOMAYOR: I paid money, I lost the  
18 money, I have it back because what I've bought was a  
19 conflict-free --

20 MR. LAMKEN: That's exactly right.

21 JUSTICE SOTOMAYOR: -- referral, and that's  
22 not what I got?

23 MR. LAMKEN: Like an aggrieved trust  
24 beneficiary, she is seeking to get back something that  
25 belonged to her, \$455 that she parted company with in a



1 conflicted transaction.

2 CHIEF JUSTICE ROBERTS: You -- you don't  
3 want the conflict-free transaction because you don't  
4 want to get out of this contract. You are perfectly  
5 happy with the contract. You want \$500. You don't want  
6 a conflict-free transaction because even if it was a --  
7 were a conflict-free transaction, the price would be the  
8 same, in Ohio.

9 MR. LAMKEN: Not necessarily so, Your Honor,  
10 because Ohio does not preclude price competition. You  
11 can file for --

12 CHIEF JUSTICE ROBERTS: Okay. Now there the  
13 answer to my question, and I don't mean to focus on a  
14 peculiar structure but your answer was on part 1. You  
15 said no, not necessarily. Here there was an  
16 injury-in-fact, she might have gotten a better deal.

17 MR. LAMKEN: She has been exposed -- it's  
18 impossible to tell whether or not Fidelity would have  
19 been better because of financial settlements or another  
20 company would have been better because it has better  
21 clean paneling down the road.

22 JUSTICE SCALIA: And you don't want to have  
23 to prove that, because if you proved any damage, there  
24 goes your class action --

25 MR. LAMKEN: Absolutely not.

1 JUSTICE SCALIA: -- because you don't have  
2 commonality.

3 MR. LAMKEN: The reason we're not -- we did  
4 not allege it is because the statute doesn't require it  
5 and for 280 years when somebody takes a -- takes a  
6 kickback that interferes with your obtaining the best  
7 deal possible, that itself was actionable without  
8 proving any further --

9 JUSTICE SCALIA: How does it -- how does it  
10 harm her to get a title insurance policy for the price  
11 of \$453 from what you call a kickback-free seller, as  
12 opposed to getting the same title insurance for \$453  
13 from a non-kickback-free seller? Is that an  
14 injury-in-fact?

15 MR. LAMKEN: Yes.

16 JUSTICE SCALIA: The -- the -- the vague  
17 notion of -- of buying it from -- from -- I don't know,  
18 a white knight? Is -- is that the kind of  
19 injury-in-fact that our cases talk about?

20 MR. LAMKEN: Your Honor --

21 JUSTICE SCALIA: It seems to me purely -- I  
22 don't know, philosophical.

23 MR. LAMKEN: It's not philosophical at all  
24 because that exact right, ensuring that she gets her --  
25 her purchase in a kickback-free transaction is for her

1 benefit. And when she is denied that right, she has  
2 been denied something of potential value that hasn't  
3 been denied to everybody else in the universe.

4 For her protection, she was entitled to have  
5 them -- the very fact of the kickback undermines the  
6 incentive to pursue her best interest. Like a trust  
7 beneficiary, a home buyer spending her money to insure  
8 title on her home as a concrete and particularized  
9 interest in insuring that those who direct the purchase  
10 are not doing it based on kickbacks, which is so  
11 undermining -- incentive to seek her best interest.

12 It may be very hard to prove in individual  
13 cases that, you know, fidelity is more financially sound  
14 or another has better claims handling. But it was  
15 precisely for that reason that Congress got out of the  
16 business and courts got out of the business of trying to  
17 regulate the underlying economics. They are not going  
18 to regulate price. They are not going to regulate  
19 quality. And instead, we are going to give you a right  
20 to get the referral from somebody who has expertise and  
21 who doesn't have a conflict created by a conflict -- by  
22 a kickback that so undermines their incentive --

23 JUSTICE SCALIA: That is Congress wanted to  
24 get out of the business. But the issue here is whether  
25 Congress can get out of the business, whether it is the

1 function of courts to provide relief to people who  
2 haven't been injured. I mean, that's -- that's --  
3 that's the whole issue.

