No. 13-679

In the Supreme Court of the United States

FIRST NATIONAL BANK OF WAHOO AND
MUTUAL FIRST FEDERAL CREDIT UNION,
Petitioners,

v.

JAREK CHARVAT, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
RICHARD B. KATSKEE
JAMES F. TIERNEY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

DONALD M. FALK
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

KENNETH W. HARTMAN
Baird Holm LLP
1700 Farnam Street,
Suite 1500
Omaha, NE 68102
(402) 344-0500

MONICA L. FREEMAN
TODD W. WEIDEMANN
Woods & Aitken LLP
10250 Regency Circle,
Suite 525
Omaha, NE 68114
(402) 898-7400

Counsel for Petitioners

TABLE OF CONTENTS

Page

Table of Authorities ... ii

A. The Eighth Circuit Squarely Held That Violation Of A Statute Is By Itself Sufficient To Satisfy Article III's Standing Requirement. ... 3

B. Respondent's Eleventh-Hour Attempt To Assert An Economic-Injury Claim Provides No Reason To Deny Review And Is Unavailing. ... 7

Conclusion ... 11

TABLE OF AUTHORITIES

Page(s)

CASES

Alvarez v. *Longboy*,
697 F.2d 1333 (9th Cir. 1983)............................... 5

American Canoe Ass'n v. *City of Louisa Water & Sewer Comm'n*,
389 F.3d 536 (6th Cir. 2004)................................ 5

Charvat v. *Mutual First Fed. Credit Union*,
725 F.3d 819 (8th Cir. 2013)........................*passim*

Cooper Indus., Inc. v. *Aviall Servs., Inc.*,
543 U.S. 157 (2004)... 8

Cutter v. *Wilkinson*,
544 U.S. 709 (2005)... 8

F. Hoffmann–LaRoche Ltd. v. *Empagran S.A.*,
542 U.S. 155 (2004)... 8

Federal Election Comm'n v. *Akins*,
524 U.S. 11 (1998)... 4

First Am. Fin. Corp. v. *Edwards*,
132 S. Ct. 2536 (2012)............................ 1, 2, 3, 10

Grant ex rel. Family Eldercare v. *Gilbert*,
324 F.3d 383 (5th Cir. 2003)................................ 5

Heartwood, Inc. v. *U.S. Forest Serv.*,
230 F.3d 947 (7th Cir. 2000)................................ 5

Perry v. *Thomas*,
482 U.S. 483 (1987)... 8

Public Citizen v. *FTC*,
869 F.2d 1541 (D.C. Cir. 1989)............................ 5

Public Citizen v. *U.S. Dep't of Justice*,
491 U.S. 440 (1989)... 4

TABLE OF AUTHORITIES—continued

Page(s)

Robins v. *Spokeo, Inc.*,
__ F.3d __, 2014 WL 407366
(9th Cir. Feb. 4, 2014) 2

Travelers Cas. & Sur. Co. v. *Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007) 8

CONSTITUTION AND STATUTES

U.S. Const. art. III, § 2 .... *passim*

Electronic Fund Transfer Act
15 U.S.C. § 1693 *et seq*. 5, 10

MISCELLANEOUS

Class Action Complaint, *Charvat* v. *ACO, Inc.*,
No. 8:12-cv-13 (D. Neb. Jan. 8, 2012) 10

Class Action Complaint, *Charvat* v. *IDI ATM, LLC*, No. 8:12-cv-12 (D. Neb. Jan. 8, 2012)........ 10

REPLY BRIEF FOR PETITIONERS

Respondent does not even try to challenge the petition's principal arguments in favor of certiorari. Thus, he does not dispute that the courts of appeals have reached conflicting conclusions as to whether Article III's injury-in-fact requirement is satisfied when the only harm alleged by the plaintiff is a bare statutory violation. Neither does he dispute that this question—which the Court accepted for review but did not decide in *First American Financial Corp.* v. *Edwards*, 132 S. Ct. 2536 (2012) (per curiam)—is an important one that arises under a wide array of significant federal statutes and raises critical issues regarding the scope of federal courts' authority under Article III.

The brief in opposition instead employs obfuscation and diversion, advancing various arguments why the Court supposedly would not be able to address the question presented in this case. Each of those arguments is wrong. The court below squarely rested its finding of Article III standing on its determination that petitioners' alleged failure to comply with the statute was by itself sufficient to establish respondent's standing. Respondent's attempts to revive alternative grounds for standing are both irrelevant (because if those grounds actually were preserved, they may be asserted on remand if this Court reverses the court of appeals' holding) and unavailing (because respondent plainly and unequivocally waived those arguments, which in any event are meritless).

