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 DRI – THE VOICE OF THE DEFENSE BAR AND ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
535 Griswold,
Suite 2400
Detroit, MI 48226
(313) 983-4801

R. MATTHEW CAIRNS
PRESIDENT OF DRI
Counsel of Record
55 W. Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

Attorneys for Amici Curiae

237838

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

STATUTES

Cited Authorities

Page

OTHER CITED AUTHORITIES

Cited Authorities

INTEREST OF *AMICI CURIAE* DRI AND ASCDC[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of approximately 22,00 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership and to the judicial system.

The Association of Southern California Defense Counsel ("ASCDC") is a voluntary membership association of approximately 1,100 attorney members of California's civil defense bar. ASCDC's members, like those of DRI, primarily represent individuals and businesses involved in civil litigation. ASDCD has appeared as *amicus curiae* in numerous cases, including before this Court in *Burlington N.R. Co. v. Woods*, 480 U.S. 1 (1987). ASCDC

1. In accordance with Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from *amici curiae*, their members, and their counsel, made a monetary contribution to the brief's preparation or submission. All parties have granted a blanket consent to the filing of this brief and all other *amicus curiae* briefs, through letters on file with the Clerk's office.

is one of over 50 state and local defense organizations that are affiliated with DRI, and has a particular interest in joining DRI in this appeal, which began in litigation in Southern California.

DRI and ASCDC seek to contribute to the Court's consideration of cases in which the experiences of its members may assist the Court in the decision-making process. This is one such case. DRI and ASCDC's members are regularly called upon to defend their clients in lawsuits brought merely to pursue public policies rather than to seek redress for a distinct and personalized injury. The Ninth Circuit's decision in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010), has a profound effect on businesses and individuals who may be subject to these types of suits as it narrows the doctrine of standing to allow the judiciary to resolve these disputes in the absence of an actual injury. The Ninth Circuit's erroneous disposition, if affirmed, would encourage hosts of unwarranted suits against the individuals and corporations DRI's and ASCDC's members are called upon to defend.

When the federal courts narrow the standing doctrine, they open the floodgates of litigation well beyond the Framers' intent to limit the jurisdiction of the judicial branch to "cases" and "controversies." This, in turn, directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI and ASCDC.

The Ninth Circuit's decision erodes the equilibrium sought to be achieved through the U.S. Constitution's establishment of three separate branches of government. DRI therefore has a strong interest in assuring that the

rule adopted in this case recognizes Congress's right to create statutory causes of action while safeguarding the balance between the three branches of government and ensuring that no-harm class action suits do not proliferate.

SUMMARY OF THE ARGUMENT

Through the establishment of legislative, executive, and judicial departments of government, the United States Constitution embodies a bedrock separation-of-powers principle that prevents courts from undertaking tasks assigned to the political branches of government. The United States Constitution, Article III vests the judicial power in the courts. In pertinent part, it provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The federal Constitution vests the executive power in the President. U.S. Constitution, Article II, Section 1. And it vests the legislative power in a Congress comprised of a Senate and House of Representatives. U.S. Constitution, Article I, Section 1. This Court has long recognized that the separation of governmental divisions "is not merely a matter of convenience or of governmental mechanism." *O'Donoghue v. U.S.*, 289 U.S. 516, 530 (1933). The constitutional constraints upon the judiciary's powers to render decisions about executive or legislative actions are significant protections in our system of government.

Equally important is the Constitutional limitation of the judiciary's power to resolving only "Cases" or "Controversies." Article III, Section 2, Clause 1. This

provision forms the underpinnings of a constitutionally-required standing doctrine that cannot be abrogated by statutory language purportedly entitling any person to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Thus, the Legislature cannot confer standing on any person in the absence of a showing that the person satisfies the constitutional test for standing. That test requires the plaintiff to allege "personal injury fairly traceable to the defendant's allegedly unlawful conduct" that is "likely to be redressed by the requested relief." *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007), quoting *Allen v. Wright*, *supra*, at 751. This test comports with the longstanding precept that federal courts are courts of limited jurisdiction. *Owen Equipment & Erection Co v. Kroger*, 437 U.S. 365, 374 (1978).