4 MR. LAMKEN: Justice Scalia, the  
5 Constitution, statutes, the common law regularly create  
6 bright line across the board rights to protect  
7 underlying financial or other economic interests. Where  
8 the right may sweep more broadly or may apply in cases  
9 where those underlying inputs are defected. But we  
10 don't go look backwards at the purpose of the right,  
11 abstract the right to its purpose and say, well, unless  
12 it's purpose was -- was achieved in this particular  
13 purpose, we're not going to --

14 JUSTICE ALITO: Would there be  
15 injury-in-fact if the plaintiff knew everything that was  
16 relevant to this had -- had -- was an economist who had  
17 studied the effect of these things on title insurance  
18 price and quality, and in fact, had -- was aware of  
19 every single transaction that had ever occurred between  
20 the title insurance company and the title agent? Would  
21 there be injury, in fact, in that situation?

22 MR. LAMKEN: Yes.

23 JUSTICE ALITO: And nevertheless said, okay,  
24 I understand this is what I'm getting into, but I'm  
25 going ahead.

1 MR. LAMKEN: Yes. There's -- there's  
2 injury --

3 JUSTICE ALITO: There would be injury, in  
4 fact"?

5 MR. LAMKEN: Yes, because he has been denied  
6 something he is entitled to, which is another expert's  
7 untainted referral, which is not affected by any way by  
8 kickbacks, which we know is entirely corrosive in  
9 interest to pursue his best interest. You might --

10 JUSTICE KENNEDY: But -- but it's circular  
11 for you to say he was denied something that he is  
12 entitled to. The question is whether there is an  
13 injury. The Constitution requires an injury.

14 MR. LAMKEN: Right.

15 JUSTICE KENNEDY: If you were to say he was  
16 entitled to it and therefore, there is an injury, that's  
17 just -- that's just circular. That gives no substance  
18 at all to the -- to the meaning of the term "injury."

19 MR. LAMKEN: Yes, but the -- the invasion of  
20 a statutory right itself can be injury in fact so long  
21 as it is sufficiently concrete and -- and  
22 particularized. That you are not just asserting  
23 another -- an interest of the public at large.

24 The Court has protected interests as  
25 divorced from property interest, as the right to obtain

1 information from the government through FOIA or FACA,  
2 and it can protect your -- your non-property interest in  
3 not being defamed. All of these things are protected.  
4 Your rights to performance under contract. All of the  
5 these things are protected whether or not there is  
6 further economic harm that results.

7 And the no further inquiry world that is  
8 applied in the trust and fiduciary contracts sphere is  
9 just another example where the law elevates your  
10 interest in not having conflict --

11 CHIEF JUSTICE ROBERTS: Can I ask you, just  
12 to follow up. You said whether or not there is further  
13 economic harm. So you say economic harm is required --

14 MR. LAMKEN: No, I --

15 CHIEF JUSTICE ROBERTS: -- because there  
16 can't be further economic harm if there isn't economic  
17 harm in the first place.

18 MR. LAMKEN: Further, comma, economic harm.  
19 Further harm of the economic sort, Your Honor.

20 CHIEF JUSTICE ROBERTS: Further harm that  
21 happens to be economic, not further economic harm.

22 MR. LAMKEN: Exactly. But I view it to be  
23 further harm, much less further economic harm.

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Lamken.

2 Mr. Yang?

3 ORAL ARGUMENT OF ANTHONY A. YANG,

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIE,

5 SUPPORTING THE RESPONDENT

6 MR. YANG: Mr. Chief Justice, and may it  
7 please the Court:

8 When an individual has a statutory right to  
9 a kickback-free referral in a financial transaction, she  
10 participates in a particular financial transaction in  
11 which her right is violated and she pays money for the  
12 service unlawfully referred, she has sustained an  
13 Article III injury in fact based on, as this Court in  
14 its repeatedly explained test, an invasion of a legally  
15 protected interest. That is --

16 JUSTICE SCALIA: Suppose -- Mr. Yang, let  
17 me -- me give -- give you a hypothetical. Suppose  
18 Congress did this to spare the Attorney General the  
19 necessity of suing to enforce these requirements.  
20 Suppose Congress wants to take the burden off the back  
21 of the Internal Revenue Service.

22 So it says that anybody who buys any product  
23 from a company that has not paid its taxes is entitled  
24 to \$500, okay? What that person is entitled to is a --  
25 a tax-observant seller -- given a national right to a

1 tax-observant seller. Would every person who buys from  
2 some -- some company that hasn't paid its taxes have a  
3 cause of action?

