Nos. 12-2790 and 12-2797(consolidated)

In the United States Court of Appeals for the Eighth Circuit

JAREK CHARVAT,
Plaintiff-Appellant,

v.

MUTUAL FIRST FEDERAL CREDIT UNION,
Defendant-Appellee.

JAREK CHARVAT,
Plaintiff-Appellant,

v.

FIRST NATIONAL BANK OF WAHOO,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Nebraska

BRIEF FOR APPELLANT JAREK CHARVAT

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INTRODUCTION

The district court below adopted an unprecedented and far-reaching theory of Article III standing. Unlike every other court to confront the question, it held that federal courts lack jurisdiction over claims for statutory damages under the Electronic Funds Transfer Act (EFTA) unless the plaintiff alleges some *other* injury, separate from the injury contemplated by Congress. That holding effectively nullifies the primary means of EFTA enforcement and, if allowed to flourish, would hinder enforcement of a wide range of consumer, health, safety, and environmental protections enacted by Congress.

EFTA requires the operator of an ATM to notify consumers of transaction fees by displaying notice of the fee *both* on the ATM and, after the consumer has initiated the transaction, on the ATM's screen. Congress intended both forms of notice to encourage competition among ATM operators and protect consumers by ensuring they are adequately notified of the fees they will be charged. But unlike the on-screen notice, which consumers will not receive until their transaction is almost complete, the on-machine notice ensures that a consumer is informed of the fee *before* spending the time necessary to wait in line, provide a card and security code, and navigate the ATM's screens to identify a transaction. As Congress recognized, on-machine notice is essential to achieving the statute's purposes because, after investing that time, "[i]t is not realistic" to expect consumers to

abandon their transactions and search for another ATM. *Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the Senate Committee on Banking, Housing & Urban Affairs*, 104th Cong., at 3 (1996).

The theory adopted by the district court borrows from one advanced in *First American Financial Corp. v. Edwards*, 131 S. Ct. 3022 (2011). There, the defendant argued that a consumer lacked standing to sue under the Real Estate Settlement Procedures Act for statutory violations that allegedly had no effect on the cost or quality of the services she received. Adopting similar logic, the district court here reasoned that plaintiff Jarek Charvat lacked standing to sue despite the defendants' statutory violations because he received the required on-screen notice of the fees before he completed his transactions and thus had not been injured.

Even setting aside the fact that the Supreme Court dismissed *Edwards* as improvidently granted, the argument made there does not apply here. First, EFTA prohibits ATM operators from charging fees absent on-machine notice, and the defendants' decision to charge fees in violation of the statute *did* increase the cost of the services Charvat received in a way that was absent in *Edwards*. Charvat's payment of an illegal fee constitutes a classic injury-in-fact under Article III. Second, the defendants' conduct deprived Charvat of notice before he initiated his transactions—the time at which Congress considered notice to be especially relevant to consumers and important to influencing behavior. Depriving consumers

of notice in the manner Congress directed is a second well-established form of injury that was absent in *Edwards* and an independent reason why the district court erred in holding that Charvat lacks standing here.

Because Charvat was injured by the defendants' violation of EFTA's notice requirements, this Court need not address the question—not reached by the Supreme Court in *Edwards*—whether a plaintiff has standing to claim statutory damages in the absence of some other injury. But even if the court does reach that question, Charvat should prevail. As the Supreme Court has repeatedly recognized, "the injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (internal quotation marks omitted). The district court's holding would effectively nullify the right to pre-transaction notice provided by EFTA by depriving consumers of standing to enforce the statute's express terms as long as notice is provided at *any* time during a transaction. Article III neither requires nor authorizes the federal courts to flout Congress's statutory command.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On July 12, 2012, it entered final judgments dismissing these consolidated cases. On July 27, 2012, the plaintiff filed notices of appeal in each case under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Does a consumer have an injury to support Article III standing where (1) he has been charged and has paid a fee prohibited by statute, (2) he has been denied notice of the fee in the manner and at the time prescribed by Congress, and (3) Congress has provided that the consumer is entitled to statutory damages?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory Background

The Electronic Fund Transfer Act (EFTA) prohibits ATM operators from imposing fees for ATM cash withdrawals unless they provide prior notice of the fee and sets forth the specific manner in which that notice must be provided. 15 U.S.C. § 1693b(d)(3)(A), (C). First, the ATM operator must provide on-machine notice "posted in a prominent and conspicuous location on or at the automated teller machine." *Id.* § 1693b(d)(3)(B). Second, the ATM operator must provide a separate on-screen notice "after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." *Id.* Taken together, these provisions make it illegal for an ATM operator to charge a fee without providing *both* the required on-machine and on-screen notices. Moreover, the right to receive this notice cannot be waived. EFTA prohibits waiver by agreement "of any right

conferred or cause of action created by this [statute]." *Id.* § 1693l.[1]

