

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:

18   AARON M. PANNER, ESQ., Washington, D.C.; for  
19       Petitioners.

20   JEFFREY A. LAMKEN, ESQ., Washington, D.C.; for  
21       Respondent.

22   ANTHONY A. YANG, ESQ., Assistant to the Solicitor  
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24       United States, as amicus curiae, supporting  
25       Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-708, First American  
5 Financial Corporation v. Edwards.

6 Mr. Panner.

7 ORAL ARGUMENT OF AARON M. PANNER

8 ON BEHALF OF THE PETITIONERS

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

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

20 JUSTICE BREYER: So, let me just be -- use  
21 an example, a hypothetical based on the next case,  
22 really. I was thinking Congress passes a law, says you  
23 can't phone people between 7:00 at night and 7:00 in the  
24 morning and try to sell them something. Okay? That's  
25 the law.

1 MR. PANNER: Yes, Your Honor.

2 JUSTICE BREYER: And anyone who gets such a  
3 phone call gets \$500 in damages automatically if they  
4 sue in court if they receive such a call.

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

9 Now, can she sue?

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

17 But if the injury-in-fact requirement means  
18 anything, it means that a plaintiff who comes before the  
19 court must have a harm in fact.

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

1                   MR. PANNER: Well, Your Honor, in the case  
2 in which --

3                   JUSTICE BREYER: -- can't sue?

4                   MR. PANNER: In the case in which someone is  
5 exposed to a substance that has -- that is illegal, they  
6 might well suffer a harm, and the harm might be the  
7 exposure to the substance. And the -- the sort of  
8 inquiry that you're looking into, which is even if the  
9 exposure ended up not being harmful, would that be a  
10 case --

11                  JUSTICE BREYER: Well, here she was exposed,  
12 or the plaintiff was exposed, to the kind of transaction  
13 that Congress said was harmful as a general matter, just  
14 like the example you gave.

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

21                  JUSTICE GINSBURG: Because she can't --

22                  JUSTICE SOTOMAYOR: Counsel, going back to  
23 Justice Breyer's --

24                  CHIEF JUSTICE ROBERTS: I'm sorry.

25                  Justice Ginsburg.

1 JUSTICE GINSBURG: Because she can't prove  
2 it at the early stage. I mean, the problem that  
3 Congress was concerned about was that you can't tell  
4 until the house is going to be sold in the end how  
5 adequate the title insurance was. So, Congress is  
6 acting on the potential that these kind of kickbacks can  
7 cause harm. And this does seem to fit the bill of  
8 restitution, unjust enrichment cases, where the  
9 plaintiff doesn't have to prove any harm; she just gets  
10 back what the defendant should not have received.

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

1           This is not a case like that, and there's no  
2   allegation that there is anything lacking in the  
3   insurance that was issued. This is a circumstance in  
4   which Congress may believe that a certain practice as a  
5   general matter can tend to bring out -- bring about  
6   bad -- bad outcomes and can therefore make it unlawful.  
7   But the question here is whether this plaintiff has a  
8   harm --

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

18           Is that the position you're taking?

19           MR. PANNER: I -- no, Your Honor. The type  
20   of injury that is incurred doesn't necessarily have to  
21   be a financial one, and there could be circumstances  
22   where a plaintiff would allege an injury. And I -- it's  
23   important to --

24           JUSTICE SOTOMAYOR: No, no. Please tell me,  
25   in those States in which insurance is not fixed by the

1 State --

2 MR. PANNER: Well, if there --

3 JUSTICE SOTOMAYOR: -- what does the  
4 plaintiff have to do other than to say I -- they didn't  
5 disclose to me that there was a kickback, and I want the  
6 amount I paid for the service?

7 Do they have to show something more?

8 MR. PANNER: If the -- I want to -- I'm not  
9 sure I understand Your Honor's question, but if the  
10 question is there were various rates available and the  
11 plaintiff alleges an overcharge, that they purchased  
12 a -- a policy and there was a cheaper policy available,  
13 and as a result of the violation --

14 JUSTICE SOTOMAYOR: So, you are in fact  
15 arguing very broadly that there is no presumption of --  
16 of injury in these cases, that the plaintiff still has  
17 to come in and prove --

18 MR. PANNER: Your Honor --

19 JUSTICE SOTOMAYOR: -- that in fact they  
20 would have gotten a cheaper -- a cheaper policy?

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

25 JUSTICE SOTOMAYOR: Same thing with nominal



1 damages and statutory damages? You're -- you're taking  
2 a very broad position now.

3 MR. PANNER: I don't think so, Your Honor,  
4 because, again, the question for purposes of standing,  
5 the question for purposes of the ability of a plaintiff  
6 to come into court, is to show that they have some  
7 injury-in-fact, that there is some harm, some way in  
8 which they were made worse off. This plaintiff --

9 JUSTICE SCALIA: That's not so  
10 extraordinary. It's what has to be shown in -- in  
11 Sherman Act cases, right? Contracts and combinations  
12 in -- in restraint of trade are unlawful; but in order  
13 to recover under the Sherman Act, you have to show not  
14 only that it was unlawful, but that you were harmed by  
15 it.

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

18 JUSTICE KENNEDY: I was going to ask you,  
19 along that line, are there antitrust cases that -- that  
20 Respondents or the Government could cite in which a  
21 party can go into court alleging that the market has  
22 been distorted, even though that person has no damage?  
23 Anything like that in the antitrust -- what would be  
24 their closest case?

25 MR. PANNER: Well, Your Honor, I'm not

1 sure -- I did not see any of the cases that they cited  
2 involving the trust -- the trust circumstance --

3 JUSTICE KENNEDY: Yes.

4 MR. PANNER: -- where there was that sort of  
5 vague allegation. The trust cases I think actually are  
6 a good illustration of the type of injury that's  
7 required. We're talking about trust, not antitrust now.

8 JUSTICE KENNEDY: Right.

9 MR. PANNER: But the trust cases involve a  
10 circumstance, the -- I think that the plaintiff here  
11 kind of gives the game away by, in the -- when talking  
12 about the Michoud case, using the phrase "the plaintiff  
13 may sue." And, of course, that's not what the case  
14 says. What the case says is that a -- that a  
15 beneficiary can come into court and say the trust has  
16 violated the duty to me; I want to unwind the  
17 transaction to get the benefit that I would have gotten  
18 had the trustee behaved in the way required.