As the *amicus* briefs supporting certiorari make clear, "the significance of the Eighth Circuit's error reaches far beyond this particular case or the statute

under which it arises" to affect companies throughout the national economy. *Amicus* Brief of Chamber of Commerce of the United States 4; see also *id.* at 2; *Amicus* Brief of Washington Legal Foundation 12-13 ("the economic incentives to file suit created by statutory damages provisions are sufficiently large that the issue faced by the Eighth Circuit * * * arises very frequently"); *Amicus* Brief of ACA International 18-19 (issue arises "daily, and at every level," under many different statutes).

In the few weeks since the petition was filed, moreover, the conflict among the lower courts on the question has deepened. In *Robins* v. *Spokeo, Inc.*, __ F.3d __, 2014 WL 407366 (9th Cir. Feb. 4, 2014), the Ninth Circuit reaffirmed its determination in *First American*, broadly holding that the Fair Credit Reporting Act "does not require a showing of actual harm when a plaintiff sues for willful violations" (*id.* at *3), and that Article III's causation and redressability requirements are always satisfied, and therefore may be ignored, whenever a plaintiff asserts a bare violation of a statutory right (*id.* at *4).

Unless this Court grants review, the confusion in the lower courts over Article III's requirements will persist, with cases dismissed for lack of standing in some circuits that would be permitted to proceed in others, and with federal courts adjudicating lawsuits involving claimed injuries that fall short of what the Constitution requires.

A. The Eighth Circuit Squarely Held That Violation Of A Statute Is By Itself Sufficient To Satisfy Article III's Standing Requirement.

The question presented here, like the question in *First American*, is whether Congress by statute may create an injury sufficient to satisfy Article III even though the plaintiff suffers no conventional injury-in-fact. Respondent's assertions that the Eighth Circuit's ruling does not rest on its affirmative answer to this question are plainly wrong.

1. Respondent first points (Opp. 10) to the court of appeals' statement that "Article III precludes a plaintiff from asserting a claim for an abstract statutory violation." Pet. App. 9a. But the Eighth Circuit was merely distinguishing respondent's situation—in which "the statutory damages are given to a consumer who personally experiences a statutory violation"—from a claim by a "third party" who "simply heard from an acquaintance that [petitioners] did not provide 'on machine' notice" but did not himself visit the ATM. *Ibid*.

Finding standing whenever an individual "personally experiences" a statutory violation poses the critical Article III question presented here: Does experiencing a statutory violation confer standing notwithstanding the absence of an injury-in-fact? That is the question that the Eighth Circuit answered "yes": "the [statute] created a right to a particular form of notice before an ATM transaction fee could be levied. If that notice was not provided and a fee was nonetheless charged, an injury occurred." Pet. App. 8a; see also *id*. at 7a-8a ("the district court erred by requiring [respondent] to

demonstrate an injury beyond [petitioners'] failure to provide the prescribed 'on machine' notice").

The Eighth Circuit held it irrelevant that respondent received the information on the ATM screen before incurring the fee; petitioners' failure to provide the "particular form" of duplicative notice required by the statute was sufficient to create an injury actionable under Article III. The question whether suffering a statutory violation is by itself sufficient to confer standing is therefore squarely presented in this case.

2. Respondent devotes more attention (Opp. 11-12) to a second, related argument, asserting that because failure to convey information can *in some circumstances* satisfy Article III's injury requirement, the "informational injury" here qualifies as an injury-in-fact and not merely an "injury-in-statute."

But this Court has found a failure to provide information sufficient to support standing only when the information in question was never conveyed to the plaintiff. See *Federal Election Comm'n* v. *Akins*, 524 U.S. 11, 21, 24-25 (1998) (denial of information necessary to cast an informed vote—a deprivation "directly related to voting, the most basic of political rights"); *Public Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (deprivation of information needed to scrutinize the "workings" of government in order to "participate more effectively in the judicial selection process").

Neither case addressed the situation here—in which petitioners provided respondent with the information before he engaged in each transaction, and respondent authorized payment of the fees. Pet. 4-5. Respondent therefore was not deprived of the infor-

mation; he received it before engaging in the ATM transactions and incurring the fees.[1]

Nothing in this Court's "informational injury" decisions, or the lower-court cases applying those decisions, supports the bizarre proposition that Article III injury-in-fact may be found even though the plaintiff obtained the relevant information from the party required to provide it, simply because the information was not provided in each of the ways specified by statute.