Congress enacted these notice requirements as part of the ATM Fee Reform Act of 1999, in an effort to protect "individual consumer rights" and to encourage competition among ATM operators. *Id.* § 1693(b). In hearings leading up to the notice requirement's enactment, Congress heard testimony from industry representatives that on-machine notice was already the prevailing industry standard and that requiring all banks to abide by that standard would encourage competition among banks on ATM fees. *See, e.g.*, *The Expanding ATM Market and Increased Surcharge Fees: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 105th Cong. at 31–32 (1997); *ATM Surcharges: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Banking & Fin. Servs.*, 104th Cong. at 31–31, 37 (1996); *Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 104th Cong. at 51, 104, 108, 113–14 (1996). Congress also heard testimony from consumer advocates that "many machines do not provide the screen warning until after the consumer has inserted his or her card, entered a PIN, viewed an advertising message, selected an account, and inserted an amount," and that, "[b]y then, the consumer is trapped into paying the fee." *Hearing on Automatic Teller Machine Fees and Surcharges Before the Senate Comm. on Banking, Housing and Urban Affairs* (June 11, 1997) (prepared testimony of Edmund

[1] EFTA's implementing regulation, known as Regulation E and promulgated by the Federal Reserve Board, tracks its requirements. 12 C.F.R. § 1005.16.

Mierzwinski, U.S. PIRG), *available at* http://banking.senate.gov/97_06hrg/061197/witness/mierzwin.htm.

Echoing these concerns, the Congressional Budget Office warned Congress that the failure of some banks to disclose fees before consumers initiated ATM transactions was an "important factor inhibiting price competition among Bank ATM owners." Congressional Budget Office, *Competition in ATM Markets* (1998), *available at* http://www.cbo.gov/publication/10946. EFTA's requirement of on-machine notice of ATM fees directly responds to that problem. As Senator D'Amato, a key proponent of the law, explained:

> When someone walks in to use an ATM, and up on a little screen goes a sign that says, you will be charged an additional fee, it's too late. How many people do you think are then going to go to another ATM if it's the middle of the day or in the evening, et cetera, if they find themselves going to an ATM out of necessity because it is close by? It is not realistic.

Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the Senate Committee on Banking, Housing & Urban Affairs, 104th Cong., at 3 (1996).

B. Factual Background

Plaintiff-appellant Jarek Charvat made a withdrawal from an ATM owned by defendant-appellee Mutual First Credit Union. JA 7 ¶ 7. Although Mutual First charged Charvat a $2 fee for the transaction, Charvat alleged that no notice of the fee was posted on the machine or in its vicinity. *Id.* at 7 ¶¶ 7, 9. Charvat therefore did not receive notice until he had almost completed his transaction, when an on-

screen notice informed him of the fee. *Id.* at 17. Charvat later made separate cash withdrawals from another ATM owned by defendant-appellee First National Bank of Wahoo. *Id.* at 25 ¶ 7. Again, no notice of the fee was posted on the ATM, but Charvat was nevertheless charged $2 for his transactions. *Id.* at 25 ¶¶ 7, 9.

Charvat sued both banks on behalf of himself and all others similarly situated in the U.S. District Court for the District of Nebraska, alleging that the banks failed to post notice of their ATM fees "on or at" their machines, as required by EFTA. 15 U.S.C. § 1693b(d)(3)(B). First National Bank of Wahoo moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Charvat had suffered no injury and thus lacked standing to bring his claim. *First Nat'l Bank of Wahoo*, Docs. 7-8. Alternatively, the bank argued that the court should stay the case pending the Supreme Court's review of the Ninth Circuit's decision in *Edwards v. First American Corp.*, 610 F.3d 514, 516 (9th Cir. Cal. 2010), *cert. granted*, 131 S. Ct. 3022 (2011)*; see First Nat'l Bank of Wahoo*, Doc. 8, at 9.

The district court agreed with First National that Charvat failed to allege an Article III injury, notwithstanding his allegations that the defendants violated his rights under EFTA by charging him fees without providing the required statutory notice. JA 37. The court expressly disagreed with the conclusions of every other district court to have decided the issue, which have held "that when an ATM operator fails to provide a fee notice on the exterior of the ATM as required by the

EFTA, the statutory violation is in itself an injury." *Id.* at 36. The court instead concluded that EFTA's "authorization of statutory damages is unrelated to injury," and thus that Charvat lacked standing to enforce his rights under the statute. *Id.* at 37. Rather than dismissing, however, the district court accepted First National's alternative request to stay proceedings while awaiting the Supreme Court's decision in *Edwards* based on its view that the issue in *Edwards* was "similar to the standing issue presented here." *Id.* at 41-43. After the Supreme Court dismissed *Edwards* as improvidently granted, *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012), the court dismissed both of Charvat's cases for lack of Article III standing. JA 19, 45.

