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 U.S. Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress has the authority to confer Article III standing to sue when the plaintiff suffers no concrete harm and alleges as an injury only a bare, technical violation of a federal statute.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government.

To that end, WLF has frequently appeared in this and other federal courts to urge courts to confine themselves to deciding cases that fall within their jurisdiction as set forth in Article III of the U.S. Constitution. *See, e.g., Clapper v. Amnesty Int'l* USA, 133 S. Ct. 1138 (2013); *Boumediene v. Bush,* 553 U.S. 723 (2008); *Al-Haramain Islamic Found. v. Obama*, 705 F.3d 845 (9th Cir. 2012); *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 552 U.S. 1179 (2008).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing; letters of consent have been lodged with the Court. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of *amici*'s intent to file.

law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that the decision below, by conferring Article III standing on plaintiffs who suffered no concrete harm, dramatically expands the judicial power—at the expense of the Executive Branch—by assigning to the courts the power to enforce federal statutes in contexts far removed from what has traditionally been understood to constitute an adversarial judicial proceeding. Unless reversed by this Court, the decision below will authorize individuals to invoke federal court jurisdiction based on alleged injuries consisting of little more than an affront to their sensibilities caused by the belief that someone is not complying with federal law.

STATEMENT OF THE CASE

Petitioners are two small Nebraska financial institutions, First National Bank of Wahoo ("First National") and Mutual First Federal Credit Union ("Mutual First"), that are alleged to have violated the Electronic Fund Transfer Act (EFTA) by failing to post adequate warnings that they would charge fees to certain users of their automated teller machines (ATMs). Respondent Jarek Charvat filed suits in federal district court against both institutions based on the alleged violations, and he seeks to represent a class consisting of all individuals who incurred fees for using one of five ATMs during the class period. Petitioners seek review of the Eighth Circuit's determination that Charvat has Article III standing to maintain the suits.

At the time the ATM transactions occurred in 2012, EFTA required ATM operators that charged transaction fees to provide two forms of notice at the time of the transaction: (i) a physical sign (usually a sticker) "on or at" the ATM; and (ii) a notice "on the screen . . . after the transaction is initiated and before the consumer is irrevocably committed to completing the transaction." 15 U.S.C. § 1693b(d)(3)(B)(i) & (ii) (2012). As the courts below found, Charvat does not contest that both First National and Mutual First supplied the required on-screen notification and that he knew in advance that he would incur a $2.00 fee if he completed the ATM withdrawals in question. Pet. App. 3a, 19a. He alleged, however, that none of the five ATMs from which he withdrew cash complied with EFTA's physical-sign requirement.[2] Charvat's complaints did not seek recovery of any actual damages incurred as a result of Petitioner's alleged EFTA violations; rather, he sought to recover the statutory damages provided by EFTA, as well as costs and attorney's fees.[3]

That Charvat had advance knowledge of, and agreed to pay, the ATM fees is best illustrated by his

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[2] Congress amended EFTA in December 2012 to eliminate the physical-sign requirement. *See* 15 U.S.C. § 1693b(d)(3)(B) (2013).

[3] The statute provides that each violation of EFTA's notice provision renders an ATM operator liable to an individual plaintiff in "an amount not less than $100 nor greater than $1,000." 15 U.S.C. § 1693m(a)(2)(A). If the suit is certified as a class action, EFTA limits total statutory damages to no more than $500,000. 15 U.S.C. § 1693m(a)(2)(B). Prevailing plaintiffs are also entitled to recover costs and attorney's fees. 15 U.S.C. § 1693m(a)(3).

lawsuit against Mutual First. The original complaint was based on a single transaction at an ATM operated by Mutual First. After filing suit, Charvat withdrew cash from two additional Mutual First ATMs. He then amended his complaint to add claims that the second and third transactions (for each of which he paid a $2.00 fee) also violated EFTA because the ATMs in question allegedly failed to display the required physical sign. But having already filed a lawsuit alleging inadequate notice at a Mutual First ATM, and having agreed to proceed with the second and third transactions after receiving on-screen notification of the $2.00 fee, Charvat quite obviously entered into those transactions with full knowledge that he would be charged a fee. Indeed, the only plausible explanation for his actions is a desire to increase his statutory damage claim by tripling the potential size of the plaintiff class in his pending lawsuit.