19 So, in those cases involving trustees, for  
20 example, they --

21 JUSTICE KENNEDY: There's not automatic  
22 disgorgement in those --

23 MR. PANNER: There could be automatic  
24 disgorgement, Your Honor. But, again, that reflects the  
25 lost value of what was paid for in terms of the -- of

1 the --

2 JUSTICE SCALIA: Well, but --

3 JUSTICE KAGAN: But, Mr. Panner, I

4 thought --

5 JUSTICE SCALIA: -- let's assume that a  
6 trustee acts on its own interest and sells property, but  
7 let's assume that he gets top dollar for that property,  
8 so that the beneficiary hasn't really been deprived of  
9 anything. What's the injury to the beneficiary?

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

23 So, it's a very conventional kind of harm  
24 where someone believes that their property was -- was  
25 taken away from them and used in a way to their

1     detriment, and they are therefore seeking relief.

2                   JUSTICE SOTOMAYOR:   So, what more does this  
3     plaintiff have to allege other than, if I had been told  
4     that this was a prearranged, tied product between the  
5     mortgage and the title company but that I had a right to  
6     get an untied product even at the same price, and I  
7     would have exercised that right if I had known?  Would  
8     that be enough?

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

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

14                   MR. PANNER:  Yes, I think that certainly  
15    would be enough, absolutely.  The point is that this  
16    complaint abstracted away any such particularized claim  
17    for a very particular purpose, which was that in order  
18    to maintain this case as a class action, the basis of  
19    harm could not be anything personal or individual to  
20    this plaintiff.

21                   JUSTICE SOTOMAYOR:  So, you go back to your  
22    position that Congress has no power to give a cause of  
23    action on the basis of a statutory violation in which it  
24    is presuming injury?

25                   MR. PANNER:  That is correct, Your Honor.

1 The -- what Congress cannot do is to confer on a  
2 particular plaintiff an injury that's constitutionally  
3 sufficient under Article III. I think this Court has  
4 made clear that Congress cannot do that and that the  
5 existence of a statutory right by itself, even the  
6 invasion, the violation of the statutory right does not  
7 create injury for constitutional purposes. Injury --

8 JUSTICE SOTOMAYOR: Well, certainly you  
9 couldn't -- you couldn't sue. But if I paid money that  
10 I would have -- and that I'm entitled to get back, then  
11 I've been injured, because --

12 MR. PANNER: Well, Your Honor, you paid  
13 money -- in this case the plaintiff paid money for a  
14 title insurance policy which she received. She paid at  
15 -- at the legally required rate, and she makes no  
16 complaint about the policy, nor does she claim that it  
17 would have mattered to her --

18 JUSTICE ALITO: Could I ask you to clarify  
19 something? What could a plaintiff who purchases title  
20 insurance in Ohio allege that would be sufficient to  
21 provide standing?

22 MR. PANNER: Well, certainly if a plaintiff  
23 said that the -- that the manner in which the title  
24 insurance was provided had delayed her closing or that  
25 there were procedures that were --

1 JUSTICE ALITO: No, what could be done --  
2 okay. Go ahead.

3 MR. PANNER: -- that there was something  
4 about the service that she received as a result of  
5 the -- the referral to a particular title insurer,  
6 again, assuming that this is a violation, which we  
7 don't -- we don't think it is. But -- but assuming that  
8 it is, that --

9 JUSTICE ALITO: So, you could -- the  
10 plaintiff could allege some kind defective service at  
11 the time when the title insurance was purchased? There  
12 really is no service provided at that time, is there?

13 MR. PANNER: Actually, most --

14 JUSTICE ALITO: You get -- you get a title  
15 insurance policy and that's it; and you don't know  
16 whether -- you don't know what will happen if there's  
17 some problem alleged with the title at some point down  
18 the road.

19 MR. PANNER: Well, that's really -- the --  
20 the risk of that is really on the title insurer, which  
21 is why the title insurer has no incentive whatsoever to  
22 encourage poor service by a title insurance agent. The  
23 title --

24 JUSTICE KENNEDY: Well, that -- that leads  
25 me to this -- I thought -- I never thought of title

1 insurance companies as being fungible, and some were  
2 very, very good about narrowing the exceptions, about  
3 working with the seller of the property, if you  
4 represented the buyer, to get rid of the exceptions.  
5 And so, I'm not sure that it's just a question of a  
6 policy versus no policy. There's a -- there's a quality  
7 to the -- to the research they do.

8           And the next -- and related to that is this:  
9 You -- you put the case as if the price is going to be  
10 the same for the insurance. (A) I think there's nothing  
11 in -- in the State law that permits the insurance  
12 company to get -- to set a lower rate; and, second,  
13 don't the title companies charge other fees, title  
14 search fees and so forth, other fees in addition to the  
15 price of the insurance? And those other fees,  
16 arguably -- I know she didn't allege any damage -- but  
17 those other fees arguably are too high because of this  
18 fixed market.

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

20           JUSTICE KENNEDY: Now, she didn't allege  
21 that. I know that.

22           MR. PANNER: She didn't allege it, and I  
23 think that's critical, because the -- the issue is not  
24 whether it's conceivable that an injury could occur from  
25 the violation. It could. And what you have indicated

1 about difficulty clearing objections to a title, for  
2 example, if there was a problem that she had with  
3 respect to that and she believed that it was the case,  
4 that would actually be the job of the title agent,  
5 which -- and there's no allegation that she was  
6 improperly referred to the title agent.

7               So, there -- the insurer is issuing --  
8 underwriting the policy and bears the residual risk, but  
9 it's the agent that is actually engaged with the -- with  
10 the plaintiff here. And there, the agent's name here  
11 was Tower City.

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



1 on the basis of a kickback. And they write that right  
2 into the statute.

3 So, therefore, there is no doubt that the  
4 plaintiff here suffered the harm that Congress sought to  
5 forbid. That harm was being engaged in a transaction  
6 where the title insurance company was not chosen on the  
7 merits but partly in terms of a kickback. Now, what in  
8 the Constitution forbids Congress from doing that?