SUMMARY OF THE ARGUMENT

The district court's holding that Charvat lacks an injury sufficient to support standing under Article III is wrong for three independent reasons.

1. EFTA prohibits ATM operators from charging a fee unless they provide notice in the manner the statute requires—both "on or at" the ATM and on the ATM's screen. Yet the defendants here charged Charvat $2 transactional fees without providing the required on-machine notice. Charvat's out-of-pocket payment of ATM fees that the statute plainly prohibits the defendants from charging is an injury of the sort that courts routinely find sufficient to support a plaintiff's standing. For that reason alone, the district court erred in holding that

Charvat lacks Article III standing to bring his claims under the statute.

Although payment of a $2 fee is not a large injury, Article III requires only an "identifiable trifle" to support standing. An actual expense, even if small, is more than sufficient to satisfy that standard. Nor does the fact that Charvat chose to proceed with his transaction after receiving on-screen notice deprive federal courts of jurisdiction. Because EFTA prohibits waiver of its notice requirements, Charvat could not have waived his claim by agreeing to pay the unlawfully charged fee. And even if the statute allowed Charvat to consent to payment of an illegal fee, it would have no bearing on whether he suffered an injury for Article III purposes. Regardless of Charvat's consent, the defendants' decision to charge a fee prohibited by statute injured Charvat in a way that is both concrete and particularized to him. Article III's requirements are thus satisfied.

Rather than addressing Charvat's allegations of actual injury, the district court focused on his claim for statutory damages. But statutory damages are relevant only to the measure of damages to which Charvat is entitled, not to whether he suffered an injury for Article III purposes. Where damages are likely to be small, Congress commonly provides for statutory damages in an amount exceeding a plaintiff's actual loss. Statutory damages are particularly important to EFTA's enforceability because, without them, plaintiffs would have little incentive to bring suit to recover a $2 ATM fee, and defendants would accordingly have little

incentive to comply with the statute's notice requirements. Given due regard for Congress's judgments about the need to protect consumers and encourage competition among ATM operators, EFTA's provision of a minimum of $100 in statutory damages is well within the range of damages the Supreme Court has approved.

Regardless, the question of Charvat's entitlement to statutory damages is irrelevant to the court's jurisdiction to hear Charvat's claims. Resolution of that issue is a merits question for the district court to address, if at all, after the defendants' liability has been established.

2. The defendants' failure to provide Charvat with notice at the time and in the manner prescribed by Congress constitutes an independent basis for Charvat's Article III standing here. EFTA's requirement that ATM operators provide notice "on or at" ATMs in addition to on-screen notice is an essential part of the statute's notification scheme. As Congress recognized, consumers are much less likely to reject an ATM fee after they have already invested time in a transaction. EFTA's requirement of notice *before* consumers begin a transaction is thus necessary to accomplish its purpose of protecting consumers and encouraging competition among ATM operators.

The Supreme Court has long held that violation of a statutory right to receive information is an injury sufficient to satisfy Article III's requirements even

in the absence of financial loss. In light of that precedent, every court to have considered the issue—other than the district court below—has held that failure to provide the on-machine notice EFTA requires constitutes a concrete, particular injury for Article III purposes. The district court's contrary holding would not only effectively nullify EFTA's dual-notice scheme, but would cast doubt on Congress's authority to mandate enforceable notice requirements under a wide variety of other statutes.

As courts have recognized, consumer-protection statutes are particularly amenable to relief in the form of statutory damages because the injuries resulting from denial of a statutory entitlement to information are often small and difficult to quantify. Both the Truth and Lending Act and the Fair Debt Collection Practices Act, for example, require that disclosures be made at particular times and in particular ways, and it is no defense under those statutes that the consumer received the information at a later stage of the transaction and thus suffered no actual injury. Similarly, Article III does not immunize defendants from claims that they failed to provide notice at the time and in the manner that EFTA requires.

3. Even setting aside the illegal fee and lack of notice, Charvat would still have standing to enforce his rights under EFTA. An injury for Article III purposes requires no more than the violation of a legal right, and Anglo-American law has traditionally recognized the authority of legislatures to establish such rights.

Without any question of standing, federal courts have long awarded nominal or presumed damages on a wide range of claims where no actual damages have been shown. Courts have also allowed vindication of invasions of rights through statutory damages. The Copyright Act, for example, has for more than a century allowed plaintiffs to recover statutory damages without proof of monetary loss. Numerous consumer statutes, including EFTA, borrow from that common-law and statutory tradition to provide damages for violations of legally protected interests where proving monetary loss would be difficult or impossible.

In such cases, the relevant standing question is whether the statute can be understood as granting those in the plaintiff's position a right to judicial relief. That test is easily satisfied here. By violating the statute's notice requirements, the defendants invaded Charvat's legally protected interests and the statute accordingly provides him a right to relief against them. Charvat's EFTA claims thus provide the courts with all the concrete particularity that Article III requires.