In a Memorandum and Order issued in June 2012 in the First National action, the district court concluded that Charvat lacked Article III standing because his complaint failed to allege injury-in-fact. Pet. App. 12a-24a. The court explained that while EFTA granted consumers a right not to be charged ATM fees unless they were informed of the fees in advance, Charvat failed to allege any infringement of that informational right because "[t]he fee information was available to him through the on-screen notice." *Id.* at 19a. The court also concluded that Charvat could not assert standing based on injury-in-fact suffered by the federal government, both because EFTA was not adopted for the purpose of protecting federal interests and because "EFTA is not a *qui tam* statute that clearly assigns the federal government's standing to

private actors." *Id.* at 20. It stated that Charvat's "interest appears to be solely in the enforcement of the EFTA statute," an interest the court deemed insufficient to establish Article III standing in the absence of concrete injury-in-fact. *Id.* at 21a.

The district court nonetheless stayed final action on First National's motion to dismiss until after this Court issued its anticipated *First American* decision.[4] It explained, "In both *First American* and here, the question remains whether a violation of a statute, without an alleged injury in fact, is in itself sufficient to create standing under Article III." *Id.* at 23a. This Court ended up not deciding the question: on June 28, 2012, the Court dismissed, as improvidently granted, the writ of certiorari in *First American*. 132 S. Ct. 2536 (2012). The district court thereafter dismissed the lawsuits against both First National and Mutual First for lack of Article III standing, explicitly relying on the reasoning contained in its June 2012 Memorandum and Order. *Id.* at 27a, 28a-32a, 33a.

The Eighth Circuit reversed, finding that Charvat had adequately alleged injury-in-fact and thus had standing to maintain his lawsuits. Pet. App. 1a-11a. On appeal, Charvat based his Article III standing claim on two independent injuries allegedly caused by Petitioners: (1) an economic injury (the payment of the $2.00 fee); and (2) an informational injury (failure to provide him with the statutorily required notice). The

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[4] In November 2011, the Court heard oral arguments in a case raising very similar Article III standing issues. *First American Fin. Corp. v. Edwards*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 3022 (2011).

appeals court did not address the alleged economic injury because Charvat had not raised that injury claim in the district court; it assumed, without deciding, that Charvat had waived the economic injury claim. *Id.* at 6a. It nonetheless found that Charvat alleged a cognizable injury-in-fact by alleging noncompliance with EFTA's physical-sign requirement, without regard to whether noncompliance deprived Charvat of any specific information that he was statutorily entitled to receive. *Id.* at 7a. The appeals court held that a plaintiff establishes injury-in-fact by alleging "denial of a statutory right to receive information," regardless whether the defendant supplied the same information by other means. *Id.* It concluded:

> Once Charvat alleged a violation of the notice provision of the EFTA in connection with his ATM transactions, he had standing to claim damages. . . . Thus, the district court erred by requiring Charvat to demonstrate an injury beyond Appellees' failure to provide the prescribed "on machine" notice.

Id. at 7a-8a.

SUMMARY OF ARGUMENT

This case raises a constitutional issue of exceptional importance. Federal courts have issued sharply conflicting decisions regarding whether and when individuals can validly claim Article III standing to sue for violations of federal statutes that were adopted for their benefit. The court below held that any such violation is sufficient to create standing,

without regard to whether the violation caused him to suffer a concrete harm. Other courts have defined standing more narrowly and have refused to find that a plaintiff suffers the requisite injury-in-fact unless the statutory violation inflicts some concrete harm. In light of the frequency with which this issue arises and the threat that expanded standing rules pose to separation of powers principles, review is warranted to resolve the conflict.