3. Respondent now contends (Opp. 10-11) that he suffered injury in fact from the few seconds' delay between the time he might have seen (and been dissuaded by) sticker notices and the time he saw (and agreed to) the on-screen notices. He argues that the EFTA's dual-notice scheme was designed to prevent ATM customers from becoming "trapped" into paying

---

[1] The lower-court cases that respondent cites (see Opp. 12-13 n.3) likewise involve situations in which the information was not provided at all—and therefore are inapposite. See *American Canoe Ass'n* v. *City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 541-542 & n.1 (6th Cir. 2004) (plaintiffs deprived of information about whether public waters were safe for recreational use); *Grant ex rel. Family Eldercare* v. *Gilbert*, 324 F.3d 383, 386-388 (5th Cir. 2003) (mentally disabled patient not informed that he no longer required institutionalization); *Heartwood, Inc.* v. *U.S. Forest Serv.*, 230 F.3d 947, 951-952 & n.5 (7th Cir. 2000) (plaintiffs sought to "monitor" federal actions affecting their use of public lands); *Public Citizen* v. *FTC*, 869 F.2d 1541, 1543-1545 (D.C. Cir. 1989) (allegation that failure to require statutorily mandated health warnings might actually mislead plaintiffs' members); *Alvarez* v. *Longboy*, 697 F.2d 1333, 1336-1337 (9th Cir. 1983) (replacement workers not informed about strike).

fees by investing time waiting in line or standing at the screen.[2]

But in his complaints—and in his arguments before the district court—respondent said nothing about this loss of time, or about being deceived, misled, or confused. He merely alleged that the ATM stickers were missing, and claimed that this fact alone warrants class recoveries. See C.A. App. JA25, JA29-31, SA10, SA15-16, SA27-28, SA75.

Moreover, the court of appeals did not rest its standing holding on a determination that the fleeting delay was a constitutionally cognizable injury-in-fact—it did not address the delay at all. Instead, it rested its decision solely on the alleged statutory violation.

This case therefore squarely presents the question whether Congress can override the normal Article III requirements by simply declaring that private parties may sue for a regulatory violation, regardless of the actual effect that the violation may have on them. Whether Congress can elevate a violation into something that is actionable in federal court is a question that cries out for this Court's prompt attention.

---

[2] The source of this contention is not any judicial decision recognizing a several-second delay as universally sufficient to establish injury-in-fact, but rather a statement by a single member of Congress (see Opp. 10-11) about the possible delay before receiving the on-screen notice.

B. Respondent's Eleventh-Hour Attempt To Assert An Economic-Injury Claim Provides No Reason To Deny Review And Is Unavailing.

Respondent also contends that the Court may not be able to reach the question presented in the petition because, he says, he also suffered an economic loss by paying the $2 transaction fees for his ATM withdrawals. Respondent maintains that because petitioners did not meet a statutory prerequisite to charging the fees—providing redundant on-machine sticker notice—he was harmed by each fee that he paid, even though he concedes (Opp. 6 n.1) that he received actual notice of the fees and expressly consented to pay them.

This argument provides no basis for denying review, for three separate reasons. First, the Eighth Circuit chose not to address it, and instead based its decision on the issue presented for review. This Court has the power to address the issue that the Eighth Circuit decided without first resolving the claimed alternative basis for upholding the lower court's ruling. Indeed, that is the course that this Court typically follows in such situations. If respondent loses in this Court, and the alternative claim was not waived, he will be free to raise it on remand. Second, respondent did, in fact, waive this claim of economic injury. Third, the claim is meritless.

First, this Court need not resolve an alternative ground for affirmance that the lower court did not address in order to decide the legal question actually decided by the lower court and presented for review. Indeed, the Court's typical practice is the opposite—addressing the question decided by the lower court and presented for review and then, if the petitioner

prevails, remanding the case to allow the lower court to address in the first instance the respondent's alternative contention. That is just what this Court did, for example, in *F. Hoffmann–LaRoche Ltd.* v. *Empagran S.A.*, 542 U.S. 155 (2004), explaining: "The Court of Appeals * * * did not address [respondents' alternative] argument, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim." *Id.* at 175 (citation omitted); accord, *e.g.*, *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 455-456 (2007); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 168-169 (2004).