In light of these separation-of-powers principles, the Ninth Circuit should have accepted First American's argument that the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2607, cannot be read to allow suit in the absence of a showing of actual injury because such a construction renders the provision unconstitutional. Plaintiff in this case argued, and the Ninth Circuit agreed, that "[b]ecause "RESPA gives Plaintiff a statutory cause of action," she had standing to pursue her claim against First American, even though Plaintiff was not charged more for title insurance due to the claimed kickback and exclusivity agreement. *Edwards v. First American Corp.*, 610 F.3d 514, 518 (9th Cir. 2010). The Ninth Circuit's decision represents a grave misunderstanding of the standing doctrine mandated by Article III's limitation on the judiciary's power to only "cases" or "controversies." It contradicts this Court's observation of the constitutional underpinnings to the standing doctrine and the need to be

vigilant to prevent the judiciary from usurping the power assigned to the political branches. *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Allen v. Wright*, *supra*, at 750-752.

The pertinent language in RESPA – "to the person or persons charged for the settlement service involved in the violation" – must be read to incorporate the constitutionally-required "actual injury" showing that is the core component of the standing doctrine. Because the Ninth Circuit erroneously ruled that Plaintiff may proceed with her RESPA lawsuit without any showing of actual injury, this Court should reverse the Ninth Circuit's decision and squarely hold that Plaintiff lacks standing to pursue her and the putative class' RESPA §8(a) claim. Failure to do so will not only provide an additional forum for individuals who have not prevailed in the representative process of government to rehash their grievances, it will also result in the increase of costly litigation against businesses and individuals that was not intended by the Framers of the United States Constitution. DRI and ASCDC believe that preserving the Legislature's right to create a statutory cause of action while simultaneously requiring a plaintiff to allege actual injury will safeguard the constitutionally-derived balance of powers between and among the three branches of government, by maintaining the longstanding doctrine of standing, which is as an indispensable element of our separation of powers.

ARGUMENT

REQUIRING A LITIGANT TO SHOW ACTUAL INJURY IN ALL LAWSUITS, INCLUDING THOSE ARISING OUT OF STATUTORY CAUSES OF ACTION, IS NECESSARY TO MAINTAIN THE EQUILIBRIUM BETWEEN THE BRANCHES OF GOVERNMENT AND TO LIMIT THE JUDICIAL BRANCH TO DECIDING ONLY REAL, VITAL CONTROVERSIES RATHER THAN NO-HARM LAWSUITS THAT ARE ESSENTIALLY EFFORTS TO SECOND-GUESS EXECUTIVE BRANCH POLICY DECISIONS MADE AS PART OF ITS OBLIGATION TO FAITHFULLY EXECUTE THE LAWS.

A. Our federal Constitution embodies the idea separate but overlapping branches of government.

Political philosopher Baron de Montesquieu provided the classical formulation of separation of powers and liberty in the 18th century:

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the

> judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of the oppressor.

C. Montesquieu, *The Spirit of the Laws* 202 (D. Carrithers ed. 1977) (T. Nugent trans 1st ed. 1750). Another early thinker, George Lawson, laid the foundation for Locke's Second Treatise on Government, a work that was important to the thinking of this country's founders. See Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L J 449, 459 (1991). Earlier thinkers, such as Montesquieu, had emphasized the importance of dividing judging from the legislative and executive powers. Lawson divided the notion of execution of the laws into "'acts of Judgment'—hearing and decision of cases upon evidence—and 'execution.'" *Id.* quoting George Lawson, *Politica Sacra et Civilis*, at 41-56 (London 1660). This division was later embodied in Locke's theory emphasizing the separation of powers, which proposed a division of power between three branches of government. *Id.* quoting Locke at 350-351.

These separation-of-powers notions were a critical element of the Founders' discussions about the structure of government that was eventually adopted in the United States Constitution. Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L J 1725, 1764-1771 (1996). According to Montesquieu, "legislative power comprised the enactment, amendment, or abrogation of permanent or temporary laws; executive authority included the power to make peace or war and to establish public security; judicial power entailed punishing criminals and resolving disputes between individuals." Flaherty, citing Montesquieu, *The*

Spirit of the Laws 151 (T Nugent trans 1949). Consistent with this, the United States Constitution establishes three distinct departments of government and grants to each the responsibility for exercising one of the three major types of governmental power. US Const, art I, § 1; art II, § 2; art III, § 1. But this separation of powers was not intended to make each branch completely autonomous or result in a 'hermetic division" of the branches. *Bowsher v. Synar*, 478 U.S. 714, 748-49 (1986); *Mistretta v. U.S.*, 488 U.S. 361, 381 (1989). This idea of separate but overlapping branches was perhaps best articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Because the spheres of action overlap, the branches can check each other's actions. For example, the judiciary reviews executive branch actions and the legislature enacts laws that define and limit executive branch powers within various regulatory spheres, such as in the area of banking, environmental, or real estate transactions. Each branch can therefore serve as a check and balance on the other. The standing doctrine serves to keep this careful calibration of powers in balance.