Indeed, the Court granted a writ of certiorari in 2011 in *First American* to address this very issue. In June 2012, the Court dismissed the writ as improvidently granted, thereby preventing the Court from resolving the issue. This case provides the Court with an excellent opportunity to revisit the issue. It raises none of the fiduciary duty issues that existed in *First American* and that may have led to dismissal of the writ. Moreover, it raises few, if any, contested factual issues. Although Charvat claims to have suffered injury, he can point to nothing concrete (such as the denial of specific information that he was entitled by statute to receive) but rather points to the affront he suffered when a statute adopted for his protection was violated. The case thus squarely presents the issue of whether such an affront is a sufficient injury-in-fact to satisfy standing requirements.

Article III, § 2 of the U.S. Constitution maintains the separation of powers among the three branches of the federal government by extending the "judicial Power" of the United States only to "Cases" and "Controversies." Standing to sue is part of what is required to establish a justiciable case. *Whitmore v.*

Arkansas, 495 U.S. 149, 155 (1990). The decision below threatens a significant relaxation of standing requirements—and thereby threatens separation of powers principles—by authorizing federal courts to enforce federal statutes at the behest of claimants who have not suffered a concrete injury as a result of the alleged statutory violation.

True, the injury required by Article III "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). But the Court has explained that the statutorily-created legal rights it has in mind are "concrete, *de facto* injuries that were previously inadequate in law" but which now (by virtue of the newly adopted statute) have been "elevat[ed] to the status of legal cognizable injuries." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). Suffice to say, Charvat does not allege any such injury. Rather his alleged "informational injury" consists of the failure of financial institutions with whom he conducted business to comply with statutory requirements, not the failure to provide him with specific information to which he was entitled. Under this Court's precedents, Charvat would have suffered informational injury-in-fact had Petitioners' alleged statutory violations rendered him unaware that he would be charged a fee for his ATM transactions—but that did not happen. Review is warranted to resolve the conflict between the decision below and the Court's case law governing Article III standing.

The Eighth Circuit deemed it significant that EFTA explicitly prohibited ATM operators from imposing an ATM fee without first providing the two

forms of notice mandated by the statute. Pet. App. 8a. *See* 15 U.S.C. § 1693b(d)(3)(C). The Court stated that Charvat suffered an injury-in-fact when he paid a $2.00 fee that Petitioners were not permitted to charge because they did not fully comply with the statutory prerequisites. Pet. App. 8a. If accepted, the Eighth Circuit's rationale would empower Congress to grant roving commissions entitling private individuals to file suit for virtually any violation of federal law. For example, Congress could prohibit a merchant from charging for the goods it sells unless it complies fully with the scores of federal regulatory statutes that govern most businesses. Under the Eighth Circuit's rationale, any consumer could assert that the statute prohibited the merchant from charging for its goods because it violated one of the many applicable federal regulations, and could thereby claim injury-in-fact based on being required to pay for goods he purchased.

The Eighth Circuit's rationale is sharply at odds with this Court's past understanding of Congress's power to confer Article III standing on individual litigants. The Court has consistently rejected assertions that courts may entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws, even when Congress has explicitly authorized such suits. Payments made by a plaintiff to a merchant for goods or services provided by the merchant do not strengthen the plaintiff's Article III standing claims, if the payments were made voluntarily and if, in return for payment, the plaintiff received everything he was entitled to receive under the applicable statute (including all required information).

Indeed, the Court recently rejected claims, arising under analogous circumstances, that expenditures voluntarily incurred by plaintiffs were sufficient to create Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). The Court reasoned that such "self-inflicted injuries" cannot be deemed fairly traceable to the defendants' allegedly illegal conduct—even though the expenditures are incurred to reduce the likelihood that the plaintiffs might be adversely affected by the alleged misconduct—if the plaintiffs have not otherwise established injury-in-fact. 133 S. Ct. at 1152-53.