9 MR. PANNER: The Constitution, Article III,  
10 as this Court has interpreted it, requires that a  
11 plaintiff that comes into court must have suffered an  
12 injury-in-fact. And Congress cannot create that injury  
13 legislatively. Otherwise, the Congress can enlist the  
14 courts for regulatory purposes that are unrelated to the  
15 core function of the court as this Court has -- has  
16 articulated it --

17 JUSTICE KAGAN: Mr. Panner --

18 MR. PANNER: -- which is --

19 JUSTICE KAGAN: -- suppose that there were a  
20 contract between Mrs. Edwards and Tower and the contract  
21 had a no-kickback clause, not one that suggested that  
22 Ms. Edwards had to show any kind of injury, greater cost  
23 or lesser service, but just you can't have any  
24 kickbacks. Can she sue on that contract?

25 MR. PANNER: Well, if it was a negotiated

1 agreement and it was -- it was one where the parties had  
2 given value for that assurance, then that would  
3 represent something that there had been a judgment in  
4 advance by this -- by this particular individual that  
5 there was -- that that was something -- that was a  
6 performance that she was willing to pay for and a  
7 promise that meant something to her. And so, that would  
8 potentially be a different case.

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

12 MR. PANNER: Right.

13 JUSTICE KAGAN: Would she now have standing?

14 MR. PANNER: Most likely not, Your Honor,  
15 and the reason is that it's the difference between a  
16 contract that the parties engage in, where there would  
17 be a -- if there's a negotiated contract, it would be  
18 reasonable for the court to say, well, there's value  
19 attached to the rights that the parties have bargained  
20 for here. But it's different if Congress is using it as  
21 a mechanism to create injury legislatively, and in that  
22 circumstance, the court would still have to determine  
23 whether there was injury-in-fact that would allow the --  
24 allow the plaintiff to get into court.

25 JUSTICE SCALIA: Could --

1 MR. PANNER: But it's a different case.

2 JUSTICE SCALIA: Could Congress decree that  
3 the agent in this case shall be an agent of the  
4 purchaser rather than an agent of the title insurance  
5 company? As it has done in real estate, I think. The  
6 real estate broker must be an agent of the seller and  
7 not of the purchaser. Can it -- can it establish a  
8 trust relationship between the purchaser here and the  
9 person selecting the title insurance company?

10 MR. PANNER: Well, I think that Congress  
11 could potentially create a trust relationship --

12 JUSTICE SCALIA: And if it did, would the  
13 violation of that trust relationship constitute injury  
14 for -- for Article III purposes?

15 MR. PANNER: Well, it would depend, Your  
16 Honor. Not -- not per se. It would depend on whether  
17 there was some way in which that violation caused an  
18 injury-in-fact. So, for example -- first of all, to the  
19 extent that there was some --

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

22 MR. PANNER: You do, Your Honor. That is to  
23 say that in the case of any of the examples that the  
24 plaintiff has cited there is an underlying interest, an  
25 antecedent interest, a concrete interest in property or

1 in an economic opportunity, paid-for services of an  
2 agent, and it is that concrete interest which is invaded  
3 by the -- by the alleged violation of the -- of the  
4 responsibility of trust.

5 But, of course, here you don't even have  
6 that relationship of trust. The -- as --

7 JUSTICE SCALIA: Well, I understand, but I'm  
8 just saying that that concrete interest can be created  
9 by Congress instead of being created by contract. What  
10 difference does it make? If you become a trustee by  
11 contract, you get one result; but if you are a trustee  
12 by government decree so that you must be a trustee,  
13 contract or not?

14 MR. PANNER: No, I --

15 JUSTICE SCALIA: Somehow the situation  
16 changes?

17 MR. PANNER: I don't -- I don't think the  
18 situation would change. I guess what I'm saying is that  
19 even -- I don't see any of the common law cases  
20 involving trusts, trustees, as involving recoveries or  
21 suits in the absence of what this Court would certainly  
22 consider to be an injury-in-fact, that is to say some  
23 harm to a concrete interest that exists apart from the  
24 statutory duty or the common law duty.

25 JUSTICE KAGAN: But, Mr. Panner, in response

1 to Justice Scalia's questions and my questions, you are  
2 suggesting that there's a difference depending on what  
3 the source of the law is. If the source of the right is  
4 -- is a contract, there's one result. If the source of  
5 the right is a statute, there's another result. And I  
6 thought that that was very much -- that is -- that's  
7 very much inconsistent with our case law, and  
8 specifically with Lujan.

9 MR. PANNER: I certainly didn't mean to say  
10 that, Your Honor. So, let me try to clarify. The  
11 question was -- there are circumstances in which the  
12 legal relationship is such that there could be -- let me  
13 back up.

14 The question is whether there's an  
15 injury-in-fact, that is to say a harm that exists as a  
16 factual matter. And those interests certainly can be  
17 reflected by the legal duties that are created. So, for  
18 example, there are legal duties in contract that are  
19 intended to protect the interests of the contracting  
20 parties. There are legal duties under the law of trust  
21 that are intended to protect the beneficiary.

22 But this Court has frequently reflected the  
23 fact that there is the question of the violation, but  
24 then there is separately the question of the injury.  
25 And the point that I'm making -- and it should be the

1 same answer with respect to your question and  
2 Justice Scalia's -- is if -- the mere fact of the  
3 violation of a duty does not create injury per se, and  
4 none of the cases reflect that. And that is the  
5 proposition that plaintiff relies on here, precisely  
6 because of what she alleged and what she is  
7 attempting -- the type of case that she is attempting to  
8 bring.

9 She's attempting to bring a case in which  
10 the statutory violation is the injury. No other injury  
11 is required. She very straightforwardly says it does  
12 not matter if there's any economic harm, it does not  
13 matter if there's any quality difference, it does not  
14 matter if there is any consequential effect on me at  
15 all.

16 JUSTICE KAGAN: I'm not sure that that's the  
17 right understanding of her complaint. She's saying: I  
18 don't have to prove those things because there's been a  
19 judgment made that -- that these kinds of practices tend  
20 to decrease service and tend to increase price, and  
21 therefore I don't have to prove those matters.

22 And that's the exact same judgment that's  
23 made in the trust cases, for example.

24 MR. PANNER: Again, I don't think that the  
25 trust cases can be fairly read to say that, Your Honor.

1 But the key point is that there's a distinction between  
2 what Congress -- the statutory duties that Congress can  
3 impose and the manner in which Congress can choose to  
4 have those enforced -- well --

5 JUSTICE GINSBURG: Suppose she -- suppose  
6 she appended to her complaint an affidavit by a  
7 well-respected economist that says Congress was right;  
8 these kind of arrangements will have an adverse effect  
9 on the people who are purchasing title insurance. And  
10 goes through all kinds of analyses that show that.  
11 Would that be adequate then?