B. The standing doctrine is essential to maintaining the equilibrium between the branches of government.

This case falls at the heart of these limits on the judiciary's exercise of legislative power and presents the Court with the opportunity to clarify the standing doctrine as it applies to RESPA and the Legislature's right to confer standing on a litigant. Whether a party has a sufficient stake in an otherwise justiciable controversy in order to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Standing is not an ingenious academic exercise in the conceivable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The doctrine assures that the "courts exercise power 'only in the last resort, and as a necessity,' and only when adjudications consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." John G. Roberts, *Article III Limits On Statutory Standing*, 42 Duke L R 1219, 1223-1224 (1993) quoting *Allen v. Wright*, *supra*, at 752.

Standing, a threshold requirement to any suit, originated from Article III's limitation of the judicial power of the United States to the resolution of "Cases" and "Controversies." art III, § 2; *Hein v. Freedom From Religions Foundation, Inc.*, *supra*, at 598; *Lujan*, *supra*; *Friends of the Earth, Inc v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). It has been said that Article III requires a live contest in which to test legal differences. Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. R. 1002, 1006 (1924). The issue of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy

as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution. Stated otherwise, it is incumbent upon a party to demonstrate more than just a commitment to vigorous advocacy. *Lujan, supra,* at 559-560. See also *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009).

Those who seek to invoke the jurisdiction of the federal courts must therefore satisfy the threshold requirement imposed by Article III by alleging standing. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). That means that a plaintiff must demonstrate a personal stake in the outcome in order to assure the presence of that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions. 103 S Ct at 1665. Under such an approach, abstract injury is not enough. *Id.* A plaintiff must show that she sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Id.* The plaintiff must also demonstrate that the injury will likely be redressed by a favorable decision. *Friends of the Earth v. Laidlaw Environmental Services*, *supra*, at 180-81.

The requirement of standing serves as a means of resisting judicial intrusion into the operations of the other branches of government. The standing doctrine is a critical and inseparable element of the separation-of-powers principle and the separation of powers is a fundamental method of protecting liberty. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-342 (2006). Under the doctrine

of the separation of powers, each branch of government has powers that belong to it and cannot be transferred to another branch of government. The doctrine of standing recognizes and honors those bounds.

The concern present here – that one branch of government can turn an "undifferentiated public interest…into an 'individual right' vindicable in the courts" -- led this Court in *Lujan* to reject citizen standing on the basis of a Congressional grant unless the plaintiff could show actual injury. Similarly, this Court in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), held that standing to sue may not be predicated upon an interest held in common by the public at large but must be predicated upon concrete injury, actual or threatened. The *Schlesinger* court explained that permitting suit in those circumstances would "distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id.* at 222. According to *Schlesinger*, this flows from our system "of government [which] leaves many crucial decisions to the political processes." *Id.* at 227. The Constitution did not "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts"; it "created a representative Government" with citizens having the "right to assert [their] views in the political forum or at the polls." *US v. Richardson*, 418 U.S. 166, 179 (1974).

Likewise in *Steel Co v. Citizens for a Better Environment*, 523 U.S. 83 (1998), this Court rejected an organization's efforts to litigate because the organization

"seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA." *Id.* at 106. This was not enough to create standing but merely underscored the separation-of-powers problem raised by such suits. In *Steel Co*, the Court grounded its rejection of citizen-standing on the redressibility requirements. The same separation-of-powers theme can be readily seen, regardless of the prong of the standing doctrine on which the court relies.

Lujan similarly taught that a citizen suit provision cannot confer standing to sue in the absence of the traditional showing. 504 US at 573. According to *Lujan*, if the courts ignore the concrete injury requirement "at the invitation of Congress," they would be ignoring "one of the essential elements … that are the business of the courts rather than of the political branches." *Id.* at 576. Standing cannot be satisfied by a "congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law." *Id.* at 573. The plaintiff must show that the violation of the statute endangers a concrete interest that is more than simply execution of the law. When addressing the Legislature's power to confer standing on an individual, this Court remarked, "It is settled that 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).