Similarly, the ATM fees paid by Charvat cannot be deemed fairly traceable to Petitioners' alleged statutory violations when the fees were paid voluntarily for services rendered and after Petitioners fully informed Charvat of their intent to impose fees. Indeed, with respect to some and perhaps all of his ATM transactions, Charvat was fully aware that Petitioners were not in compliance with the physical-sign requirement, yet he nonetheless proceeded voluntarily with transactions that he knew would result in a $2.00 service fee. Under those circumstances, *Clapper* indicates that the fees voluntarily incurred by Charvat were not fairly traceable to the alleged EFTA violation. If the Court is interested in addressing the monetary loss issue, review is also warranted to resolve this conflict between *Clapper* and the decision below.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Question Presented Raises an Important, Frequently Recurring Issue That Is Central to Determining Whether Article III Imposes Meaningful Limitations on the Judiciary's Exercise of Jurisdiction

The principle of separation of powers has long been a central feature of our federal government. By denying any one branch of government excessive powers, the Framers sought to prevent despotism. In praising the importance of separating power within the government, James Madison stated, "[N]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." The FEDERALIST No. 47 (J. Madison). Article III, § 2 of the Constitution directly limits judicial power by limiting its exercise to actual "Cases" and "Controversies."

As Justice Scalia has pointed out, the doctrine of standing is "a crucial and inseparable element" of separation of powers principles, a doctrine whose disregard "will inevitably produce . . . an overjudicialization of the processes of self-governance." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881 (1983). The limits of judicial power have been sorely tested in recent years by the proliferation of federal statutes that can be interpreted as authorizing private citizens to vindicate the rule of law, without regard to whether they have

suffered a concrete injury. Unless courts adhere strictly to standing doctrine principles, the inevitable tendency of such statutes is to transfer to the judiciary responsibility for ensuring that the laws are faithfully executed, a role assigned by the Founders to the Executive Branch.

The EFTA statute at issue here raises just such concerns. It explicitly provides a right of action to consumers against "any person who fails to comply" with EFTA provisions "with respect to" those consumers. 15 U.S.C. § 1693m(a). Indeed, it strongly encourages the filing of such consumer suits by authorizing an award of statutory damages (of between $100 and $1,000), costs, and a "reasonable attorney's fee" to prevailing plaintiffs, in addition to any actual damages sustained by the plaintiff. *Id.* The inevitable result is that opportunistic litigants such as Charvat will seek to become parties to an ATM transaction in which an EFTA violation is committed, and thereafter to file a profitable EFTA lawsuit. Under those circumstances, courts must be vigilant to ensure that Article III standing requirements are adhered to; otherwise, courts will find themselves being asked to administer federal law (a role assigned to the Executive Branch) instead of adjudicating Cases or Controversies initiated by injured plaintiffs.

The Petition lists numerous federal statutes that include statutory damages provisions that are functionally identical to EFTA's statutory damages provision. Pet. 9-12. *Amici* will not repeat that list here. Suffice to say that the economic incentives to file suit created by statutory damages provisions are

sufficiently large that the issue faced by the Eighth Circuit—whether Article III jurisdiction exists with respect to a plaintiff who can point to no concrete injury but alleges that the defendants violated federal law during the course of a transaction in which he was directly involved—arises very frequently. While cases based on a fact pattern identical to the facts of this case are unlikely to recur frequently—indeed, the December 2012 amendment to EFTA means that no such cases will arise based on events occurring after 2012—the standing issue raised by the Petition arises frequently, thereby warranting review by this court.

A. The Decision Below Conflicts with Decisions of This Court and Other Federal Appeals Courts

The Court has explained Article III standing requirements as follows:

> The irreducible constitutional minimum of standing contains three requirements. . . . First, and foremost, there must be alleged (and ultimately proven) an "injury in fact"—a harm suffered by the plaintiff that is "concrete" and "actual and imminent, not 'conjectural' or 'hypothetical.' " . . . Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. . . . And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury.

Steel Co. v. Citizens for a Better Environment, 523 U.S.

83, 102-103 (1998) (citations omitted).