STANDARD OF REVIEW

This court reviews dismissal of a complaint for lack of jurisdiction "de novo, accepting as true the factual allegations contained in the complaint and granting the [plaintiff] the benefit of all reasonable inferences that can be drawn from those allegations." *Gomez v. Wells Fargo Bank*, 676 F.3d 655, 660 (8th Cir. 2012).

ARGUMENT

The requirement of standing arises from Article III's limit on federal jurisdiction to "Cases" or "Controversies." The "gist of the question" is whether the party seeking to invoke federal jurisdiction has "a personal stake in the outcome of the controversy." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (internal quotation marks omitted). Satisfying this "injury in fact" standard requires showing "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These factors are designed "to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.*, 901 F.2d 673, 677 (8th Cir. 1990) (internal quotation marks omitted).

The defendants' failure to provide the notice required by EFTA injured Charvat in two ways. First, the defendants' decision to charge Charvat a fee prohibited by the statute caused him a direct financial injury. Second, defendants' failure to provide on-machine notice violated Charvat's statutory right to receive that notice at the time and in the manner directed by Congress. Either one of those injuries, standing alone, is sufficient to support Charvat's standing. But even setting aside those separate injuries, defendants' violation of Charvat's statutory rights

under EFTA constitutes an Article III injury based on Congress's well-established authority to establish "legal rights, the invasion of which creates standing." *Lujan*, 504 U.S. at 578.

I. By Charging Charvat an Illegal Fee, the Defendants Caused Him a Direct Economic Injury.

A. Charvat's first "direct stake" in these cases is straightforward—the defendants charged him $2 transactional fees that, by law, they were not permitted to charge. EFTA provides that "*[n]o fee may be imposed* by any automated teller machine operator" unless the notices required by the statute—including on-machine notice—are first provided to the consumer. 15 U.S.C. § 1693b(d)(3)(C) (emphasis added). The statute thus provides banks with a choice: Either charge a fee and provide the notice required by statute, or provide no notice and charge no fee. The defendants here, however, charged a fee *without* providing the required notice, and, thus, charged Charvat a fee that the statute prohibits.

The "expenditure of funds" is "the most mundane of injuries of fact." *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 133 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2431. Charvat alleged such an injury here. His complaints allege that the defendants charged him "a fee of $2.00 in connection with the transaction[s]." JA 7 ¶ 7, 25 ¶ 7. Moreover, Charvat alleged that EFTA and its implementing regulations "prohibit ATM operators from imposing a fee on a consumer unless EFTA's notice and posting requirements are followed by the ATM operator." *Id.* at

9 ¶ 16, 27 ¶ 16; *see also id.* at 11 ¶ 30, 29 ¶ 30 (required notice is a "prerequisite to imposition of a usage fee upon a consumer"). By charging Charvat an illegal fee, the defendants caused him "direct financial harm"—"a classic form of qualitatively concrete injury." *Hosp. Council of W. Penn. v. City of Pittsburgh*, 949 F.2d 83, 87 (3d Cir. 1991). There can be no serious question that "allegations of economic injury are sufficient to meet the demands of Art[icle] III." *Rodeway Inns v. Frank*, 541 F.2d 759, 763 (8th Cir. 1976); *see, e.g.*, *Eckles v. City of Corydon*, 341 F.3d 762, 768 (8th Cir. 2003) (holding that even a *threatened* fee for removal of signs was a "direct, financial injury"); *Bloom v. NLRB*, 153 F.3d 844, 848 (8th Cir. 1998) (holding that an employee suffered a cognizable injury when union dues and fees were withheld from his paycheck).

To be sure, a $2 fee is not a large injury. But "injury-in-fact is not Mount Everest." *Danvers Motor Co., Inc. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005). Article III requires only that a plaintiff be "adversely affected" or "aggrieved" by a defendant's conduct. *Nat'l Wildlife Fed'n*, 901 F.2d at 677. In meeting that requirement, even an "identifiable trifle" is sufficient. *Id.* An actual out-of-pocket cost attributable to a defendant's conduct—no matter how small—is thus necessarily sufficient to establish Article III standing. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973) ("We have allowed important interests to be vindicated by plaintiffs with no more at stake in

the outcome of an action than a fraction of a vote, ... a $5 fine and costs, ... and a $1.50 poll tax.").