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

22 Congress has broadly prohibited practices  
23 involving kickbacks, and the paradigm case has nothing  
24 to do with a situation in which a title insurance agent  
25 is issuing a title insurance policy for an underwriter.

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

8           JUSTICE SOTOMAYOR: Counsel, I'm still  
9   having problems --

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

20          MR. PANNER: Well, Your Honor, there has to  
21   be a connection between the violation alleged and the  
22   harm that ensues. And so, a general understanding  
23   that a particular --

24          JUSTICE KENNEDY: Well, the person alleges:  
25   And I was in this market and I might have -- there's a



1 reasonable probability I could have had a lower price,  
2 according to economic theory.

3 MR. PANNER: Well -- well, again, that  
4 wasn't alleged here. So, the question with these  
5 particular --

6 JUSTICE KENNEDY: No, I'm assuming it's  
7 alleged.

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

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

20 JUSTICE ALITO: And if the plaintiff went  
21 any further and alleged some harm particular to her,  
22 wouldn't that be even more speculative?

23 MR. PANNER: Well, Your Honor --

24 JUSTICE ALITO: Some economic harm  
25 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's 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 it seems to me a  
9 commission. There's no duty of loyalty. Isn't -- isn't  
10 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 --

17 JUSTICE SCALIA: We have a different -- we  
18 have a different case then.

19 MR. LAMKEN: Yes.

20 JUSTICE SCALIA: But they didn't do that,  
21 did they?

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

1 best interest, that undermine their incentive to choose  
2 the insurer that provides the best quality and the best  
3 service.

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

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

22 MR. LAMKEN: Well, you might have an  
23 interest in getting an honest opinion. It's just not  
24 protected in law. They're allowed to tell you what they  
25 want to tell you because you have no protected interest

1 in their opinion.

2 JUSTICE ALITO: I know. But we're looking  
3 for whether there's an injury-in-fact. Put aside the  
4 question of whether there's a breach of the duty in law.  
5 There is allegedly here. I just don't see where there's  
6 an injury-in-fact, because I know -- I'm an idiot if I  
7 don't realize -- that they have a strong economic  
8 incentive to say come have it fixed at my place.

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

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

24 MR. LAMKEN: Right. But the common law was  
25 absolutely clear that when someone invaded your right to

1 a conflict-free transaction, invaded your right not to  
2 have kickbacks in your transaction, you didn't have to  
3 prove that there was an economic consequence. The  
4 invasion of your right not to have conflicts invade that  
5 transaction was sufficient.

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

14 MR. LAMKEN: If the -- if they are acting --

15 JUSTICE KENNEDY: And he doesn't know --  
16 they haven't been informed --

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

1 JUSTICE SCALIA: If I take a car to an auto  
2 mechanic, he's not my agent. He's an independent  
3 contractor doing business. He's not my agent.

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

5 JUSTICE SCALIA: And it's not an agency  
6 relation here, either.

7 MR. LAMKEN: Congress --

8 JUSTICE SCALIA: It's a customer going to  
9 somebody who is an independent contractor.

10 MR. LAMKEN: Congress imposed one component  
11 of the duty that applies to agents and fiduciaries  
12 across the board, and that is: Don't take kickbacks  
13 that undermine the incentive to obtain the best deal for  
14 your consumer.

15 JUSTICE SCALIA: More than agents and  
16 fiduciaries across the board. He is neither an agent  
17 nor a fiduciary. And what's the closest case you have  
18 to a situation where there is neither an agency  
19 relationship nor a trust relationship, and yet this kind  
20 of a right to sue without showing damage exists? What's  
21 the -- what's your best shot?

22 MR. LAMKEN: Well, the law has a number of  
23 contexts where you don't have to show financial loss.  
24 If somebody defames you, you don't have -- in your  
25 business, you don't have to show that you're financially

1 injured. That's injury-in-fact in and of itself.

2 CHIEF JUSTICE ROBERTS: Well, that gets to a  
3 point that I'm having trouble getting my arms around.  
4 It seems to me what your position is, what you want us  
5 to focus on, there are three possible arguments. One is  
6 that there is injury-in-fact in this case. I see some  
7 of that argument in your briefs. Two, that Congress  
8 presumes injury-in-fact. Injury-in-fact is still  
9 required, but that is presumed. I read that to be  
10 perhaps what the trust cases say. Or, three, that  
11 injury-in-fact is not required at all. Now, which are  
12 you arguing? One, two or three?

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

16 CHIEF JUSTICE ROBERTS: Okay, statutory  
17 right.

18 MR. LAMKEN: But it also has --

19 CHIEF JUSTICE ROBERTS: Can I -- I'm sorry  
20 to interrupt you, and I want to pause on that question.  
21 You said violation of a statute is injury-in-fact. I  
22 would have thought that would be called injury-in-law.  
23 And when we say, as all our standing cases have, is that  
24 what is required is injury-in-fact, I understand that to  
25 be in contradistinction to injury-in-law. And when you



1 tell me all that you've got or all that you want to  
2 plead is violation of the statute, that doesn't sound  
3 like injury-in-fact.

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

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

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

21 CHIEF JUSTICE ROBERTS: Potential --  
22 potential value.

23 MR. LAMKEN: Potential value. And it's more  
24 valuable --

25 CHIEF JUSTICE ROBERTS: Now, we said in the

1 Whitmore case, and this is a quote: "Allegations of  
2 possible future injury do not satisfy the requirements  
3 of Article III." Potential value sounds to me like  
4 possible future injury.

5 MR. LAMKEN: In this sense, Your Honor:  
6 It's what you received is substantively less valuable.  
7 All you have to do is ask yourself, would I value more  
8 advice from somebody who's playing it straight --

9 CHIEF JUSTICE ROBERTS: Okay.

10 MR. LAMKEN: -- on a financial side or  
11 someone who is taking kickbacks from --

12 CHIEF JUSTICE ROBERTS: So, that's  
13 injury-in-fact?

14 MR. LAMKEN: That's injury-in-fact --

15 CHIEF JUSTICE ROBERTS: Okay.

16 MR. LAMKEN: -- and there's another way in  
17 which it's injury-in-fact.

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

22 MR. LAMKEN: Well, she proved that she got  
23 something less valuable. She got something she was  
24 entitled to --

25 CHIEF JUSTICE ROBERTS: But I thought -- and

1 maybe it's a unique circumstance in this case, but Ohio  
2 says this is going to cost you the same no matter what  
3 you do.