Reversing the district court's determination, the Eighth Circuit held that Charvat's complaints adequately alleged injury-in-fact. The appeals court held, "Once Charvat alleged a violation of the notice provisions of the EFTA in connection with his ATM transactions, he had standing to claim damages." Pet. App. 7a. It rejected the district court's determination that violation of a statutorily imposed notice requirement is insufficient "standing alone" to establish injury-in-fact when the defendant nonetheless supplies the defendant with all the required information by other means. *Id.* Rather, the requisite injury-in-fact consists of a plaintiff's failure to receive information in the precise manner mandated by the relevant statute. *Id.*

Review is warranted because the Eighth Circuit's decision conflicts with many of this Court's standing decisions. By focusing on Petitioners' alleged failure to comply with all notice requirements in their dealings with Charvat, the Eighth Circuit failed to analyze whether that failure imposed any concrete injuries on Charvat. That mode of analysis conflicts sharply with this Court's decisions requiring a plaintiff to demonstrate that his injury-in-fact is "concrete" and "actual" rather than "conjectural" or "hypothetical." In particular, a plaintiff does not demonstrate injury-in-fact merely by demonstrating a violation of federal law, even a law adopted for his particular benefit; a plaintiff lacks standing merely to seek "vindication of the rule of law." *Steel Co.*, 523 U.S. at 106. As the Court explained:

> [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully executed, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court.

Id. at 107 (citations omitted).

Lujan similarly rejected injury-in-fact claims where the plaintiff asserted that Congress had imposed procedural requirements on federal agencies for their benefit and thus that they were injured by the agencies' failures to adhere to the requirements. The Court explained:

> Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens, or for that matter, a subclass of citizens who suffer no distinctive concrete harms, to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To

> permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important duty, to "take Care that the Laws be faithfully executed." Art. II, § 3.

Lujan, 504 U.S. at 576-77. The Eighth Circuit's determination that Charvat established standing by alleging "a violation of the notice provision of the EFTA in connection with his ATM transactions," Pet. App. 8a, without any showing that the violation inflicted a concrete injury, conflicts with both *Steel Co.* and *Lujan*.

Lujan explicitly held the creation of a statutory entitlement to sue cannot serve as a substitute for a showing of concrete injury. The Court explained that its holding was fully consistent with the principle, enunciated in *Warth*, that "the injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Id.* at 578 (quoting *Warth*, 422 U.S. at 500). The Court explained that the statutorily-created legal rights it has in mind are "concrete, *de facto* injuries that were previously inadequate in law" but which now (by virtue of the newly adopted statute) have been "elevat[ed] to the status of legal cognizable injuries." *Id.* Suffice to say, Charvat does not allege any such injury; he alleges a violation of a statutory "right" (the posting of a physical sign at the ATM machines he used), but he fails to explain how that violation inflicted a concrete injury on him. *See* John Roberts,

Article III Limits on Statutory Standing, 42 DUKE L. J. 1219, 1228 (1993) (explaining that the citizen suit provision at issue in *Lujan* did not seek to elevate the status of concrete, *de facto* injuries but rather "simply authorize[d] suit to vindicate rights which must be found elsewhere.").

The Petition notes that the decision below also directly conflicts with decisions from the Second, Third and Fourth Circuits. Pet. 13-15. Although none of the cited cases involve EFTA claims, there can be little doubt that the federal appeals courts have adopted sharply divergent approaches to injury-in-fact issues that arise when Congress creates statutory rights to sue for alleged violations of statutory duties. The conflict arises from fundamental disagreements regarding broadly applicable Article III standing requirements rather than from an analysis of statute-specific provisions. Accordingly, review is also warranted to resolve that conflict.

B. Charvat Has Not Suffered an "Informational" Injury of the Sort That Can Give Rise to Article III Injury-in-Fact

When Congress adopts a statute granting individuals a right of access to information, a denial of access undoubtedly constitutes injury-in-fact sufficient to support Article III standing. An obvious example is the Freedom of Information Act, 5 U.S.C. § 552; individuals are injured when the federal government denies them access to documents to which the FOIA grants them a right of access. Similarly, EFTA grants

ATM users the right to information regarding the existence and amount of ATM fees. But Petitioners provided Charvat with the required information, so he simply has no basis for claiming an informational injury.

In support of its conclusion that Charvat suffered an "informational injury" sufficient to meet Article III standing requirements, the Eighth Circuit cited *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). *Akins* is inapposite and provides no support for Charvat's injury-in-fact claim.