Nor does the fact that Charvat chose to proceed with his transaction after receiving on-screen notice deprive him of standing. EFTA prohibits waiver by agreement "of any right conferred or cause of action created by this [statute]." 15 U.S.C. § 1693l. Charvat thus could not have waived his claim by agreeing to pay the unlawfully charged fee. And even if Charvat could have consented to an illegal fee, it would have no bearing on whether he suffered an injury for Article III purposes. *See Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 770-71 (8th Cir. 2010) (declining "to use the principle of constitutional standing to enforce" state-law voluntary payment rule, and holding that the question was "better left to the applicable substantive law"). As in *Curtis Lumber*, Charvat's "injuries are actual, particularized to [the plaintiff], traceable to [the defendants'] acts, and redressable by a verdict in [plaintiff's] favor. As such, the standing requirements are satisfied." *Id.*

B. In reaching the contrary conclusion, the district court was led astray by its focus on Charvat's claim for statutory damages. The court held that Charvat had failed to establish an injury-in-fact because EFTA's "authorization of statutory damages is unrelated to *injury*." JA 17, 37. But given Charvat's allegations that the defendants charged him an illegal fee, statutory damages under EFTA are relevant

only to the *amount* of damages to which he is entitled for the defendants' violation, not to whether he suffered an injury in the first place. Congress commonly provides for a measure of statutory damages that exceeds the plaintiff's actual damages where, as under EFTA, individual loss is likely to be small. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). The propriety of such provisions is well established. In the leading case on the subject, the Supreme Court upheld an award of $75 in statutory damages against a railroad for charging 66 cents more for tickets than allowed by Arkansas law—a ratio of approximately 113:1. *St. Louis Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 66-67 (1919). Even without adjusting for inflation, FCRA's minimum of $100 is only twice the $50 minimum in 1919 dollars provided by the law upheld in *Williams*. And the 50:1 ratio of EFTA's minimum statutory damages to Charvat's $2 per-transaction loss is substantially less than the Court approved there.

Statutory damages are particularly appropriate under EFTA given their importance to accomplishing the law's objectives. Congress enacted the ATM Fee Reform Act, which added EFTA's notice requirements, in response to concern by both industry and consumer groups that some banks were failing to comply with the industry standard of providing both on-machine and on-screen notice of fees, and that, as a result, competition among ATM operators had been compromised. *See, e.g.*, *The Expanding ATM Market and Increased Surcharge Fees: Hearing Before the S.*

Comm. on Banking, Hous., & Urban Affairs, 105th Cong. at 31–32 (1997); *Hearing on Automatic Teller Machine Fees and Surcharges Before the Senate Comm. on Banking, Housing and Urban Affairs* (June 11, 1997) (prepared testimony of Edmund Mierzwinski, U.S. PIRG), *available at* http://banking.senate.gov/97_06hrg/061197/witness/mierzwin.htm. Congress considered private actions for damages under EFTA "an essential part of enforcement of the [statute]." H.R. Rep. No. 95-1315, at 15 (1978). Without EFTA's statutory damages provision, plaintiffs would have little incentive to bring suit to recover a $2 ATM fee, and defendants would accordingly have little incentive to comply with the statute's notice requirements. *See Crabill v. Trans Union, LLC*, 259 F.3d 662, 665 (7th Cir. 2001) (noting that, where damages are small, the cost of suit can "exceed the damages themselves, making the right to sue nugatory"). Given due regard for Congress's judgments about the need to protect consumers and encourage competition among ATM operators, EFTA's provision of a minimum of $100 in statutory damages falls well within the "wide latitude of discretion" accorded to legislatures to fix monetary sanctions under *Williams*. 251 U.S. at 66.

In any event, the question of Charvat's entitlement to statutory damages—and the amount of statutory damages to which he is entitled—are merits questions for the district court to address, if at all, after the defendants' liability has been established. *See Murray*, 434 F.3d at 954. The court's resolution of those issues is

irrelevant to Charvat's injury, and thus to the court's jurisdiction to hear his claims.

II. Defendants Independently Injured Charvat by Denying Him the Notice Required by Statute.

The district court ignored Charvat's payment of an illegal fee, instead focusing on whether the defendants' failure to provide on-machine notice of the fee was sufficient to give him standing. Even setting aside the court's failure to recognize Charvat's out-of-pocket loss as an injury, the district court's analysis fails on its own terms. The court premised its holding on the fact that Charvat received on-screen notice of the fees during his transaction. That the defendants provided *some* notice, however, does not forgive their failure to provide notice *"in the form prescribed by Congress*." *In re Regions Bank ATM Fee Notice Litig.*, No. 11–2202, 2011 WL 4036691, at *4 (S.D. Miss. Sept. 12, 2011). Defendants' decision to provide Charvat only half the notice required by statute is an independent Article III injury.