4 MR. LAMKEN: That's actually quite  
5 incorrect, Your Honor. Ohio --

6 CHIEF JUSTICE ROBERTS: Okay. But then  
7 again, that's an argument about was there or was there  
8 not injury-in-fact.

9 MR. LAMKEN: Well, the injury-in-fact is  
10 getting something that's potentially -- not getting  
11 something to which the law entitles you, which has  
12 potential value to you. And a conflict-free referral is  
13 much more valuable than one laden by conflicts.

14 And there is another thing. We haven't  
15 disclaimed the notion entirely. We haven't -- in fact,  
16 we believe it is very likely that -- that quality or  
17 price suffered as a result of these -- of these  
18 conflicts. But --

19 CHIEF JUSTICE ROBERTS: That sounds --  
20 again, to use a word we've said is inadequate to support  
21 standing, that sounds conjectural.

22 MR. LAMKEN: No, it's not. It's not  
23 conjectural at all. Congress specifically found that  
24 these are the consequences. But the --

25 CHIEF JUSTICE ROBERTS: No, no, no. We're

1 talking about not what Congress found; what the  
2 injury-in-fact is.

3 MR. LAMKEN: Right. Your Honor --

4 CHIEF JUSTICE ROBERTS: So, you will agree,  
5 won't you, that the idea that it's certainly possible or  
6 whatever your formulation was, that the quality here  
7 wasn't good enough or that the entire quality across the  
8 board might be better, that's conjectural, right?

9 MR. LAMKEN: No. Well, Your Honor, it's  
10 very hard to prove. And it was for that exact reason  
11 that --

12 CHIEF JUSTICE ROBERTS: Now we're in point  
13 -- now we're at level two: It's hard to prove. So, is  
14 that your argument, that Congress presumed injury?

15 MR. LAMKEN: No, Your Honor.

16 CHIEF JUSTICE ROBERTS: Okay.

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

21 JUSTICE BREYER: What is the -- I think --  
22 this is very interesting and informative to me. Go back  
23 to the middle category. As I'm now seeing it, you have  
24 a version of the middle category that the Chief Justice  
25 was asking. And -- and call it Congress sometimes

1 passes a statute that creates a pariah. It could be a  
2 substance. It could be a form of behavior. It could be  
3 a structure of an industry.

4 And then once it does that, it makes that  
5 unlawful. And now what it's done, it is more unusual  
6 than I ever thought. It comes up in the loyalty  
7 context, fiduciary, but we're not talking about  
8 fiduciary. It says it is a harm and you will earn money  
9 if you deal with a pariah, assuming it wasn't your  
10 fault.

11 Now, that's where I have ended up with your  
12 answers to the Chief, and now, having put it that way, I  
13 can find loads of examples in my mind where there's a  
14 trustee or fiduciary involved. I can think of an  
15 example in the qui tam context, but to think of one  
16 right on point is a little hard, though I thought there  
17 must be some.

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

20 JUSTICE BREYER: The what?

21 MR. LAMKEN: A breach of contract. If  
22 somebody breaches a -- a contractual duty owed to me, I  
23 don't have to prove that I suffered economic injury.  
24 The breach of the promise itself gives me a grievance  
25 sufficient to entitle me to sue for nominal damages

1 and statutory damages.

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

7 MR. LAMKEN: I'd like \$1 more, Your Honor.  
8 I want nominal damages or if there's --

9 JUSTICE BREYER: And you can do that?

10 MR. LAMKEN: Or -- or -- so, if there are  
11 stipulated liquidated damages, you're entitled to those  
12 as well. That was the common law rule for years --

13 JUSTICE BREYER: No liquidated --

14 MR. LAMKEN: -- it's the majority rule  
15 today.

16 JUSTICE BREYER: All right. Okay.

17 MR. LAMKEN: So, that is -- that is  
18 precisely the context. But if I --

19 JUSTICE SOTOMAYOR: Counsel --

20 CHIEF JUSTICE ROBERTS: So, you would accept  
21 \$1 in this case?

22 MR. LAMKEN: Well, Your Honor, we're in --  
23 but I think that is --

24 (Laughter.)

25 MR. LAMKEN: We're hoping to do better, Your

1 Honor. But that actually illustrates --

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

7 MR. LAMKEN: Your Honor, if the injury is  
8 sufficient to get you in court to get \$1 --

9 JUSTICE GINSBURG: Is that -- is that right?  
10 I thought --

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

13 JUSTICE GINSBURG: Mr. Lamken, you're not  
14 seeking damages. You're seeking what the statute says  
15 you can get, which is your money back treble?

16 MR. LAMKEN: Exactly, Your Honor. We're  
17 seeking precisely what the statute entitles to us when  
18 there is the breach of this duty owed to us --

19 JUSTICE GINSBURG: So, it's not that you  
20 have to prove --

21 MR. LAMKEN: -- for our protection.

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

24 MR. LAMKEN: That's exactly right. When you  
25 show --

1 CHIEF JUSTICE ROBERTS: So, do you -- I'm  
2 sorry.

3 MR. LAMKEN: -- one injury not two, one  
4 injury-in-fact, a violation of a duty owed to us for our  
5 protection, not an additional injury in the form of  
6 having suffered an economic loss.

7 CHIEF JUSTICE ROBERTS: Do you want to get  
8 out of this contract?

9 MR. LAMKEN: Pardon?

10 CHIEF JUSTICE ROBERTS: Do you want to get  
11 out of this deal?

12 MR. LAMKEN: Your Honor, I don't know  
13 whether or not Ms. Edwards would want to get out of the  
14 deal or not. But the statute says that she doesn't have  
15 to give up her insurance which protects her home in  
16 order to obtain the benefits of -- that Congress  
17 guaranteed her, which were --

18 CHIEF JUSTICE ROBERTS: I didn't see -- I  
19 didn't see an allegation for rescission or -- or, you  
20 know -- so, you're perfectly happy as far as we know  
21 from the complaint with this deal; you just want the  
22 extra \$500 per class member without showing any  
23 injury-in-fact.