Here, the court of appeals expressly declined to resolve (a) whether respondent waived reliance on the payment of the $2 transaction fees, and (b) if not, whether those fees satisfied Article III's requirements of actual injury and traceability. Pet. App. 6a-7a. The Eighth Circuit's holding that a statutory violation is sufficient to establish actual injury—even when not accompanied by any injury-in-fact—will apply to cases litigated in that Circuit unless overturned by this Court. The conflict among the lower courts should not be allowed to persist. Respondent's alternative argument "may be resolved on remand; its status as an alternative ground for [affirmance] does not prevent [this Court] from reviewing the ground exclusively relied upon by the courts below." *Perry* v. *Thomas*, 482 U.S. 483, 492 (1987).

Second, respondent plainly waived reliance on the $2 fee. As the petition explains (at 6-7), respon-

dent represented to the district court in both cases that "[t]he injury to Plaintiff Charvat and the putative class in this matter is *not the $2 fee*, but the failure to provide information in the manner prescribed by Congress." C.A. App. SA27-28, SA75 (emphasis added).

Respondent now contends (Opp. 7-9) that we took these unequivocal statements out of context. That is false; the quoted sentence appeared in two different (and lengthy) explanations for why the $2 fees were entirely irrelevant to respondent's claims and theory of recovery. See C.A. App. SA27-28, SA75. The context in each case thus confirms that respondent waived any claims of economic injury.

Respondent also argues (Opp. 8) that, because he "contended in the district court that he had standing to pursue his claims," his belated assertion of an independent economic injury is merely an additional legal argument for standing that is not subject to waiver. But adopting a brand new factual basis for injury is not merely an additional legal argument. It is a new claim—and not the one that respondent brought.

Third, respondent's decision not to plead or seek actual damages for any purported economic harm reflected the reality that he did not suffer any economic injury. He expressly—and repeatedly—consented to pay the ATM fees after receiving on-screen notices and before those fees were incurred. He made a withdrawal from a Mutual First ATM on January 3, 2012. On that very same day he also made fee-incurring withdrawals from two other ATMs that were operated by two other entities (not parties here). And five days later, on January 8, he filed three separate class actions in federal court—

represented by the same counsel—over missing stickers at those three ATMs.[3] He then made *two more withdrawals* from Mutual First ATMs on February 28 and March 3, before filing his Amended Complaint against Mutual First on March 22. And along the way, he went to Wahoo's ATMs on January 22 and March 4, before filing suit against that bank on March 8. See C.A. App. JA6, JA25, SA10.

Finally, and most improbably, respondent argues (Opp. 8-9) that his waiver of economic-injury claims makes him somehow atypical of EFTA plaintiffs and thus impairs this case as a vehicle to decide whether Congress may confer Article III standing by statute. That is exactly backwards. Because respondent expressly waived any claim of injury beyond experiencing the alleged statutory violations—and appropriately so, because there was no other injury to assert—the constitutional question is presented with unusual clarity. See *Amicus* Brief of Washington Legal Foundation 7 (explaining that this case "raises none of the fiduciary duty issues that existed in *First American* and that may have led to dismissal of the writ").

* * *

As explained by some of the *amici* supporting the petition, respondent "quite obviously entered into [his ATM] transactions with full knowledge that he

---

[3] See Class Action Complaint, *Charvat* v. *ACO, Inc.*, No. 8:12-cv-13 (D. Neb. Jan. 8, 2012), ECF No. 1; Class Action Complaint, *Charvat* v. *IDI ATM, LLC*, No. 8:12-cv-12 (D. Neb. Jan. 8, 2012), ECF No. 1. The only apparent differences in the three complaints, aside from the (sequential) docket numbers, are the names of the defendants, the locations of the ATMs, and the amounts of the ATM fees.

would be charged a fee. Indeed, the only plausible explanation for his actions is a desire to increase his statutory claim by tripling the potential size of the plaintiff class[es].” *Id.* at 4. But Article III does not authorize manufactured controversies; it forbids them. Review by this Court is warranted to clarify Article III’s standards and curtail misuse of the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. HARTMAN
Baird Holm LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102
(402) 344-0500

MONICA L. FREEMAN
TODD W. WEIDEMANN
Woods & Aitken LLP
10250 Regency Circle, Suite 525
Omaha, NE 68114
(402) 898-7400

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
RICHARD B. KATSKEE
JAMES F. TIERNEY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

DONALD M. FALK
Mayer Brown LLP
Two Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
(650) 331-2000

Counsel for Petitioners

FEBRUARY 2014