Constitutional concerns are at their height when the courts read a statute to encroach on Article III's standing requirement by conferring standing upon a litigant

without regard to the actual injury requirement, as with the Real Estate Settlement Procedures Act ("RESPA") at issue in this case. RESPA provides for relief in favor of a litigant who shows that he or she was charged for a settlement service involved in the violation of a kickback. In particular, 12 U.S.C. § 2607(a) provides:

> (a) Business referrals
>
> 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.
>
> * * *
>
> (d)(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

The Ninth Circuit, reading this statute, held that "[b]ecause RESPA gives Plaintiff a statutory cause of action[…]Plaintiff has standing to pursue her clams against Defendants." *Edwards v. The First American Corporation, et a*l, 610 F.3d 514, 518 (9th Cir. 2010).

This broad reading cannot result in the creation of universal standing without a showing of actual injury and the other components of the judicial test for standing. *Raines v. Byrd,* supra, at 818-19. Contrary to the Ninth Circuit's decision in *Edwards*, RESPA should not be read to provide for a universal grant of standing because notions fundamental to the tripartite structure of our government mandate a rejection of this position. Under the Article III model of the scope of judicial function, standing serves as a gatekeeper to the federal courthouse. It determines whether, when, and by whom important questions can be adjudicated. In the federal system, standing defines the work of Article III courts and marks the boundary between the worlds of law and politics. Jan Deutsch, *Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan L R 169, 170 (1968) and Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 Duke L J 679, 688 (1997). In short, the Ninth Circuit's decision cannot withstand scrutiny when viewed in light of Article III and the standing doctrine this Court has embraced.

C. Narrowing standing to permit litigants to sue in the absence of actual injury will dramatically increase costly litigation against businesses and individuals.

RESPA is just one of a myriad of federal statutes embracing this "no harm" approach to litigation. From the Telephone Consumer Protection Act to the Fair Credit Report Act to the Truth in Lending Act, the Legislature has authorized suits based on a mere statutory violation alone. For example, the Telephone Consumer Protection Act, 47 U.S.C. § 227(3), allows a private right of action with an alternative-damages provision. Similarly, the Fair Credit Reporting Act, 15 U.S.C. § 1681n, allows a

consumer to recover up to $1,000 in damages in a civil suit as an alternative to actual damages sustained. The Truth in Lending Act, 15 U.S.C. § 1640, contains a similar alternative-damages provision that has been interpreted to allow a consumer to bring a claim and receive damages upwards of $500,0000 without any showing of actual injury or damages. *See, e.g.*, *Gambardella v. G. Fox & Co.*, 716 F.2d 104 (2nd Cir. 1983); *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797 (6th Cir. 1996). Accordingly, a decision by this Court affirming the Ninth Circuit may well reach beyond RESPA. A decision from this Court to narrow the standing doctrine to permit a suit in the absence of an actual injury could be applied to upwards of fifteen federal statutes permitting suits based on mere statutory violations alone. *See, e.g.*, 15 U.S.C. § 1692 (Fair Debt Collection Practices Act); 29 U.S.C. § 1854 (Migrant and Seasonal Agricultural Worker Protection Act); 15 U.S.C. § 1693m(a)(2) (Electronic Funds Transfer Act); 12 U.S.C. § 4907 (Homeowners Protection Law); 15 U.S.C. § 1681, *et. seq.* (Fair and Accurate Credit Transactions Act).

These legislatively-conferred statutory suits can be brought through any of a number of means, but are typically brought in the form of a class action, as in this case. This Court has required careful consideration of the propriety of certifying class actions, most recently in its decision reversing the Ninth Circuit's decision to certify the largest employment class action in history. *Wal-Mart Stores, Inc. v. Dukes, et. al.*, 131 S. Ct. 2541, 2556-57 (2011). Although this Court has recognized that class actions can be a useful tool to protect certain public rights, DRI and ASCDC believe that when used in connection with "no harm" statutes they pose a great potential for abuse by entrepreneurial lawyers seeking enormous fees. Stated simply, when a plaintiff has no actual injury at stake in

the lawsuit, only the lawyers who bring the suits – not the plaintiffs – benefit. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. Legis. 76 (2009). It is for this precise reason class actions are often viewed as nothing more than "money generators" for the lawyers who bring them. *Id.*

The cost attendant to defending "no harm" lawsuits cannot be overstated. The advent of electronic discovery has further increased litigation costs, particularly for large corporate defendants. Robert F. Carangelo, *et. al.*, *Cost-Shifting in Electronic Discovery*, 50 Dec Fed. Law. 35 (Nov/Dec 2003) (noting that the cost of production of electronic data in discovery is greater "than the costs associated with the old-fashioned production of paper documents[.]").[2] For new companies and those suffering under today's current economic climate, a major lawsuit, and the attendant costs, could sound the death knell. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010).