24 MR. LAMKEN: I think this -- I think this  
25 brings me back to the question you were asking me



1 before, which is, indeed, it's -- we think it's like --  
2 that there is -- there are diminution in quality and  
3 paying excessive price, but the law says we don't have  
4 to prove that because the -- because the law has  
5 elevated our right to a conflict-free transaction to be  
6 -- to legally protected status.

7           The very reason the common law said -- in  
8 the fiduciary and the trust and all the other  
9 confidential issues in context, said we're not going to  
10 ask about the economics, we're not going to regulate the  
11 economics here, because that's too hard. What we're  
12 going to do is we're going to protect your right to  
13 receive the best advice possible. And at that --

14           JUSTICE SOTOMAYOR: Counsel, maybe I'm just  
15 looking at this too simply. You pay -- your client paid  
16 \$455 for title insurance, correct?

17           MR. LAMKEN: Yes.

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

21           MR. LAMKEN: It's not a disclosure duty but  
22 on the statutory basis that she was entitled to a  
23 conflict-free referral, that they were not directing her  
24 purchase on the basis of conflict that so undermined --

25           JUSTICE SOTOMAYOR: She said I didn't

1 receive what I paid for, correct?

2 MR. LAMKEN: Exactly, Your Honor.

3 JUSTICE SOTOMAYOR: I paid money, I lost the  
4 money, I'd have it back because what I've bought was a  
5 conflict-free --

6 MR. LAMKEN: That's exactly right.

7 JUSTICE SOTOMAYOR: -- referral, and that's  
8 not what I got.

9 MR. LAMKEN: Like an aggrieved trust  
10 beneficiary, she is seeking to get back something that  
11 belonged to her, \$455 that she parted company with in a  
12 conflicted transaction.

13 CHIEF JUSTICE ROBERTS: You -- you don't  
14 want a conflict-free transaction because you don't want  
15 to get out of this contract. You're perfectly happy  
16 with the contract. You want \$500. You don't want a  
17 conflict-free transaction, because even if it was a --  
18 were a conflict-free transaction, the price would be the  
19 same, in Ohio.

20 MR. LAMKEN: Not necessarily so, Your Honor,  
21 because Ohio does not preclude price competition. You  
22 can file for --

23 CHIEF JUSTICE ROBERTS: Okay. Now, there  
24 the answer to my question -- and I don't mean to focus  
25 on a peculiar structure, but there -- your answer was on

1 part one. You said no, not necessarily. Here there was  
2 an injury-in-fact; she might have gotten a better deal.

3 MR. LAMKEN: She has been exposed -- it's  
4 impossible to tell whether or not Fidelity would have  
5 been better because of financial soundness or another  
6 company would have been better because it has better  
7 claim handling down the road.

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

11 MR. LAMKEN: Absolutely not.

12 JUSTICE SCALIA: -- because you don't have  
13 commonality.

14 MR. LAMKEN: The reason we're not -- we did  
15 not allege it is because the statute doesn't require it,  
16 and for 280 years, when somebody takes a -- takes a  
17 kickback that interferes with your obtaining the best  
18 deal possible, that itself was actionable without  
19 proving any further --

20 JUSTICE SCALIA: How does it -- how does it  
21 harm her to get a title insurance policy for the price  
22 of \$453 from what you call a kickback-free seller, as  
23 opposed to getting the same title insurance for \$453  
24 from a non-kickback-free seller? Is that an  
25 injury-in-fact?

1 MR. LAMKEN: Yes.

2 JUSTICE SCALIA: The -- the vague notion  
3 of -- of buying it from -- from -- I don't know, a white  
4 knight? Is that the kind of injury-in-fact that our  
5 cases talk about?

6 MR. LAMKEN: Your Honor --

7 JUSTICE SCALIA: It seems to me purely -- I  
8 don't know -- philosophical.

9 MR. LAMKEN: It's not philosophical at all  
10 because that exact right, ensuring that she gets her --  
11 her purchase in a kickback-free transaction is for her  
12 benefit. And when she is denied that right, she has  
13 been denied something of potential value that hasn't  
14 been denied to everybody else in the universe.

15 For her protection, she was entitled to have  
16 them -- the very fact of a kickback undermines the  
17 incentive to pursue her best interest. Like a trust  
18 beneficiary, a home buyer spending her money to insure  
19 title on her home has a concrete and particularized  
20 interest in insuring that those who direct the purchase  
21 are not doing it based on kickbacks, which so  
22 undermine the incentive to seek her best interest.

23 It may be very hard to prove in individual  
24 cases that, you know, Fidelity is more financially sound  
25 or another has better claims handling. But it was

1 precisely for that reason that Congress got out of the  
2 business and the courts got out of the business of  
3 trying to regulate the underlying economics. They're  
4 not going to regulate price. They're not going to  
5 regulate quality. And, instead, we're going to give you  
6 a right to get the referral from somebody who has  
7 expertise and who doesn't have a conflict created by a  
8 conflict -- by a kickback that so undermines their  
9 incentive --

10 JUSTICE SCALIA: Doubtless Congress wanted  
11 to get out of the business. But the issue here is  
12 whether Congress can get out of the business, whether it  
13 is the function of courts to provide relief to people  
14 who haven't been injured. I mean, that's -- that's --  
15 that's the whole issue.

16 MR. LAMKEN: Justice Scalia, the  
17 Constitution, statutes, the common law regularly create  
18 bright-line across-the-board rights to protect  
19 underlying financial or other economic interests, where  
20 the right may sweep more broadly and may apply in cases  
21 where those underlying interests are defected. But we  
22 don't go look backwards at the purpose of the right,  
23 abstract the right to its purpose and say, well, unless  
24 it's purpose was -- was achieved in this particular  
25 purpose, we're not going to --

1 JUSTICE ALITO: Would there be  
2 injury-in-fact if the plaintiff knew everything that was  
3 relevant to this -- was an economist who had studied the  
4 effect of these things on title insurance price and  
5 quality and, in fact, had -- was aware of every single  
6 transaction that had ever occurred between the title  
7 insurance company and the title agent? Would there be  
8 injury-in-fact in that situation?