4 MR. YANG: No.

5 JUSTICE SCALIA: Why not?

6 MR. YANG: This Court has explained, I think  
7 principally in your opinion in Lujan v. Defenders of  
8 Wildlife, that Congress cannot convert an  
9 undifferentiated public interest in enforcement of the  
10 law --

11 JUSTICE SCALIA: But this is differentiated.  
12 You have to have bought from one of these companies.  
13 It's not everybody. Not everybody has bought from these  
14 tax cheats.

15 MR. YANG: I understand.

16 JUSTICE SCALIA: It's only the people who  
17 bought from tax cheats.

18 MR. YANG: There is also a threshold.  
19 Obviously, Congress can't simply narrow the class of --  
20 of plaintiffs to say people with college degrees, or  
21 people who were born on a Monday. There needs to be a  
22 sufficient connection between the --

23 JUSTICE SCALIA: A nexus, right? Your brief  
24 is full of nexus.

25 MR. YANG: Would you -- would you --



1 JUSTICE SCALIA: Legal jargon for  
2 "connection."

3 MR. YANG: We'll use "connection" here.

4 JUSTICE SCALIA: Lovely. Say connection, I  
5 might add. I love it.

6 (Laughter.)

7 MR. YANG: We'll say "connection."

8 But what -- in our view, there needs to be a  
9 reasonable connection between the proscribed conduct:  
10 here, the paying of taxes, and the class of persons --

11 JUSTICE SCALIA: Okay.

12 MR. YANG: -- to which the Congress has  
13 conferred the right, and that has to be such that the  
14 first class is reasonably regarded as victims of the  
15 conduct.

16 JUSTICE SCALIA: How much of a connection  
17 is -- is necessary? Suppose you -- you have a law that  
18 requires all machine parts produced by companies to --  
19 to contain a certain feature, and anyone who buys one  
20 that doesn't contain that feature gets \$500. I purchase  
21 one. That feature is of no use to me at all. That  
22 product would be just as good for me for the purposes  
23 for which I am using it had it not had that feature.

24 Would that be okay? Would I have a cause of  
25 action?

1           MR. YANG: It's unclear. Let me -- let me  
2 try to figure out the hypothetical a little bit further.  
3 If Congress -- for instance, if the machine part was a  
4 safety harness in your car and you purchased a car with  
5 a safety harness but you happen simply, you know, to not  
6 use the safety harness, Congress might well be able to,  
7 say -- provide for a protection for all purchasers of  
8 this particular vehicle or any kind of vehicle, must --  
9 those types of vehicles must have that safety equipment  
10 in order to protect the consumers who purchase it.

11           And in that instance, Congress could well  
12 provide for a statutory damage provision to protect such  
13 an individual generally.

14           JUSTICE SCALIA: So even though I've  
15 installed my own safety harness, which I always do when  
16 I buy a car, I can sue because this car that they sold  
17 me didn't have the safety harness. 500 bucks.

18           MR. YANG: That's correct. And let me --  
19 let me throw out some historical analogues to explain  
20 why the focus has to be on the invasion of the legally  
21 protected interest. You have things like trespass. At  
22 common law -- and this was well known to the framers --  
23 at common law, if you simply step across a boundary  
24 line, a line defined in law and the rights that are  
25 defined in law that are associated with that line, if

1 you simply step across this and step back, that is a  
2 trespass.

3 You can bring an action in court, and you  
4 could have no -- no impact whatsoever except the  
5 invasion of your legal right, and you would get nominal  
6 damages. And that type -- similarly, if you have a  
7 contract, you could have a breach of the contract.

8 JUSTICE BREYER: But Justice Scalia has a  
9 point. I mean, as I heard it, he was reiterating what  
10 used to be called a prudential rule of standing. It  
11 wasn't constitutional, but you looked to see if the  
12 statute is meant to protect this kind of person against  
13 that kind of harm, all right?

14 And if not, there is lack of prudential  
15 standing. Well, if that's the test, his case would fall  
16 outside it, because the tax law is not meant to protect  
17 the plaintiff there, but this case would fall within it.

18 MR. YANG: I think it's more than prudential  
19 standing. It goes to what is an injury in fact, which  
20 the Court has again repeatedly explained is an invasion  
21 of a legally protected interest that is sufficiently  
22 concrete and particularized.

23 No, we don't think that Congress can,  
24 through the guise of a right, convert a generalized  
25 interest in enforcement of the law into something that

1 an individual can come into --

2 CHIEF JUSTICE ROBERTS: Why do --

3 JUSTICE SCALIA: What is the specific -- I'm  
4 sorry, Chief, go ahead.

5 CHIEF JUSTICE ROBERTS: What -- why do we  
6 always say injury in fact then? You say so long as the  
7 harm is a violation of the law in legally protected  
8 interest. Our standing cases always say injury in fact  
9 as opposed to injury in law. And you are saying if you  
10 violate the law, you have sufficient injury.