Akins upheld the plaintiffs' standing to sue after identifying specific information to which they had been denied access and which they claimed a right of access under applicable federal election laws:

> The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that on respondents' view of the law, the statute requires that AIPAC make public.

524 U.S. at 21. Charvat has made no similar claim with respect to any information that he was unable to obtain from Petitioners. The Eighth Circuit cited *Akins* for the proposition that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." Pet. App. 7a (quoting *Akins*, 524 U.S. at 21).

But in the absence of a citation to specific information that he "fail[ed] to obtain," Charvat finds no support in *Akins*.

C. Whether Charvat Has Suffered a Monetary Loss Directly Traceable to Petitioners' Conduct Was Not Decided Below and Is Not Before the Court, but He Clearly Has Suffered No Such Injury

Charvat did not assert in the district court that his payment of a $2.00 fee for each ATM transaction constituted injury-in-fact. Although he attempted to raise that claim for the first time in the Eighth Circuit, Petitioners objected that Charvat had waived the claim by failing to raise it in the district court. The Eighth Circuit did not address the waiver issue and did not take Charvat's monetary payments into account when determining that he had suffered injury-in-fact. Accordingly, the Court need not consider the monetary loss claim when deciding whether to grant review. It can review the injury-in-fact claims actually considered by the Eighth Circuit without reaching the monetary loss claim. Should the Court determine that the Eighth Circuit misapplied standing law in concluding that Charvat suffered an informational injury sufficient to support Article III standing, it can remand the case to the Eighth Circuit to determine in the first instance: (1) whether Charvat has waived his monetary loss claim; and (2) whether that claim is sufficient to support Article III standing. Accordingly, the existence of the monetary loss claim should not deter the Court from granting the Petition.

In any event, Charvat's belated assertion that his monetary losses constituted injury-in-fact is without merit. It is undisputed that Charvat voluntarily agreed to pay the $2.00 fee for each ATM transaction after being fully informed that he would be charged the fees if he continued with his transactions. Under those circumstances, any "loss" suffered by Charvat can only be attributed to his voluntary decisions to pay the fees, not to Petitioners' alleged statutory violations. A plaintiff does not establish Article III standing when, as here, the evidence shows that his monetary losses were not directly attributable to the defendants' complained-of conduct. *Steel Co.*, 523 U.S. at 102-03.

Indeed, the Court recently rejected claims, arising under analogous circumstances, that expenditures voluntarily incurred by plaintiffs were sufficient to create Article III standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). The Court reasoned that such "self-inflicted injuries" cannot be deemed fairly traceable to the defendants' allegedly illegal conduct—even though the expenditures are incurred to reduce the likelihood that the plaintiffs might be adversely affect by the alleged misconduct—if the plaintiffs have not otherwise established injury-in-fact. 133 S. Ct. at 1152-53.

Similarly, the ATM fees paid by Charvat cannot be deemed fairly traceable to Petitioners' alleged statutory violations when the fees were paid voluntarily for services rendered and after Petitioners fully informed Charvat of their intent to impose fees. Indeed, with respect to some and perhaps all of his

ATM transactions, Charvat was fully aware that Petitioners were not in compliance with the physical-sign requirement, yet he nonetheless proceeded voluntarily with transactions that he knew would result in a $2.00 service fee. Under those circumstances, *Clapper* indicates that the fees voluntarily incurred by Charvat were not fairly traceable to the alleged EFTA violation. If the Court is interested in addressing the monetary loss issue, review is warranted to resolve this conflict between *Clapper* and the decision below.

Charvat's monetary loss claim is not strengthened by an EFTA provision that prohibits ATM operators from imposing an ATM fee without first providing the two forms of notice mandated by the statute. *See* 15 U.S.C. § 1693b(d)(3)(C). Despite maintaining that it would not address the potentially waived monetary loss claim, the appeals court relied on this statutory provision to suggest that Charvat did, in fact, suffer a monetary loss: "At the time of Charvat's transactions, the EFTA 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, and the statutory damages are directly related to the consumer's injury." Pet. App. 8a.