9 MR. LAMKEN: Yes.

10 JUSTICE ALITO: Nevertheless said, okay, I  
11 understand this is what I'm getting into, but I'm going  
12 ahead.

13 MR. LAMKEN: Yes. There's -- there's  
14 injury-in-fact.

15 JUSTICE ALITO: There would be  
16 injury-in-fact?

17 MR. LAMKEN: Yes, because he has been denied  
18 something he is entitled to, which is another expert's  
19 untainted referral which is not affected in any way by  
20 kickbacks, which we know are entirely corrosive in the  
21 interest to pursue his best interest. He might --

22 JUSTICE KENNEDY: But -- but it's circular  
23 for you to say he's denied something he's entitled to.  
24 The question is whether there's an injury. The  
25 Constitution requires an injury.

1 MR. LAMKEN: Right.

2 JUSTICE KENNEDY: For you to say he was  
3 entitled to it and, therefore, it's an injury, that's  
4 just -- that's just circular. That gives no substance  
5 at all to the -- to the meaning of the term "injury."

6 MR. LAMKEN: Yes, but the -- the invasion of  
7 a statutory right itself can be injury-in-fact so long  
8 as it's sufficiently concrete and -- and particularized.  
9 That you're not just asserting another -- an interest of  
10 the public at large.

11 The Court has protected interests as  
12 divorced from property interests as the right to obtain  
13 information from the government through FOIA or FACA.  
14 It can protect your -- your non-property interest in not  
15 being defamed. All of these things are protected. Your  
16 rights to performance of your contract. All of the  
17 these things are protected whether or not there's  
18 further economic harm that results.

19 And the no further inquiry rule that's  
20 applied in the trust and fiduciary contracts for years  
21 is just another example where the law elevates your  
22 interest in not having conflict --

23 CHIEF JUSTICE ROBERTS: Can I ask you, just  
24 to follow up -- you said whether or not there's further  
25 economic harm. So, you say economic harm is required --

1 MR. LAMKEN: No, I --

2 CHIEF JUSTICE ROBERTS: -- because there  
3 can't be further economic harm if there isn't economic  
4 harm in the first place.

5 MR. LAMKEN: Further, comma, economic harm.  
6 Further harm of the economic sort, Your Honor.

7 CHIEF JUSTICE ROBERTS: Further harm that  
8 happens to be economic, not further economic harm.

9 MR. LAMKEN: Exactly.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. LAMKEN: There doesn't need to be  
12 further harm, much less further economic harm.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 Mr. Lamken.

16 Mr. Yang.

17 ORAL ARGUMENT OF ANTHONY A. YANG

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING THE RESPONDENT

20 MR. YANG: Mr. Chief Justice, and may it  
21 please the Court:

22 When an individual has a statutory right to  
23 a kickback-free referral in a financial transaction, she  
24 participates in a particular financial transaction in  
25 which her right is violated, and she pays money for the



1 service unlawfully referred, she has sustained an  
2 Article III injury-in-fact based on, as this Court has  
3 repeatedly explained its test, an invasion of a legally  
4 protected interest that is --

5 JUSTICE SCALIA: Suppose -- Mr. Yang, let  
6 me give -- give you a hypothetical. Suppose, you know,  
7 Congress did this to spare the Attorney General the  
8 necessity of suing to enforce these requirements.  
9 Suppose Congress wants to take the burden off the back  
10 of the Internal Revenue Service.

11 So, it says that anybody who buys any  
12 product from a company that has not paid its taxes is  
13 entitled to \$500. Okay? What that person is entitled  
14 to is a -- a tax-observant seller, given a national  
15 right to a tax-observant seller. Would every person who  
16 buys from some -- some company that hasn't paid its  
17 taxes have a cause of action?

18 MR. YANG: No.

19 JUSTICE SCALIA: Why not?

20 MR. YANG: This Court has explained, I think  
21 principally in your opinion in Lujan v. Defenders of  
22 Wildlife, that Congress cannot convert an  
23 undifferentiated public interest in enforcement of the  
24 law --

25 JUSTICE SCALIA: But this is differentiated.

1 You have to have bought from one of these companies.  
2 It's not everybody. Not everybody has bought from these  
3 tax cheats.

4 MR. YANG: I -- I understand.

5 JUSTICE SCALIA: It's only the people who  
6 bought from tax cheats.

7 MR. YANG: There is also a threshold.  
8 Obviously, Congress can't simply narrow the class of --  
9 of plaintiffs to say people with college degrees or  
10 people who were born on a Monday. There needs to be a  
11 sufficient connection between the --

12 JUSTICE SCALIA: A nexus, right? Your brief  
13 is full of "nexus" --

14 MR. YANG: Well, would you --

15 JUSTICE SCALIA: It's legal jargon for  
16 "connection."

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

18 JUSTICE SCALIA: Lovely. Say "connection."  
19 I like it.

20 (Laughter.)

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

22 JUSTICE SCALIA: I love it.

23 MR. YANG: But what -- in our view, there  
24 needs to be a reasonable connection between the  
25 proscribed conduct -- here, the paying of taxes -- and

1 the class of persons --

2 JUSTICE SCALIA: Okay.

3 MR. YANG: -- to which the Congress has  
4 conferred the right, and that has to be such that the  
5 person class is reasonably regarded as victims of the  
6 conduct --

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

15 Would that be okay? Would I have a cause of  
16 action?

17 MR. YANG: It's unclear. Let me -- let me  
18 try to figure out the hypothetical a little bit further.  
19 If Congress -- for instance, if the machine part was a  
20 safety harness in your car and you purchased a car with  
21 a safety harness but you happen simply, you know, to not  
22 use the safety harness, Congress might well be able to  
23 say -- provide for a protection for all purchasers of  
24 this particular vehicle or any kind of vehicle must --  
25 that those types of vehicles must have that safety

1 equipment in order to protect the consumers who purchase  
2 it.

3 And in that instance, Congress could well  
4 provide for a statutory damage provision to protect such  
5 an individual generally.

6 JUSTICE SCALIA: So, even though I've  
7 installed my own safety harness, which I always do when  
8 I buy a car, I --

9 (Laughter.)

10 JUSTICE SCALIA: -- I can sue because this  
11 car that they sold me didn't have the safety harness?

12 MR. YANG: That's --

13 JUSTICE SCALIA: 500 bucks.

14 MR. YANG: That's correct. And let me --  
15 let me go to some historical analogues to explain why  
16 the focus has to be on the invasion of a legally  
17 protected interest. You have things like trespass. At  
18 common law -- and this was well known to the framers.  
19 At common law, if you simply step across a boundary  
20 line, a line defined in law and the rights that are  
21 defined in law that are associated with that line, if  
22 you simply step across this and step back, that is a  
23 trespass. You could bring an action in court. You  
24 could have no -- no impact whatsoever except the  
25 invasion of your legal right, and you would get nominal

1 damages.