EFTA's requirement of notice "on or at" the ATM in addition to on-screen notice is an essential part of the statute's notification scheme. In passing the requirement, Congress relied on a Congressional Budget Office report warning that banks often failed to disclose fees before consumers initiated ATM transactions and that this failure was an "important factor inhibiting price competition among Bank ATM owners." Congressional Budget Office, *Competition in ATM Markets* (1998), *available at* http://www.cbo.gov/publication/10946. By requiring on-

machine notice, Congress ensured that a consumer can determine that a fee will be charged *before* the consumer has waited in line, "inserted his or her card, entered a PIN, viewed an advertising message, selected an account, and inserted an amount," by which time "the consumer is trapped into paying the fee." *Hearing on Automatic Teller Machine Fees and Surcharges Before the Senate Comm. on Banking, Housing and Urban Affairs* (June 11, 1997) (prepared testimony of Edmund Mierzwinski). Congress recognized that those actions take time that commits consumers to the transaction, making it unlikely that they will go through the trouble of leaving the ATM and repeating the process elsewhere. As Senator D'Amato, a key proponent of the law, explained:

> When someone walks in to use an ATM, and up on a little screen goes a sign that says, you will be charged an additional fee, it's too late. How many people do you think are then going to go to another ATM if it's the middle of the day or in the evening, et cetera, if they find themselves going to an ATM out of necessity because it is close by? It is not realistic.

Fair ATM Fees for Consumers Act, S. 1800: Hearing Before the Senate Committee on Banking, Housing & Urban Affairs, 104th Cong., at 3 (1996).

In light of Congress's intentional adoption of a dual-notice scheme, every court to consider the issue—other than the district court below—has held that failure to provide the on-machine notice required by EFTA constitutes an injury for Article III purposes even in the absence of monetary damages. *See, e.g.*, *Mabary v. Hometown Bank, N.A.*, No. 10-3936, 2012 WL 3765020 (S.D. Tex. Aug. 30, 2012);

Zabienski v. ONB Bank & Trust, No. 12–130, 2012 WL 3583020, at *1 (N.D. Okla. Aug. 20, 2012); *Sucec v. The Greenbrier*, No. 11-0968, 2012 WL 3079233 (S.D.W. Va. July 10, 2012), *report and recommendation adopted*, 2012 WL 3079212 (S.D.W. Va. July 30, 2012); *Campbell v. Hope Cmty. Credit Union*, No. 10–2649, 2012 WL 423432 (W.D. Tenn. Feb. 8, 2012); *Kinder v. Dearborn Fed. Sav. Bank*, No. 10-12570, 2011 WL 6371184 (E.D. Mich. Dec. 20, 2011); *Regions Bank*, 2011 WL 4036691. As the district court wrote in *Regions Bank*, "Congress created a statutory right to a particular form of notice" under EFTA, and a defendant's failure to provide that notice to the plaintiff "is a concrete, particular injury" under Article III. *Id.*

The conclusion of those courts is compelled by longstanding Supreme Court precedent holding that the statutory right to receive information is sufficient to establish Article III standing. *See, e.g.*, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *see generally* Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Penn. L. Rev. 613 (1999). In *Public Citizen v. U.S. Department of Justice*, for example, the Supreme Court held that the plaintiff had standing to challenge the Justice Department's failure to provide access to information, the disclosure of which was allegedly required by the Federal Advisory Committee Act, because the inability to obtain such information "constitutes a sufficiently distinct injury to provide standing to sue." 491 U.S. 440, 449 (1989); *see also Akins*, 524 U.S. at 24-25. Federal courts have also held deprivation of information to be a sufficient

injury for standing purposes in a wide variety of other statutory contexts, from government-sunshine and election law to health, safety, and environmental regulation.[2]

Because the relevant injury in *Public Citizen* and similar cases is the deprivation of a statutory entitlement to information, courts do not require the plaintiff to separately allege actual damages resulting from the deprivation to establish standing. Thus, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 363 (1982), the Supreme Court held that a housing-discrimination "tester" had standing based on a violation of his "statutorily created right to truthful housing information." *Id.* at 374. Although the tester had no "intention of buying or renting a home" and "fully expect[ed] that he would receive false information," *id.* at 373–374, the Court held that "[a] tester who has been the object of a misrepresentation made

[2] *See, e.g.*, *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004) (ongoing failure to comply with monitoring and reporting requirements of the Clean Water Act created informational injury); *Grant v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003) ("The inability to obtain information required to be disclosed by statute constitutes a sufficiently concrete and palpable injury to qualify as an Article III injury-in-fact."); *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (because the National Environmental Policy Act requires environmental assessments "to provide stakeholders with information necessary to monitor agency activity," failure to perform an assessment creates "a cognizable injury-in-fact for plaintiffs who are deprived of this information"); *Pub. Citizen v. FTC*, 869 F.2d 1541, 1543 (D.C. Cir. 1989) (plaintiffs have standing where "they are being deprived of information and warnings that will be of substantial value to them and to which they are legally entitled" under the Comprehensive Smokeless Tobacco Health Education Act); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (failure to provide notice of an ongoing strike at time of employment as required by the Farm Labor Contractor Registration Act).

unlawful under §804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing." *Id.* at 373 (internal quotation marks omitted).

