

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.

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

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Panner.

ORAL ARGUMENT OF AARON M. PANNER

ON BEHALF OF THE PETITIONERS

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

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

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

Official

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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