2 And that type -- similarly, if you had a  
3 contract, you could have a breach of the contract.

4 JUSTICE BREYER: Justice Scalia has a point,  
5 because, I mean, as I heard him, he was -- he was  
6 reiterating what used to be called a prudential rule of  
7 standing. It wasn't constitutional, but you looked to  
8 see if the statute is meant to protect this kind of  
9 person against that kind of harm. All right? And if  
10 not, there's lack of prudential standing.

11 Well, if that's the test, his case would  
12 fall outside it, because the tax law is not meant to  
13 protect the plaintiff there, but this case would fall  
14 within it.

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

20 Now, we don't think that Congress can,  
21 through the guise of a right, convert a generalized  
22 interest in enforcement of the law into something that  
23 an individual can come in to --

24 CHIEF JUSTICE ROBERTS: Well, why do --

25 JUSTICE SCALIA: What is -- I'm sorry,

1 Chief, go ahead.

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

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

14 CHIEF JUSTICE ROBERTS: Because they also go  
15 on to say that it has to be concrete.

16 MR. YANG: Right.

17 CHIEF JUSTICE ROBERTS: Real and immediate,  
18 not conjectural or hypothetical.

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

23 CHIEF JUSTICE ROBERTS: So that all of our  
24 cases -- we could have left "in fact" out of all of  
25 them? None of them come out differently because we

1     insist on injury-in-fact?

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

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

11                  MR. YANG:   Well, an injury-in-fact is not  
12    simply a legal injury in the sense of any violation of  
13    the law.  It is an invasion of a legally protected  
14    interest with respect to this particular individual, the  
15    particular plaintiff.

16                  CHIEF JUSTICE ROBERTS:  There are two  
17    elements.  That's the particularized requirement, and I  
18    understand that.  But you're saying there's --  
19    injury-in-fact simply means particularized?

20                  MR. YANG:   No.  No, no, no, no.

21                  CHIEF JUSTICE ROBERTS:  Okay.

22                  MR. YANG:   It includes several concepts.  An  
23    injury-in-fact is an invasion of a legally protected  
24    interest.  It either has to be actual or imminent, and  
25    it has to be concrete and particularized.  Now, again --

1 so, there's several concepts within the umbrella of  
2 injury-in-fact.

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

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

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

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

23 MR. YANG: But why does --

24 JUSTICE KENNEDY: -- for my -- which is my  
25 own domain.



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

2 JUSTICE KENNEDY: And there -- there is an  
3 injury to that right. Now --

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

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

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

18 JUSTICE KENNEDY: No, but it's essential to  
19 my -- it's essential to my feeling of security and  
20 dignity and privacy. Like the Justice Breyer telephone  
21 call hypothetical.

22 MR. YANG: I don't -- I don't think the --  
23 any common law court has inquired whether the invasion  
24 -- the trespass somehow made you insecure or invaded  
25 your privacy --

1 CHIEF JUSTICE ROBERTS: You can -- the  
2 trespass cases, it seems to me, are different because  
3 you are talking about a property right, and you can sell  
4 a property right. You can go to somebody and say I have  
5 the right to keep people off of this piece of property.  
6 Do you want to buy it? Here's how much it's worth. But  
7 if -- that's only a property right to the extent you can  
8 keep people off of it.

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

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

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

18 You can answer.

19 MR. YANG: Well --

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

22 (Laughter.)

23 MR. YANG: Well, it is -- it's kind of a  
24 statement, although you know in this -- this is a  
25 specific financial transaction. It's a transaction

1 involving the plaintiff. She paid money for a service  
2 that she got, and it was unlawfully tainted by a  
3 kickback, and that's the type of thing we think  
4 traditionally could be enforced in court.

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

6 MR. YANG: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Panner, you have  
8 4 minutes remaining.

9 REBUTTAL ARGUMENT OF AARON M. PANNER

10 ON BEHALF OF THE PETITIONERS

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

12 It seems to me that there are two positions  
13 that have been articulated before the Court, and both  
14 are inconsistent with the Court's prior decisions. The  
15 first is --

16 JUSTICE SCALIA: Not yours and his?

17 (Laughter.)

18 MR. PANNER: That of the -- that of the  
19 plaintiff and that of the Government, Your Honor. I  
20 should have been more particularized.

21 (Laughter.)

22 MR. PANNER: The violation of a duty owed to  
23 us, that is what plaintiff claims is the injury here.  
24 The violation of a duty is a violation of a duty; it is  
25 not injury. And similarly the Government says that what

1 is required is a sufficient connection to the conduct.  
2 But what is required is not a connection to the conduct;  
3 what is required is an injury-in-fact, a harm to the  
4 plaintiff who is seeking to obtain redress from the  
5 courts. And that fundamental limitation on the role of  
6 the courts is critical to the liberty of the people who  
7 come before the courts and who are subject to the power  
8 of the courts.

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

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

1 injury of being discriminated against.

2 JUSTICE SCALIA: What about a -- I'm sorry  
3 to interrupt your -- your concluding remarks, but I am  
4 troubled by the dollar nominal damages for breach of  
5 contract. What do you say about that?

6 MR. PANNER: Well, Your Honor, in -- in a  
7 circumstance in which there is a bargain for  
8 performance, and it may well be that there is a  
9 recognition that there is value that was assigned to  
10 that performance that may be hard to measure, and  
11 therefore there is a concrete injury that's hard to  
12 measure, and, therefore, nominal damages is awarded.

13 Now, it's -- the cases are not uniform on  
14 whether nominal damages are available. There's -- it's  
15 actually split and that there's -- we are not aware of a  
16 case in this Court that would say that in a circumstance  
17 in which there was a harmless breach, that -- that a  
18 suit for nominal damages would establish Article III  
19 standing. So, with respect to that, I'm -- I'm not sure  
20 what the correct answer would be.

21 Unless the Court has further questions?

22 CHIEF JUSTICE ROBERTS: Thank you, counsel,  
23 counsel.

24 The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1   above-entitled matter was submitted.)

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