11 MR. YANG: Well, your cases actually say an  
12 injury in fact. And then you go on to explain. For  
13 instance, in Defenders of Wildlife, that that is  
14 invasion of a legally protected interest. I'm not  
15 saying it's any invasion of a law, but when Congress  
16 confers a right --

17 CHIEF JUSTICE ROBERTS: Because -- they also  
18 go on to say that it has to be concrete.

19 MR. YANG: Right.

20 CHIEF JUSTICE ROBERTS: Real and immediate,  
21 not conjectural or hypothetical.

22 MR. YANG: That's right. It can't be an  
23 abstract type of a thing; it has to be in a specific  
24 factual context that is amenable to judicial -- a  
25 realistic judicial appreciation of the consequences --

1 CHIEF JUSTICE ROBERTS: So that all of our  
2 cases, we could have left "in fact" out of all of them.  
3 None of them come out differently because we insist on  
4 injury in fact.

5 MR. YANG: Well, I -- I don't know if you  
6 could have left it out. You could have called it  
7 anything. It is a legal label that the Court has  
8 applied to --

9 CHIEF JUSTICE ROBERTS: The difference  
10 between legal harm, though -- isn't that -- I guess I'm  
11 just repeating myself. Injury in fact. How do you  
12 understand that to be different than any other kind of  
13 injury?

14 MR. YANG: Well, an injury in fact is not  
15 simply a legal injury in the sense of any violation of  
16 the law, it is an invasion of a legally protected  
17 interest with respect to this particular individual, the  
18 particular plaintiff.

19 CHIEF JUSTICE ROBERTS: The two elements,  
20 that's the particularized requirement, and I understand  
21 that. But you are saying there's -- injury in fact  
22 simply means particularized.

23 MR. YANG: No, no, no, no. It includes  
24 several concepts. An injury in fact is an invasion of a  
25 legally protected interest. It either has to be actual

1 or imminent, and it has to be concrete and  
2 particularized. Now, again, so there's several concepts  
3 within the umbrella of injury in fact.

4 But I'd like to go back to the examples that  
5 we would find at the time of the framing, of many types  
6 of injuries, where you don't have to have anything other  
7 than an invasion of your legally protected right. For  
8 instance, a right to an agreement. If there is a breach  
9 that has no impact whatsoever, you would be able to get  
10 in and sue.

11 Now, there is a question of the  
12 quantification of damage, but that's separate. That's  
13 not whether you have an injury in fact, it is how --  
14 it's the measure of damages, and the measure of damages  
15 in common law would be nominal damages.

16 Similarly, an invasion -- a trespass  
17 invasion, or, for instance, if you were a beneficiary of  
18 a --

19 JUSTICE KENNEDY: I'm not sure about  
20 trespass. The object of my owning property is that I  
21 have a right to exclude. This is what I own. This is  
22 what the law protects. This is a spatial area for --  
23 for my -- which is my own domain.

24 MR. YANG: And why you have that is --

25 JUSTICE KENNEDY: And there -- there is an

1 injury to that right. Now --

2 MR. YANG: But if the right's threatened --

3 JUSTICE KENNEDY: -- you want to say that  
4 Congress can say that you have a right to buy a  
5 conflict-free title insurance policy. I'm -- I'm not  
6 sure that the two equate.

7 MR. YANG: Well, going back to your  
8 hypothetical, the reason you have that interest, the  
9 reason you have the right to exclude this space is  
10 solely by operation of the law. Those concepts, they  
11 are attached to property rights, were created by common  
12 law courts. Just as common law courts can create  
13 rights, the invasion of which create interest, so too  
14 can a State legislature or when Congress is acting  
15 within its Article III power to the one power --

16 JUSTICE KENNEDY: Well, but it's essential  
17 to my -- it's essential to my feeling of security and  
18 dignity and privacy. Like Justice Breyer's telephone  
19 hypothetical.

20 MR. YANG: I don't -- I don't think the --  
21 any common law court has inquired whether the invasion  
22 of -- the trespass somehow made you insecure --

23 CHIEF JUSTICE ROBERTS: Trespass cases, it  
24 seems to me, are different because you are talking about  
25 a property right, and you can sell a property right.