Consumer-protection statutes are particularly amenable to relief in the form of statutory damages without proof of further injury because the injuries resulting from denial of a statutory entitlement to information—though real—are often small and difficult to quantify. The Truth in Lending Act (TILA) is a closely analogous example. TILA requires lenders to prominently disclose a loan's annual percentage rate in a particular location and format designed to allow consumers to "compare more readily the various credit terms available." 15 U.S.C. § 1601(a). Like the EFTA notice provisions at issue here, TILA is designed to encourage competition in the financial marketplace by requiring disclosure at an early stage of the transaction so that consumers have an adequate opportunity to shop for competing rates. And also like EFTA, it is no defense under TILA to claim that the consumer received the information in some other way. As this Court has made clear, "TILA plaintiffs … need not show that they sustained actual damages stemming from the TILA violations" to recover statutory damages. *Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980); *see Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 376-77 (1973). Rather, "[t]he statutory damages are explicitly a bonus to the successful TILA plaintiff, designed to encourage private

enforcement of the Act, and a penalty against the defendant, designed to deter future violations." *Dryden*, 630 F.2d at 647.[3]

Another example is the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692. The FDCPA requires debt collectors to include certain disclosures in their communications with debtors, including "that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Like EFTA and TILA, the FDCPA provides civil liability, including statutory damages, for violation of its requirements. *Id.* § 1692k. And, again, it is well-established that "[t]he FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages." *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir. 1998). Thus, the Seventh Circuit in *Keele* rejected a debt collector's argument that the plaintiff lacked standing because the defendants had not collected any "illegal collection fee." *Id.* The FDCPA, the court held, requires "focus on the debt collector's misconduct, not whether the debt is valid or … whether the consumer has paid an invalid debt." *Id.* The court concluded that it had jurisdiction to hear the plaintiff's claims "[n]otwithstanding her lack of a claim

[3] *See also Edwards v. Your Credit Inc.*, 148 F.3d 427, 441 (5th Cir. 1998) ("[W]hile the harm that Edwards may have suffered is relevant to the damages to which she may be entitled, it is irrelevant to whether she is entitled to bring an action." (citation omitted)); *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877, 879 (11th Cir. 1982) ("[T]he statutory civil penalties must be imposed for such a violation regardless of the district court's belief that no actual damages resulted or that the violation is de minimis."); *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538, 539 (3d Cir. 1979).

for actual damages." *Id.* Every other circuit to address the issue has likewise concluded that "statutory damages are available without proof of actual damages" under the FDCPA. *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir. 1982); *see also Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1211-12 (10th Cir. 2006); *Miller v. Wolpoff & Abramson, LLP*, 321 F.3d 292, 307 (2d Cir. 2003).[4]

The district court's holding, if accepted by this Court, would write Congress's requirement of pre-transaction notice out of the EFTA's statutory scheme by foreclosing enforcement of the requirement as long as notice is provided at any point in the transaction. It would also open the door to similar arguments under other consumer-protection statutes. A lender could argue, for example, that a borrower lacks standing to enforce TILA's requirement that a loan's annual percentage rate be prominently disclosed because the borrower received notice of the rate before paying any interest. And debt collectors could escape liability under the FDCPA for failing to disclose that they are attempting to collect a debt by arguing that the debtor learned that fact before making payments on the debt. In short, the district court's holding would undermine Congress's authority to mandate enforceable notice requirements under a range of consumer statutes.

[4] The defendant's argument in *Keele*—that the plaintiff lacked standing because she had not paid an illegal fee—presumed that she would have had standing if a fee *had* been paid. The district court's holding here that Charvat lacked standing *despite* his payment of an illegal fee thus goes even further than the rejected argument in *Keele* and, as explained in Part I, is doubly wrong for that reason.

Article III does not require the courts to flout Congress's express commands in this way.

III. EFTA Is A Valid Exercise of Congress's Authority to Define Statutory Injuries.

Even if Charvat could not establish an Article III injury based on his payment of illegal fees and the defendants' failure to provide the required notice, he nevertheless has standing because EFTA includes a private-enforcement provision that entitles him to statutory damages. Because "legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature," "standing['s] … existence in a given case is largely within the control of Congress." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). Thus, as both this Court and the Supreme Court have repeatedly recognized, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Rodeway Inns*, 541 F.2d at 763 (quoting *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968)); *see also Massachusetts*, 549 U.S. at 516 ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."); *Lujan*, 504 U.S. at 578 ("[T]he injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights …."); *Bloom*, 153 F.3d at 848 ("[T]he necessary injury in fact might also be premised upon … violation of

the Act itself.").