But the Eighth Circuit failed to explain how Charvat could be deemed to have suffered a concrete injury by virtue of having received specific information in one form but not in a second form; he still was not deprived of any of the statutorily required information. His only "injury" consists of the psychic injury that

accompanies knowledge that a firm with which one has conducted business has not fully complied with the law. As *Lujan* and *Steel Co.* make clear, an injury to one's interest in seeing the law fully complied with cannot satisfy Article III standing requirements.

If accepted, the Eighth Circuit's rationale would empower Congress to grant roving commissions entitling private individuals to file suit for virtually any violation of federal law. For example, Congress could prohibit a merchant from charging for the goods it sells unless it complies fully with the scores of federal regulatory statutes that govern most businesses: *e.g.,* civil rights laws, environmental laws, and laws governing employee working conditions, such as the Fair Labor Standards Act and the Occupational Safety and Health Act. Under the Eighth Circuit's rationale, any consumer could assert that the statute prohibited the merchant from charging for its goods because it violated one of the many applicable federal regulations, and could thereby claim injury-in-fact based on being required to pay for goods he purchased. This Court has repeatedly rejected assertions that Congress could, by means of adopting such statutes, largely eliminate standing requirements by placing federal law enforcement duties in the hands of private individuals. Such individuals have not suffered any "concrete" injuries, as that term is normally understood.

II. The Petition Provides a Good Vehicle for Deciding the Question Presented; In Particular, It Raises None of the Complicating Fiduciary Duty Questions That Were Present in *First American*

The reasons why the Court dismissed the *First American* writ as improvidently granted have not been publicly revealed. Many have speculated, however, that the Court may have dismissed the writ because resolution of the case was unduly complicated by the presence of fiduciary duty issues. If so, this Petition provides an attractive alternative vehicle for deciding the issue that the Court wished to address when it granted review in *First American*; there are no similar fiduciary duty issues lurking in this case.

First American addressed claims by individual homebuyers that their title insurance companies paid kickbacks to title agents for referrals. The homebuyers did not attempt to demonstrate actual damages caused by the kickback scheme. Indeed, they would have had great difficulty proving such damages because Ohio (where all the real estate transactions took place) sets the fees that title insurance companies may charge – so it was highly unlikely that the alleged kickbacks resulted in higher fees being paid by homebuyers. Instead, the plaintiffs sought statutory damages specified under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, for instances in which a title insurance company pays an improper kickback in return for obtaining a plaintiff's business.

While the Court granted review to determine

whether such plaintiffs could establish Article III standing in the absence of evidence that they suffered monetary damages, the plaintiffs presented significant evidence that: (1) the title insurance companies owed a fiduciary duty of fair dealing to homebuyers; (2) there exists a long history under the common law of presuming that one suffers injury when one's fiduciary breaches his duty of loyalty; (3) courts are willing to presume damages even in the absence of direct evidence, because such damages can be very hard to prove yet it is widely believed that the victims of such breaches of fiduciary duty are highly likely to suffer monetary loss. *See, e.g., Michoud v. Girod*, 45 U.S. 503, 557 (1846) (a beneficiaries may sue trustees for self-dealing to recoup all profits made by the trustee, without regard to proof of loss).

Under those circumstances, the Court may well have concluded that the *First American* plaintiffs might be able to establish standing under the rule established by *Lujan*: Congress may create standing where it did not previously exist by "elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law." *Lujan*, 504 U.S. at 578. In other words, before the adoption of RESPA, homebuyers had no federal cause of action against faithless fiduciaries, but the common law had nonetheless long recognized that such homebuyers are presumed to suffer "concrete, *de facto* injuries."

There is no allegation in this case that a fiduciary relationship existed between Charvat and Petitioners. Indeed, the very reason that he was

charged an ATM fee was that he was not a customer of either financial institution. The Court will thus be able to use this case to decide the issues left open following *First American*, without having to address whether the existence of fiduciary relationships affects the injury-in-fact inquiry.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court grant the Petition.

Respectfully submitted,

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