1 You can go to somebody and say I have the right to keep  
2 people off of this piece of property. Do you want to  
3 buy it? Here's how much it's worth. But if -- that's  
4 only a property right to the extent you can keep people  
5 off of it.

6 Here no one is going to buy this right from  
7 the -- the -- the plaintiff, because everybody's got it  
8 anyway. You don't -- you don't pay her, because she  
9 doesn't have a tangible concrete right. The trespass  
10 case, the person obviously does, because he can sell it.

11 MR. YANG: Well, anything can be monetized.

12 CHIEF JUSTICE ROBERTS: No, this one --  
13 that's my point. This cannot be monetized because  
14 everybody's already got it.

15 You can answer.

16 MR. YANG: Well --

17 CHIEF JUSTICE ROBERTS: It's not really a  
18 question, but you can answer.

19 (Laughter.)

20 MR. YANG: Well, it is -- it's kind of a  
21 statement, although you know in this -- this is specific  
22 transaction, this is a transaction involving the  
23 plaintiff. She paid money for a service that she got,  
24 and it was unlawfully tainted by a kickback and that's  
25 the type of thing that traditionally can be enforced in



1 court.

2 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.

3 Mr. Panner, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF AARON M. PANNER

5 ON BEHALF OF THE PETITIONERS

6 MR. PANNER: Thank you, Mr. Chief Justice.

7 It seems to me that there are two positions that have  
8 been articulated before the Court and both are  
9 inconsistent with the Court's prior decisions. The  
10 first is --

11 JUSTICE SCALIA: Not yours and his?

12 (Laughter.)

13 MR. PANNER: That of the -- that of the  
14 plaintiff and that of the government, Your Honor. I  
15 should have been more particularized.

16 (Laughter.)

17 MR. PANNER: The violation of a duty owed to  
18 us, that is what plaintiff claims is the injury here.  
19 The violation of a duty is a violation of a duty; it is  
20 not injury. And similarly the government says that what  
21 is required is a sufficient connection to the conduct,  
22 but what is required is not a connection to the conduct,  
23 what is required is an injury-in-fact, a harm to the  
24 plaintiff who is seeking to obtain redress from the  
25 courts. And that fundamental limitation on the role of

1 the courts is critical to the liberty of the people who  
2 come before the courts and who are subject to the power  
3 of the courts.

4 It is absolutely appropriate for someone who  
5 has been harmed through the violation of a statutory or  
6 common law duty owed to that person to come before the  
7 court seeking redress, but what is not possible is for  
8 the courts to be open to a plaintiff who has not alleged  
9 that the statutory duty -- the statutory violation that  
10 has been alleged has caused any adverse impact.

11 Now of course there are broadly -- there  
12 are -- there is illegal conduct that may have caused  
13 harm to a broad section of the population. If somebody  
14 engages in price fixing and then sells those price fixed  
15 goods it may be easy to show that as a result of that  
16 many people suffered harm and can come into court to sue  
17 for it. Similarly, there are non-financial harms that  
18 are the basis for standing in many, many cases: for  
19 example, defamation, harm to reputation, discrimination  
20 where somebody is subject to a -- an injury of being  
21 discriminated against.

22 JUSTICE SCALIA: What about a -- I'm sorry  
23 to interrupt your -- your concluding marks, but I am  
24 troubled by the dollar nominal damages for breach of  
25 contract. What do you say about that?

1                   MR. PANNER: Well, Your Honor, in -- in a  
2                   circumstance in which there is a bargain for  
3                   performance, and it may well be that there is a  
4                   recognition that there is value that was assigned to  
5                   that performance that may be hard to measure, and  
6                   therefore there is a concrete injury that is hard to  
7                   measure, and the therefore nominal damages is awarded.

8                   Now the cases are not uniform on whether  
9                   nominal damages are available. There is a -- it's  
10                  actually split and that there's -- we are not aware of a  
11                  case in this Court that would say that in a circumstance  
12                  in which there was a harmless breach, that -- that a  
13                  suit for nominal damages would establish Article III  
14                  standing, so with respect to that I'm -- I'm not sure  
15                  what the answers would be.

16                  Unless the Court has further questions?

17                  CHIEF JUSTICE ROBERTS: Thank you, counsel,  
18                  counsel.

19                  The case is submitted.

20                  (Whereupon, at 11:02 a.m., the case in the  
21                  above-entitled matter was submitted.)

22

23

24

25

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