Congress's authority to provide damages remedies for violations of personal legal rights, even without other ensuing harm, arises from a longstanding tradition recognizing the legitimacy of such remedies for infringements of both common-law and statutory interests. For centuries, English courts have held that a plaintiff could sue for an invasion of legal rights without any further harm as long as the invasion is "peculiar to [the plaintiff]" and not "general and common to all." *See, e.g.*, *Taylor v. Henniker*, 12 Ad. & E. 489, 492, 113 Eng. Rep. 897, 898 (Q.B. 1840) (unlawful notice was a "wrongful act" that constituted "legal damage" even though "no real damage was sustained"); *Ashby v. White,* 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703) ("[E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hind[e]red of his right."). As Blackstone wrote: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768); *see Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy.").

The common law typically allowed redress for violation of legal rights through nominal or presumed damages. *See, e.g.*, *Whittemore v. Cutter,* 29 F. Cas.

1120 (C.C.D. Mass. 1813) (Story, J.) ("Every violation of a right imports some damage, and if none other be proved, the law allows a nominal damage."). Without any question of standing, federal courts have awarded such damages for a wide range of claims, including violation of constitutional rights, defamation, and patent infringement, even where no actual damages have been shown. *See, e.g.*, *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (holding that "denial of procedural due process [is] actionable for nominal damages without proof of actual injury"); *Pollard v. Lyon*, 91 U.S. 225, 227 (1876) (upholding presumed damages for defamation per se); *Whittenmore*, 29 F. Cas. 1120 (holding that a patent owner could recover nominal damages from a defendant who made, but never used or sold, an infringing machine).

Courts have also long vindicated invasions of legal rights through statutory damages. The Copyright Act, for example, has provided for more than a hundred years that infringement of copyright is itself a violation of a legally protected interest that gives rise to a claim for statutory damages. *See* 17 U.S.C. § 504(c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998) (reviewing history of statutory damages under state and federal copyright statutes). A copyright plaintiff's entitlement to statutory damages does not depend on proof of any injury beyond the deprivation of the statutory entitlement to prevent infringing acts. Instead, the statute "give[s] the owner of a copyright some recompense for

injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits," and serves to deter "willful and deliberate infringement." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). Thus, "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Congress's tradition of allowing consumers to vindicate their rights through causes of action that do not require showings of monetary damages—and the longstanding willingness of courts to resolve those disputes—"is particularly relevant to the constitutional standing inquiry since … Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Where the Supreme Court has found a tradition of judicial resolution of a type of dispute, it has found it "unwise … to abandon history and precedent." *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 288-89 (2008). "[T]he far more sensible course is to abide by … history and tradition and find that the [plaintiffs] possess Article III standing." *Id.*

Numerous consumer-protection statutes, including EFTA, borrow from the common-law and statutory tradition of presumed or statutory damages for

violations of legally protected interests that predictably harm consumers but for which it may be difficult or impossible to prove monetary loss. In such cases, "the standing question … is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

In *Beaudry v. TeleCheck Services*, for example, the plaintiff alleged that the defendants violated the Fair Credit Reporting Act by inaccurately reporting that she was a first-time check writer. 579 F.3d 702, 703 (6th Cir. 2009). The district court dismissed the case because the plaintiff had not alleged monetary loss, but the Sixth Circuit reversed. Judge Sutton explained that the plaintiff "suffered the precise 'injury' that the statute proscribes: the defendants 'prepare[d] a consumer report' about her but failed to 'follow reasonable procedures to assure maximum possibly accuracy of the information' it contained." *Id.* at 705 (quoting 15 U.S.C. § 1681e(b)). So long as there is an adequate connection between the legal violation and the individual plaintiff, "[n]o Article III (or prudential) standing problem arises." *Id.*[5]

[5] *See also, e.g.*, *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009) (Real Estate Settlement Procedures Act); *In re Carter*, 553 F.3d 979, 989 (6th Cir. 2009) (same); *Murray*, 434 F.3d 948 (same); *Robey*, 434 F.3d at 1211–1212 (10th Cir. 2006) (Fair Debt Collection Practices Act); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 427–428 (S.D.N.Y. 2010) (Stored Communications Act); *Ramirez v. MGM Mirage, Inc.*, 524 F. Supp. 2d 1226, 1231 (D. Nev. 2007) (Fair and Accurate Credit Transactions Act).

As in *Beaudry*, Charvat "suffered the precise 'injury'" that EFTA proscribes. EFTA provides that "any person" who violates "any provision" of its requirements "with respect to any consumer" is (subject to exceptions not relevant here) "liable to such consumer." 15 U.S.C. § 1693m(a). Moreover, the statute provides for relief for such violations in the form of statutory damages. 15 U.S.C. § 1693m(a). By violating the statute's notice requirements "with respect to" Charvat, the defendants invaded his "legally protected interest," *Lujan*, 504 U.S. at 560, and the statute thus provides him "a right to judicial relief" against them, *Warth*, 422 U.S. at 500. Article III requires nothing more.

CONCLUSION

The district court's decisions in these consolidated cases should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that my word processing program, Microsoft Word, counted 7,658 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

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November 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I electronically filed foregoing brief with the Clerk of the Court by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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