---

2. Rather than "a tool to collect information to aid the fact finder," discovery in today's litigation environment is more akin to a "weapon in the requesting party's arsenal to impact the outcome of a case irrespective of the merits[.]" White Paper, *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure,* xiii (May 2010). The "*in terrorem* effect" of largely unregulated discovery is "promoting settlements that go well beyond perceived liability" and "driving up the cost of much litigation to levels entirely disproportionate to the underlying dispute." *Id.* at 18.

And corporations and individual businesses are not the only ones bearing this cost. The U.S. capital markets and economy are suffering from the relative ease in which lawsuits can be filed. Empirical research shows that the threat of litigation, particularly private securities class-action lawsuits, is a strong impediment to economic growth in the United States. *Id.* at 618. A 2007 study on the effects of private securities litigation on the competitiveness of the U.S. markets found that the prevalence of meritless lawsuits in the U.S. has driven away potential investors. A staggering 85% of CEOs indicated that they preferred London over New York "due to the litigation risk associated with U.S. Markets." *Id.* at 619, citing McKinsey & Co., *Sustaining New York's and the US' Global Financial Services Leadership 101* (2007). A different survey polling 334 senior executives of companies based in various countries, including the United States, United Kingdom, Germany, France, China, Japan, and India, revealed that nine out of ten companies who de-listed from a U.S. exchange in the last four years said that the litigation environment played some role in that decision. 33 Harv J L & Pub Pol'y at 619, citing the Fin. Servs. Forum, 2007 Global Capital Markets Survey 8 (2007). This, in turn, hampers economic growth in the United States, because the threat of class action suits is a primary disincentive to listing on U.S. exchanges. *Id.*[3]

3. The abuses attendant with use of the class action device has resulted in a growing public distrust of class actions. John H. Beisner, et. al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (April 2005). In a 2003 nationwide poll conducted by the United States Chamber of Commerce, a mere 5% of the respondents "thought consumers benefited the most from class actions; 47% viewed attorneys as the primary beneficiaries." *Id.* at 1444. District and intermediate appellate courts have similarly declined to certify classes

Careful adherence to the standing doctrine serves to guard against a proliferation of no-harm lawsuits. Litigation brought by entrepreneurial class action attorneys or those attempting to serve as a bureaucratic ombudsman for the federal government harms the civil justice system, both because it creates enormous litigation costs with no attendant benefit and because it destabilizes the carefully calibrated equilibrium between the political branches of government and the judiciary. By limiting suits to the constitutional framework of a "case" or "controversy," standing assures that corporations and individuals will not be subject to academic litigation where the complaining party has suffered no real injury. And it also guards against plaintiff attorneys, and particularly class attorneys, receiving exorbitant fees that may put a corporation out of business for a statutory violation unaccompanied by any cognizable injury. On the other hand, by allowing Congress to create a statutory cause of action so long as it comports with the constitutional strictures of Article III, defendants are incentivized to conform their conduct to the law.

It is therefore imperative that this Court adopt a rule that preserves this careful balance. And this Court can do so by upholding the right of Congress to create a statutory cause of action, but declining to allow it to do so in a manner that circumvents constitutional strictures.

---

where, on balance, the potential liability to the defendant was so disproportionate to the absence of any actual injury suffered by the plaintiffs that it raised due process concerns. *Seig v. Yard House Rancho Cucamonga, LLC*, 2007 WL 6894503 (C.D. Cal 2007); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972); *Pisciotta v. Old Nat. Bankcorp*, 499 F.3d 629 (7th Cir. 2007).

The doctrine of standing provides the key component to this balance by assuring that the judiciary's jurisdiction is limited to "cases" or "controversies" as originally contemplated by the Framers of our Constitution. The Ninth Circuit's decision, which disrupts this balance by permitting a cause of action without the requisite injury, must therefore be reversed.

CONCLUSION

For all the foregoing reasons, *Amici* urge this Court to reverse the Ninth Circuit's decision.

Respectfully submitted,

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
535 Griswold,
Suite 2400
Detroit, MI 48226
(313) 983-4801

R. MATTHEW CAIRNS
PRESIDENT OF DRI
Counsel of Record
55 W. Monroe, Suite 2000
Chicago, IL 60603
(312) 795-1101
cairns@gcglaw.com

Attorneys for Amici Curiae